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NO. 95194-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHACON,
Petitioner.

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

Thurston County Cause No. 16-1-00266-1

The Honorable Gary Tabor, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

John Chacon is a homeless veteran who suffers from mental illness, including post-traumatic stress disorder. RP 607, 610¹. Prior to his convictions in this case, he regularly used the facilities at the Olympia Center to bathe and buy coffee. RP 610. Mr. Chacon was eventually issued a formal trespass warning prohibiting him from returning to the Olympia Center. RP 70-71. Nonetheless, he went back to the center and the staff called the police, who arrested him. RP 143, 240.

Mr. Chacon cooperated with being handcuffed, but passively resisted being taken outside so the officers dragged him across the floor. RP 207. Once they got to the door, however, he stood and walked outside when asked to. RP 207-208.

Once they were outside, the officers concluded that Mr. Chacon was making it difficult for them to open the door to the police car. RP 385. Officer Jeffrey Davis executed a “knee strike” to Mr. Chacon’s leg. RP 386. Mr. Chacon was eventually taken to the ground. RP 213, 216. Sometime in the process, Davis’s knee dislocated. RP 394.

The state charged Mr. Chacon with criminal trespass and second

¹ All citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes recounting the events of 6/27/16 through 7/14/16.

degree assault, based on the theory that he had caused substantial bodily harm to Davis by dislocating his knee. CP 9.

At trial, Davis testified that Mr. Chacon had kicked him after the attempted “knee strike.” RP 389. Davis said that the pain in his knee started after Mr. Chacon kicked him. RP 389.

There were two other officers helping with the arrest, one of whom was holding onto Mr. Chacon’s arms. RP 260, 290. Neither of those officers saw Mr. Chacon kick Davis. RP 236, 262.

Davis admitted that Mr. Chacon only had about twelve to eighteen inches of space in which to kick him because of their positioning next to the car. RP 389.

The doctor who treated Davis’s knee testified that it could have been dislocated by his attempted his “knee strike” to Mr. Chacon or by being twisted. RP 441, 447, 451.

The court’s instruction to the jury on the state’s burden of proof differed from the pattern instruction. CP 30-31. The court omitted the sentence providing that “[t]he defendant has no burden of proving that a reasonable doubt exists.” CP 30-31.

The jury convicted Mr. Chacon of both charges. CP 38-39. Mr. Chacon timely appealed. CP 56. The court of appeals affirmed Mr. Chacon’s convictions in an unpublished opinion. *State v. Chacon*, 200

Wn. App. 1033 (2017). This Court granted review of the court’s failure to fully instruct the jury on the state’s burden of proof. *State v. Chacon*, 409 P.3d 1062 (Wash. 2018).

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AT MR. CHACON’S TRIAL THAT “THE DEFENDANT HAS NO BURDEN OF PROVING THAT A REASONABLE DOUBT EXISTS,” AS NECESSARY TO MAKE THE BURDEN OF PROOF MANIFESTLY CLEAR TO THE JURY AND AS ORDERED BY THIS COURT IN *BENNETT*.

Almost nine years ago, this Court exercised its supervisory authority under Article IV, section 1 of the Washington Constitution and as “guardians of all constitutional protections” to order trial courts to instruct juries in criminal cases using the language of Washington Pattern Jury Instruction: Criminal (WPIC) 4.01, which reads as follows:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

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. 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.]

State v. Bennett, 161 Wn.2d 303, 316-318, 165 P.3d 1241 (2007).

The *Bennett* court took this significant step because “[t]he presumption of innocence is the bedrock upon which the criminal justice system stands” but can be “diluted or even washed away” if a jury is not instructed clearly. *Id.* at 315-16.

The court in Mr. Chacon’s case omitted this crucial sentence from the instruction as it was given to the jury: “[t]he defendant has no burden of proving that a reasonable doubt exists.” CP 30-31.

This omission is not an isolated incident. In fact, trial courts have left this sentence out of the pattern instruction on the burden of proof read to juries in numerous other cases as well, even after this Court’s clear admonition in *Bennett*.²

The “defendant has no burden” sentence at issue in Mr. Chacon’s case was included in both versions of the instruction considered in *Bennett*, so it was not discussed in that case. *Bennett*, 161 Wn.2d at 308-09. No other published Washington case has considered specifically

² See e.g. *State v. Chudy*, 197 Wn. App. 1009 (2016) (unpublished)², review denied, 188 Wn.2d 1003, 393 P.3d 350 (2017); *State v. Ford*, 195 Wn. App. 1060 (2016), review denied, 187 Wn.2d 1011, 388 P.3d 485 (2017) (Ford I) (unpublished); *State v. Markwith*, 184 Wn. App. 1011 (2014) (unpublished); *State v. Fontaine*, 179 Wn. App. 1045 (2014) (unpublished); *State v. Stoll*, 182 Wn. App. 1010 (2014) (unpublished), review granted on other grounds, cause remanded, 183 Wn.2d 1013, 353 P.3d 639 (2015); *State v. Ford*, 175 Wn. App. 1061 (2013) (Ford II) (unpublished); *State v. Dugger*, 177 Wn. App. 1013 (2013) (unpublished).

(Continued)

whether a trial court violates an accused person's right to due process by failing to instruct the jury that s/he has no burden of presenting evidence to raise a reasonable doubt.³ There appears to be no published case in any other jurisdiction addressing this issue, either.

But the sentence instructing the jury that an accused person has no burden of raising a reasonable doubt is not mere convention. It is the only language in the WPIC clarifying to the jury that a reasonable doubt requiring acquittal need not come from the defense. Without the sentence providing that he had no burden of establishing that a reasonable doubt exists, the jury instructions in Mr. Chacon's case left open the possibility that he had the burden of presenting evidence raising a reasonable doubt.

The rest of WPIC 4.01 did not close this logical gap. The instruction properly informed the jury that Mr. Chacon was presumed innocent and that the presumption continued unless the state proved his

³ Division I of The Court of Appeals addressed a trial court's general failure to instruct the jury using WPIC 4.01, in violation of this Court's admonition in *Bennett*. *State v. Castillo*, 150 Wn. App. 466, 467, 208 P.3d 1201 (2009). One of the errors in the trial court's instruction in that case was the omission of the sentence informing the jury that the defendant has no burden to prove that a reasonable doubt exists and noting that "[n]one of the other instructions of the trial court included a statement of this principle." *Id.* at 473. But the *Castillo* court held only that the omission of the sentence demonstrates that the instruction the trial court gave was not an improvement upon the WPIC. *Id.* Mr. Castillo did not raise and the *Castillo* court did not consider whether that omission violated the constitution. *Id.*

Division II also address a trial court's failure to use the WPIC post-*Bennett*, but the instruction that the trial court gave in that case included the sentence at issue here. *State v. Lundy*, 162 Wn. App. 865, 870, 256 P.3d 466 (2011).

(Continued)

guilt beyond a reasonable doubt.⁴ CP 30-31. But that language says nothing about whether Mr. Chacon had the burden of raising that doubt.

The WPIC's provision that a reasonable doubt could arise from the "lack of evidence," similarly, failed to inform the jury that Mr. Chacon had no burden of raising a reasonable doubt. CP 31. The "lack of evidence" language provides that the jury could have a reasonable doubt because the state neglects to present any evidence as to a relevant fact. But the jury would also be required to acquit if the state did present evidence as to each element if the jury maintained apprehensions about the credibility of that evidence or simply did not believe that the state's evidence constituted sufficient proof. *See State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). These reasonable doubts would require acquittal regardless of whether the state's evidence is rebutted by any evidence from Mr. Chacon.

The instructional language providing that "[a] reasonable doubt... may arise from the evidence or lack of evidence" does not cure the error in the instruction here and may have exacerbated the problem by appearing

⁴ The state recently moved in this Court to supplement the appellate record with a transcript of the trial court's premination instructions to the jury before Mr. Chacon's trial began. *See* Motion to Supplement the Record (filed 03/08/18). But the trial court's preliminary oral instructions are inapposite because they, likewise, omit the portion of WPIC 4.01 informing the jury that the defense has no burden of raising a reasonable doubt. *See* Appendix A to Motion to Supplement the Record (filed 03/08/18).

to provide an exhaustive list of potential sources of a reasonable doubt, which does not include a reasonable doubt based on any misgivings regarding the credibility or adequacy of the state's evidence. Instead, the phrase appears to instruct that a reasonable doubt must come either from "the evidence" (which would, logically, have to be provided by the defense because the prosecution would have no reason to introduce exculpatory evidence at trial) or from a complete "lack of evidence."

The instruction's language about the presumption of innocence, likewise, did nothing to dispel the misunderstanding that a reasonable doubt requiring acquittal would have to be one provided by the defense. Rather, language about the presumption of innocence is designed to caution jurors "to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." *Taylor v. Kentucky*, 436 U.S. 478, 484–85, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); *See also Carter v. Kentucky*, 450 U.S. 288, 304, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981).

The instructional language regarding the presumption of innocence also simply informs the jury that the presumption continues unless it is overcome by proof beyond a reasonable doubt. CP 31. Consequently, that presumption can be overcome by the state's evidence unless that

evidence is offset by a reasonable doubt. Without further information that the reasonable doubt need not be provided by the defendant, the language does nothing to alleviate the misunderstanding provided by the instructions in Mr. Chacon's case.

Likely for this reason, all published federal pattern jury instructions include language clarifying that an accused person has no burden to present any evidence *in addition* to language regarding the state's burden of proof and the presumption of innocence.⁵ At least twenty-five other states publish pattern instructions including such language as well.⁶

⁵ See First Circuit Pattern Jury Instruction 3.02 (2017); Third Circuit Pattern Jury Instruction 3.06 (2015); Fifth Circuit Pattern Jury Instruction 1.05 (2015); Sixth Circuit Pattern Jury Instruction 1.06 (2017); Seventh Circuit Pattern Jury Instruction 2.03 (1998); Eighth Circuit Pattern Jury Instruction 3.05 (2014); Ninth Circuit Pattern Jury Instruction 3.2 (2017); Tenth Circuit Pattern Jury Instruction 1.05 (2018); Eleventh Circuit Pattern Jury Instruction 2.2 (2010); Modern Federal Jury Instructions – Criminal P 4.01 (2017). The Second and Fourth Circuit Courts of Appeals do not publish separate pattern instructions.

⁶ See Alaska Criminal Pattern Jury Instruction 1.06; RAJI (Criminal) 4th Standard Criminal 5a (Arizona); 1-2 Arkansas Model Jury Instructions - Criminal AMCI 2d 107 (2018); Connecticut Criminal Jury Instruction 2.2-2; FL STAND JUR INSTRUCTIONS IN CRIM CASE § 3.7 (Florida); 2 Ga. Jury Instructions - Criminal § 1.10.10; ICJI 103 (Idaho); 1-2.00 Illinois Pattern Jury Instructions – Criminal 2.03; 1NEW-1 IN Pattern Jury Instructions Criminal Instruction No. 1.1300 (2018) (Indiana); PIK Crim. 4th 51.010 (Kansas); 1-6 Maine Jury Instruction Manual § 6-7 (2017); MPJI-Cr 2:02 (Maryland); Massachusetts Superior Court Criminal Practice Jury Instructions § 1.2; M Crim JI 3.2 (Michigan); MSJI Criminal § 200, 201 (Mississippi); Montana Criminal Jury Instruction 1-104; CJI2d Presumption of Innocence (New York); N.C.P.I. Crim. 101.10 (North Carolina); Pa. SSJI (Crim) 7.01 (Pennsylvania); SC JI CRIMINAL § 1-6 (South Carolina); T.P.I. Criminal 2.02 (Tennessee); Texas Criminal Pattern Jury Charges § CPJC 2.1; VT Criminal Jury Instructions § 1-4-061 (Vermont); 2A-2A-1 Instructions for Virginia and West Virginia § 24-392 (2017).

Many other states either do not publish pattern jury instructions or make the instructions available only to members of the state bar.

The practice of informing jurors that a defendant has no burden to present any evidence *in addition to* instructing them on the state's burden of proof and the presumption of innocence is also backed up by empirical research on jurors' understanding of their instructions.

In one study, real jurors were instructed at trial that the defendant was presumed innocent and that, in order to convict, every element had to be proved beyond a reasonable doubt; but they were not explicitly told that the defendant did not have any burden to prove that a reasonable doubt exists. Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 Land & Water L. Rev. 59, 189 n. 73 (1998). The researchers then asked the jurors the following question:

According to the instructions the judge gave you, is the following statement true or false: In a criminal trial, the state is responsible for producing evidence for the jury that tends to show that the defendant may have committed the crime - once the state has made this showing, it is the defendant's responsibility to produce witnesses or other evidence to persuade the jury that the defendant did not commit the crime.

Id. at 97.

30.5% of the jurors answered that they were either "very sure" or "pretty sure" that the statement was true –believing the defendant bore

some burden of proving that a reasonable doubt existed. *Id.*⁷

The trial court's failure to provide the complete and accurate instruction found at WPIC 4.01 allowed the jury to infer that Mr. Chacon bore the burden to raise a reasonable doubt if he was to be acquitted.

A. The trial court's failure to instruct the jury using the complete WPIC 4.01 violated Mr. Chacon's rights to due process and to a jury trial. The court also acted beyond the bounds of its authority by ignoring the Supreme Court's explicit directive in *Bennett*.

Due process requires jurors to presume an accused person's innocence. *Taylor*, 436 U.S. at 479; U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. Due process also permits conviction for a crime only if the state has borne the burden of proving guilt beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An accused person has no duty to present any evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).

Due Process and the Sixth Amendment right to a jury trial are

⁷ See also David U. Strawn and Raymond W. Buchanan, Jury Confusion: A Threat to Justice, 59 *Judicature* 478, 481 (1976) (After being instructed on the presumption of innocence and burden of proof, "only 50 per cent of the instructed jurors understood that the defendant did not have to present any evidence of his innocence, and that the state had to establish his guilt, with evidence, beyond any reasonable doubt. 10 per cent were uncertain as to what the presumption of innocence meant, and a small but frightening 2 per cent still maintained the belief that the burden of proof of innocence rested with the defendant.")

violated if the jury in a criminal case is not clearly instructed that the state carries the entire burden of proof. *Bennett*, 161 Wn.2d at 307; *Sullivan*, 508 U.S. at 280–81; *See also Taylor*, 436 U.S. at 485–86; *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Jury instructions must “make the relevant legal standard manifestly apparent to the average juror.” *State v. Smith*, 174 Wn. App. 359, 369, 298 P.3d 785 (2013) (*quoting State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)).

As outlined above, the instructions read to the jury at Mr. Chacon’s trial failed to make the state’s burden “manifestly clear to the average juror” because they allowed for the misconception that Mr. Chacon had the burden of proving any reasonable doubt that could lead to his acquittal. The trial court’s failure to inform the jury that Mr. Chacon had no burden to prove that a reasonable doubt existed violated his rights to due process and to a jury trial. *Sullivan*, 508 U.S. at 280–81.

B. The trial court did not have the authority to violate the Supreme Court’s explicit order to instruct all juries in criminal cases using the language of WPIC 4.01.

The trial court’s failure to instruct the jury using the entirety of WPIC 4.01 also violated this Court’s exercise of its supervisory authority in *Bennett*. *Bennett*, 161 Wn.2d 303, 316-318.

The Washington State Constitution vests the Supreme Court with authority to supervise lower courts. *Id.* at 318 n. 10; art. IV, § 1. Once the

Supreme Court has decided an issue of state law, lower courts lack the authority to violate its mandate. *State v. Jones*, 182 Wn.2d 1, 5, 338 P.3d 278 (2014); *See also 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006), *as corrected* (Nov. 15, 2006).

This Court's directive in *Bennett*, requiring lower courts to instruct juries using only WPIC 4.01 is unambiguous. *Bennett*, 161 Wn.2d 303, 316-318; *Castillo*, 150 Wn. App. at 472. Accordingly, a trial court in Washington state does not have the authority to give a reasonable doubt instruction that differs from the WPIC. *Id.*; *Jones*, 182 Wn.2d at 5.

The trial court in Mr. Chacon's case failed to comply with this Court's unequivocal order to instruct the jury using the language of WPIC 4.01. *Bennett*, 161 Wn.2d 303, 316-318. The trial court acted outside the bounds of its authority. *Jones*, 182 Wn.2d at 5.

II. THE TRIAL COURT'S ERROR REQUIRES REVERSAL MR. CHACON'S CONVICTIONS.

In *Castillo*, Division I held that the trial court's failure to comply with the Supreme Court's unambiguous direction in *Bennett* requires reversal because this Court "neither said nor implied that lower courts were free to ignore the directive if they could find the error... harmless beyond a reasonable doubt." *Castillo*, 150 Wn. App. at 472.

In *Lundy*, Division II held that failure to follow this Court's order

in *Bennett* is subject to constitutional harmless error analysis. *Lundy*, 162 Wn. App. at 872.

In an unpublished opinion, Division III has adopted a “middle ground,” holding that any modification to WPIC 4.01 that is substantive and lowers the state’s burden of proof requires reversal. *State v. Pearson*, 191 Wn. App. 1052 (2015) (unpublished).

The error in Mr. Chacon’s case requires reversal regardless of which standard is applied.

- A. The trial court’s failure to instruct the jury regarding a critical concept of the state’s burden of proof and failure to comply with the Supreme Court’s directive in *Bennett* is not subject to harmless error analysis.

A deficient instruction on the state’s burden of proof “unquestionably qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 282. Improper jury instruction on the circumstances requiring acquittal, likewise qualifies as structural error. *Smith*, 174 Wn. App. at 368–69. Such errors affect “a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Sullivan*, 508 U.S. at 281 (citing *Rose v. Clark*, 478 U.S. 570, 580, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Their consequences “are necessarily unquantifiable and indeterminate.” *Id.* Because of this, structural errors require automatic reversal. *In re Stockwell*, 179 Wn.2d

588, 608, 316 P.3d 1007 (2014).

A trial court's action beyond the bounds of its authority is, likewise, not subject to harmless error analysis. *See State v. Brown*, 178 Wn. App. 70, 85, 312 P.3d 1017 (2013) (Brown I); *State v. Williams-Walker*, 167 Wn.2d 889, 901, 225 P.3d 913 (2010); *State v. Murray*, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003).

The trial court violated Mr. Chacon's rights to a jury trial and to due process and acted outside of its authority by violating this Court's directive in *Bennett*. These errors are necessarily unquantifiable and violate a "a basic protection...without which a criminal trial cannot reliably serve its function." *Sullivan*, 508 U.S. at 281. Mr. Chacon's convictions must be reversed. *Id.*

- B. If the trial court's failure to properly instruct the jury is subject to harmless error analysis, reversal is still required.
 - 1. If the trial court's error is subject to harmless error analysis, it is only subject to *constitutional* harmless error analysis.

An instructional error that violates due process by lowering the state's burden of proof but which does not qualify as structural error is subject to constitutional harmless error analysis. *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Kalebaugh*, 183 Wn.2d 578, 586–87, 355 P.3d 253 (2015); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (Brown II).

Even Division II, the only division of the court of appeals to conclude that a trial court's failure to substantively comply with this Court's directive in *Bennett* can be harmless, acknowledges that the error requires reversal unless harmlessness can be established under this constitutional standard. *Lundy*, 162 Wn. App. at 872.⁸

Even so, Division II found the error harmless in Mr. Chacon's case because he "has not shown prejudice." Opinion at 13. The court of appeals misapplied the constitutional harmless error standard in Mr. Chacon's case. The standard places the burden of proving harmlessness on the state, not on Mr. Chacon.

Under the constitutional analysis, an error requires reversal unless it can be determined "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15.

The burden is on the state to prove beyond a reasonable doubt that the verdict would have been the same absent the error. *Peters*, 163 Wn. App. at 850 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

⁸ The *Lundy* court held that failure to give WPIC 4.01 verbatim was harmless beyond a reasonable doubt where the only alterations were a change in the order of two paragraphs and replacing the sentence of the WPIC stating that "[t]he defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged." with the following: "[e]ach crime charged by the State includes one or more elements which are explained in a subsequent instruction." *Lundy*, 162 Wn. App. at 871. Notably, the jury in *Lundy* was instructed that the defendant has no burden of proving that a reasonable doubt exists. *Id.*

The *Neder* court held that the constitutional error of failure to instruct the jury on all of the elements of an offense requires reversal unless the omitted element is “supported by uncontroverted evidence.” *Neder*, 527 U.S. at 18. Other types of constitutional instructional errors are not harmless if they lower the state’s burden of proof. *Kalebaugh*, 183 Wn.2d at 586–87.

The evidence against Mr. Chacon was far from overwhelming. Neither of the other two police officers who were standing in very close range saw Mr. Chacon assault Davis. RP 236, 262. Mr. Chacon only had twelve to eighteen inches in which to execute the alleged kick. RP 389. Davis’s doctor said that the dislocation could have been caused by his “knee strike” to Mr. Chacon or by being twisted. RP 441, 447, 451.

Because he exercised his right to remain silent at trial, however, Mr. Chacon’s defense depended upon the proper application of the burden of proof completely to the state. As addressed at length above, the court’s instructions failed to inform the jury that Mr. Chacon had no burden to prove any reasonable doubt that would require his acquittal.⁹ CP 30-31.

⁹ Nor could the omission of the critical information from the court’s instructions be cured by any argument on behalf of defense counsel. *See Carter*, 450 U.S. at 304 (“And most certainly, defense counsel’s own argument that the petitioner ‘doesn’t have to take the stand ... [and] doesn’t have to do anything’ cannot have had the purging effect that an instruction from the judge would have had. Arguments of counsel cannot substitute for instructions by the court”).

The state cannot establish that the trial court’s error was harmless beyond a reasonable doubt. *Peters*, 163 Wn. App. at 850; *Van Arsdall*, 475 U.S. 673. Mr. Chacon’s convictions must be reversed. *Id.*

2. Regardless of the harmless error analysis applied, Mr. Chacon was prejudiced by the failure to instruct the jury that he had no burden of establishing that a reasonable doubt exists.

The prosecutor also told the jury at Mr. Chacon’s trial that they were required to convict if they believed Mr. Chacon “did it,” even if the jurors did not deem the state to have proved its case:

And sometimes we'll hear from folks, [“]well, I believe he did it, I really believe he did it, but you didn't prove it to me.[“] And I would submit to you I did. If you believe he did it, then I did prove it to you because remember, you came in here in terms of the evidence from this case, you came in here as a blank slate... You don't get to that point if it hasn't been proved to you beyond a reasonable doubt.

RP 514.¹⁰

But the jury could have believed that Mr. Chacon “did it” even if they did not believe that the state had met its burden of proof as to each element. For example, the jury could have concluded that Mr. Chacon had kicked Davis and thereby believed that he “did it.” But, at the same time,

¹⁰ Mr. Chacon argued in the court of appeals that this argument constituted prosecutorial misconduct but the court of appeals held that the argument was not improper because the prosecutor also told the jury to hold the state to its burden of proof as stated in the instructions. *Chacon*, 200 Wn. App. at 1033. This Court did not grant review of that issue. *State v. Chacon*, 409 P.3d 1062 (Wash. 2018).

the jury could have harbored a reasonable doubt as to whether a kick that occurred within 12-18 inches of space and was so small as to be imperceptible by the two other officers could have been strong enough to create “substantial bodily harm.” RP 236, 262, 389.

Indeed, the juror described in the prosecutor’s argument was likely one who harbored a reasonable doubt as to some element based on misgivings about the strength or credibility of the state’s evidence. Such a hypothetical juror is required to vote for acquittal based on proper application of the complete burden of proof to the state. *Fleming*, 83 Wn. App. at 213. But, if under the misconception that a reasonable doubt requiring acquittal had to be provided by the defense, the juror would conclude that his/her belief that the defendant “did it” required conviction absent any countervailing evidence presented by Mr. Chacon.

The circumstance described in the prosecutor’s argument is precisely that in which the concept that the defendant has no burden of proving that a reasonable doubt exists is most crucial. Given this context, Mr. Chacon was prejudiced by the trial court’s failure to properly instruct the jury using WPIC 4.01, regardless of the harmless standard applied.

III. THE ERROR IN MR. CHACON’S CASE CAN BE RAISED FOR THE FIRST TIME ON APPEAL UNDER RAP 2.5(A)(3).

An appellant may raise manifest error affecting a constitutional

first time on appeal. RAP 2.5(a)(3). This Court has long held that a claimed error concerning the omission or misstatement of critical information in the court's instructions on the state's burden of proof meets the standard at RAP 2.5(a)(3). *See e.g. State v. Cox*, 94 Wn.2d 170, 173, 615 P.2d 465 (1980); *Kalebaugh*, 183 Wn.2d at 583–85.

An alleged error affects a constitutional right under RAP 2.5(a)(3) if a constitutional right has been violated *if the appellant is correct*. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Accordingly, Mr. Chacon need not establish that his rights were actually violated in order to overcome the hurdle at RAP 2.5. *Id.* He must only demonstrate that “the asserted error... implicates a constitutional interest.” *Kalebaugh*, 183 Wn.2d at 584. Here, the claims that the court's instructions violated due process and the right to a jury trial, as well as the claim that the trial court acted outside of its authority, both implicate fundamental constitutional interests. *Id.* The claimed errors in this case can be raised for the first time on appeal even if this Court does not ultimately decide in Mr. Chacon's favor. *See e.g. Id.*

A claimed error is “manifest” under RAP 2.5(a)(3) if there is a “plausible showing” that it had “practical and identifiable consequences at trial.” *Id.* An appellate claim meets this standard if the record contains sufficient facts to review the claim and, “given what the trial court knew at

that time, the court could have corrected the error.” *Id.*; *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014). The trial court in Mr. Chacon’s case was certainly aware of the instructions it gave and “should have known” that they violated the Supreme Court’s explicit directive in *Bennett. Kalebaugh*, 183 Wn.2d at 584.

The error Mr. Chacon’s case may be raised for the first time on review. *Id.*

CONCLUSION

The trial court violated Mr. Chacon’s rights to due process and to a jury trial and acted outside of its authority by failing to provide the complete and accurate WPIC 4.01 to the jury. This error requires reversal of Mr. Chacon’s convictions.

Respectfully submitted on March 9, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

John Chacon
c/o Thurston County Jail
2000 Lakeridge Drive SW
Olympia, WA 98502

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston County Prosecuting Attorney
paoappeals@co.thurston.wa.us

I filed the Petitioner's Supplemental Brief electronically with the Supreme Court, through the Court's online filing system.

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

Signed at Seattle, Washington on March 9, 2018.



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LAW OFFICE OF SKYLAR BRETT

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