

NO. 46308-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTIAN BAILEY,

Appellant.

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

The Honorable John Hickman, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	2
	1. Procedural History	2
	2. Substantive Facts	2
C.	ARGUMENT	5
	1. THE STATE OPENED THE DOOR TO BAILEY’S COMPLETE STATEMENT ABOUT THE MOTORCYCLE, AND THE COURT’S EXCLUSION DENIED BAILEY A FAIR TRIAL.	5
	2. INSTRUCTIONAL ERROR REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL.....	9
	a. The reasonable doubt instruction given by the court undercuts the State’s burden of proof.....	10
	b. The court erroneously determined that it lacked authority to give the proposed instruction defining “abiding belief.”	13
D.	CONCLUSION.....	15

TABLE OF AUTHORITIES

Washington Cases

<u>Ang v. Martin</u> , 118 Wn. App. 553, 76 P.3d 787 (2003), <u>aff'd</u> , 154 Wn. 2d 477 (2005).....	7, 8
<u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984).....	14
<u>State v. Avendano-Lopez</u> , 79 Wn. App. 706, 904 P.2d 324 (1995)	7
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	10, 11, 13
<u>State v. Berube</u> , 171 Wn. App. 103, 286 P.3d 402 (2012)	10
<u>State v. Castle</u> , 86 Wn. App. 48, 935 P.2d 656 (1997).....	10
<u>State v. Castro</u> , 32 Wn. App. 559, 648 P.2d 485 (1982).....	14
<u>State v. Elliot</u> , 121 Wn. App. 404, 88 P.3d 435 (2004)	14
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012)	10, 11, 12, 13
<u>State v. Fedorov</u> , 181 Wn. App. 187, 324 P.3d 784, <u>review denied</u> , 181 Wn.2d 1009 (2014)	12
<u>State v. Fleiger</u> , 91 Wn. App. 236, 955 P.2d 872 (1998), <u>review denied</u> , 137 Wn.2d 1003 (1999)	15
<u>State v. Garcia-Martinez</u> , 88 Wn. App. 322, 944 P.2d 1104 (1997), <u>review denied</u> , 136 Wn.2d 1002 (1998)	15
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	6, 8
<u>State v. Kinzle</u> , 181 Wn. App. 774, 326 P.3d 870, <u>review denied</u> , 337 P.3d 325 (2014).....	12
<u>State v. Pavlik</u> , 165 Wn. App. 645, 268 P.3d 986 (2011).....	7
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026 (1996).....	12
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)	15

Federal Cases

Sullivan v. Louisiana, 508 U.S. 274, 113 S. Ct. 2078, 124 L.Ed.2d 182
(1993)..... 13

Constitutional Provisions

U.S. Const. amend. VI 13
Wash. Const. art. I, § 21..... 13
Wash. Const. art. I, § 22..... 13

Statutes

RCW 9A.56.068..... 2
RCW 9A.56.140..... 2

Rules

ER 801(d)(2) 6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence after the State opened the door to that evidence.

2. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's role in the judicial process.

3. The court failed to exercise its discretion regarding instructions proposed by appellant.

Issues pertaining to assignments of error

1. Appellant was charged with unlawful possession of a stolen vehicle. When the vehicle was found on his property, a deputy asked where it came from, and he responded that he owned it and had recently purchased it. Did the State's use of the first part of appellant's statement open the door to the entire statement, so that exclusion by the court of the second part of the statement requires reversal?

2. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

3. The trial court refused to give appellant's proposed instruction defining "abiding belief," stating it had no authority to do so. Where the trial court has authority and discretion to define terms and expressions which may confuse the jury, did the court's refusal constitute an abuse of discretion?

B. STATEMENT OF THE CASE

1. Procedural History

On July 3, 2013, the Pierce County Prosecuting Attorney charged appellant Christian Bailey with two counts of unlawful possession of a stolen vehicle. CP 1-2; RCW 9A.56.068 and RCW 9A.56.140. The case proceeded to jury trial before the Honorable John R. Hickman. The jury found Bailey not guilty one count I and entered a guilty verdict on count II. CP 51-52.

Bailey filed a motion for new trial based on newly discovered evidence. CP 75-80. After an evidentiary hearing the court denied the motion. Supp. CP (Findings of Fact and Conclusions of Law re New trial Motion, filed 8/8/14).

The court imposed a standard range sentence of 25 months. CP 97. Bailey filed this timely appeal. CP 106.

2. Substantive Facts

In January 2013, a pickup truck Bambi Hope used in her business was stolen. RP 76-77. She reported the theft to the Pierce County Sheriff's Department. RP 77. Then, in late June 2013, acting on a tip, Hope located her truck on property in Graham. RP 82-83. She again called the sheriff's department. RP 92. Deputies obtained a search warrant based on the information from Hope. RP 120-22.

The warrant was executed on July 2, 2013. RP 122. Deputy Anthony Filing contacted Christian Bailey, who lived on the property. RP 124. Filing read Bailey his rights, and Bailey cooperated fully, escorting the deputies around the property. RP 36-37, 45, 125-26. When deputies asked about the truck, Bailey explained that a friend had dropped it off some months earlier. RP 39, 148.

Bailey had keys to the various outbuildings and sheds on the property, and he unlocked them for the deputies to search. RP 38, 126. One shed contained two motorcycles, and the deputy asked Bailey where the motorcycles came from. RP 57. Bailey said they belonged to him, and he added that he had recently purchased one of them. RP 38, 46, 57. The deputies checked the vehicle identification numbers on the motorcycles and discovered that one had been stolen about three weeks

earlier. RP 108, 157. Bailey was arrested and charged with unlawful possession of the stolen truck¹ and the stolen motorcycle. RP 41.

The court held a CrR 3.5 hearing prior to trial, and Bailey did not dispute that he spoke to the deputies voluntarily after being advised of his rights. RP 52. The State indicated that it planned to offer only the first part of Bailey's statement, that he owned the motorcycles, but it asked the court to exclude the second part, that he had just purchased the motorcycle in question, as hearsay. RP 52, 54-55.

Defense counsel argued that once the State introduced the topic of whether Bailey said anything about ownership of the motorcycles, the door would be opened to Bailey's entire statement that he owned the motorcycles because he purchased them. RP 54. Without the complete statement, there was a danger of misleading the jury. RP 56-57.

The court ruled that because Bailey's statement was not spontaneous but in answer to a question after he was advised of his rights, the statement was hearsay. The first part of the statement was admissible as a voluntary response to the deputy's question, but the second part was clearly self-serving and would not be admissible unless Bailey testified. RP 58-60.

¹ The jury acquitted Bailey on the charge involving the truck. CP 51.

At trial, Deputy Filing testified that when Bailey opened the shed containing the motorcycles, he said he owned the motorcycles. RP 132, 156-57. Deputy Hotz also testified that Bailey said the motorcycles were his. RP 171.

The prosecutor argued in closing that Bailey was found in exclusive control of the motorcycle, that he claimed ownership of it, and that he admitted to possession. RP 249. The prosecutor further argued that Bailey's claim of ownership was made less than a month after the motorcycle had been stolen, when there had not been time for the motorcycle to move among a bunch of different people. RP 258.

Defense counsel pointed out, however, that there was no evidence that Bailey knew the owner of the motorcycle or that the motorcycle was stolen. RP 270. Bailey's cooperation with the deputies executing the search warrant demonstrated he had nothing to hide, and his statement that he owned the motorcycles conveyed that he had purchased them. RP 270.

C. ARGUMENT

1. THE STATE OPENED THE DOOR TO BAILEY'S COMPLETE STATEMENT ABOUT THE MOTORCYCLE, AND THE COURT'S EXCLUSION DENIED BAILEY A FAIR TRIAL.

Bailey voluntarily spoke to the deputies executing the search warrant on his property after he was advised of his constitutional rights.

His statements were therefore admissible and not hearsay if offered by the State. See ER 801(d)(2) (statement by party-opponent is not hearsay if statement is offered against the party and is the party's own statement). In this case, the court had evidence that when Bailey unlocked the shed containing two motorcycles, one of the deputies asked him where the motorcycles came from. RP 57. Bailey responded that they belonged to him and he had recently purchased one of them. RP 57.

The court allowed the State to present only the first part of Bailey's response. RP 57. It rejected the defense argument that, by offering the first part of the statement, the State opened the door to the entire statement made in response to the deputy's question. RP 56-57.

It is a long established rule in Washington that a party may not bring up a topic, drop it at a point that seems advantageous to that party, and then preclude the other party from examining the topic further. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). For example, in Gefeller, on appeal the defendant challenged admission of a police detective's testimony that the defendant had taken a lie detector test and the results were inconclusive. The record showed, however, that the defense had first introduced the matter of the lie detector test. Because the defense opened the door to the topic, the State's follow-up questions were permissible. The Supreme Court explained,

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn. 2d at 455. The trial court has discretion when administering the open door rule, and the focus must be on fairness and truth-seeking. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), aff'd, 154 Wn. 2d 477 (2005).

Here, the court ruled that the second part of Bailey's statement was inadmissible as self-serving hearsay. RP 59. First, it should be noted that "[t]here is no 'self-serving hearsay' bar that excludes an otherwise admissible statement." State v. Pavlik, 165 Wn. App. 645, 653, 268 P.3d 986 (2011). Thus, the fact that Bailey's statement was "self-serving" does not alone require its exclusion. Moreover, Washington courts have recognized that a party may open the door to otherwise inadmissible hearsay. See Ang, 118 Wn. App. at 562; State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995).

The State introduced Bailey's statement that he owned the motorcycles, in addition to the fact that he had the key to the shed where they were stored, to show guilty knowledge. The State's theory was that since he admitted possession, he must have known the motorcycle was stolen. By introducing the initial statement about ownership, the State opened the door to the complete statement, that Bailey owned both motorcycles and had recently purchased one of them. The complete statement gives the jury a context from which to evaluate the State's theory. But closing the door to the remainder of Bailey's statement, because it was hearsay, gave the State an unfair advantage in arguing its theory of the case. See Gefeller, 76 Wn.2d at 455; Ang, 118 Wn. App. at 563.

There is a reasonable likelihood that the court's erroneous ruling affected the outcome of the case. The State had also argued that Bailey was guilty of possession of the stolen truck found on his property. The State was not able to establish who stole either the truck or the motorcycle, but the jury heard that when asked about the truck Bailey explained that a friend had dropped it off some months earlier. The jury acquitted Bailey of that charge. It is reasonably likely that if the jury had evaluated the State's case in the context of Bailey's entire statement regarding the motorcycle, it would have had a reasonable doubt as to this charge as well.

2. INSTRUCTIONAL ERROR REQUIRES REVERSAL
AND REMAND FOR A NEW TRIAL.

At the close of evidence, defense counsel objected to the State's proposed reasonable doubt instruction, which included the optional language in WPIC 4.01: "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." RP 218; CP 58. Counsel argued that the term "abiding" is not commonly used and could mislead the jury as to the State's burden. RP 218, 225. He proposed a reasonable doubt instruction without the optional language. CP 20. In the alternative, counsel proposed three alternate instructions defining abiding belief. RP 225-26; CP 21-23.

The court responded that it always gives the instruction proposed by the State, and it would do so in this case. RP 226. It refused to give an instruction defining abiding belief, however, stating that there is no pattern instruction defining that term and no statute or case law providing a definition. While the court said it understood counsel's desire to better define the term, it stated, "I don't believe I have legal authority to attempt to do that." RP 227. Defense counsel took exception to the court's refusal to give the proposed instructions. RP 243.

- a. The reasonable doubt instruction given by the court undercuts the State's burden of proof.

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with an "abiding belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. Bennett,

161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court directed trial courts to use WPIC 4.01 in all future cases.

Id. at 318. The pattern instruction 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.]*

WPIC 4.01.

The Bennett Court did not comment on the “belief in the truth” language. More recent cases demonstrate the problem with such language, however. In Emery, the prosecutor told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges” is that the defendants are guilty. Emery, 174 Wn.2d at 751. The Court noted that these remarks misstated the jury’s role, but because they were not part of the court’s instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the “abiding belief” language did not “diminish” the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The Court ruled that “[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error.” Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase “abiding belief” differed from proof beyond a reasonable doubt. Id. at 657-58.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State’s burden of proof. This language fosters confusion about the jury’s role and serves as a platform for improper arguments about the jury’s role in looking for the truth. Emery, 174 Wn.2d at 760. Division One of the Court of Appeals recently held that the “belief in the truth” phrase accurately informs the jury of its duty to determine whether the State has proved the charged offenses beyond a reasonable doubt. State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870, review denied, 337 P.3d 325 (2014); State v. Fedorov, 181 Wn. App. 187, 200, 324 P.3d 784, review denied, 181 Wn.2d 1009 (2014). This Court should decline to follow Division One and hold that, like the

impermissible argument in Emery, the contested language in the court’s instruction inevitably minimizes the State’s burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.” Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, appellate courts have a supervisory role in ensuring the jury’s instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge” misstates the State’s burden of proof, confuses the jury’s role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

- b. The court erroneously determined that it lacked authority to give the proposed instruction defining “abiding belief.”

The trial court in a criminal case is required to define technical words and expressions used in jury instructions, although it need not define words or expressions of common understanding. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982). Whether words used in an instruction require definition is necessarily a matter within the trial court's discretion. Castro, 32 Wn. App. at 565.

After determining that it would use the optional "abiding belief" language of WPIC 4.01, the court below refused to give the defense proposed instructions defining "abiding belief." Defense counsel argued that that phrase is not commonly used or understood and could therefore lead to confusion in the jury as to the State's burden of proof. The court acknowledged counsel's desire to better define that phrase, but it concluded that it had no authority to give a definitional instruction where none had been approved by the courts or adopted by the WPIC committee. Contrary to the court's understanding, defining words or expressions which could cause the jury confusion is within the trial court's authority and discretion.

A court's failure to exercise its discretion is an abuse of that discretion. State v. Elliot, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State

v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was security risk before ordering “shock box” was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing exceptional sentence below standard range is reviewable error), review denied, 136 Wn.2d 1002 (1998); State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting ER 404(b) evidence).

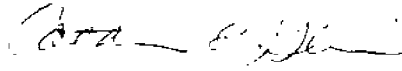
In failing to recognize and exercise its discretion, the trial court abused its discretion. This court should remand for retrial with appropriate instructions.

D. CONCLUSION

The trial court’s exclusion of evidence necessary to provide context for the State’s argument, after the State opened the door to that evidence, requires reversal. In addition, the improper reasonable doubt instruction and the court’s refusal to provide a needed definitional instruction denied Bailey a fair trial. This Court should reverse his conviction and remand for a new trial.

DATED December 22, 2014.

Respectfully submitted,



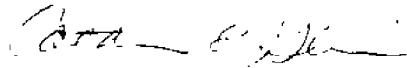
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Catherine E. Glinski
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December 22, 2014

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