

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD D. BRAXTON,

Defendant-Appellant.

UNPUBLISHED

October 21, 2004

No. 232830

Wayne Circuit Court

LC No. 00-004785

ON REMAND

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

We originally affirmed defendant's convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant thereafter filed an application for leave to appeal to the Supreme Court. In lieu of granting leave, the Supreme Court remanded the matter to us for further consideration. *People v Braxton*, 470 Mich 872; ___ NW2d ___ (2004). Specifically, the Supreme Court's order directs us to consider "whether there is a reasonable likelihood that the jury applied the reasonable doubt instructions in a manner that lowered the government's burden of proof, and, if so, the appropriate standard of review."

We believe that we answered this question in our original opinion. In addressing this issue, we stated:

Next, at least with respect to the "duty to convict" portion of the instructions, those instructions do not create the possibility of conviction where the jury did possess a reasonable doubt. That is, while a "duty to convict" instruction is disfavored, the instruction here does not raise the possibility that the jury would convict despite having a reasonable doubt. Rather, it raises the possibility that the jury may have convicted despite having an *unreasonable* doubt. Thus, this case does not present a situation, as in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), wherein the defective reasonable doubt instruction would have allowed for the jury to convict even though there did exist a reasonable doubt as properly defined.

Finally, the jury convicted of the lesser offense of second-degree murder, acquitting defendant of first-degree murder. Apparently, the jury did have a reasonable doubt as to defendant's mens rea and, therefore, acquitted on the

greater charge. This fact reflects the jury's ability to apply the proper definition of "reasonable doubt" as provided by the trial court. [*People v Braxton*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2003 (Docket No. 232830), *slip op* at 9; footnote omitted.]

Although we believe that this portion of our original opinion makes it clear that we concluded that there was not a reasonable likelihood that the jury applied the instructions in a manner that lowered the government's burden of proof, perhaps we created some confusion by our statement in the omitted footnote. That footnote, *id.*, *slip op* at 9 n 7, stated:

Arguably this is not the case with respect to the portion of the instructions which told the jury they must have a reason for their doubt. In such case, it is theoretically possible, though perhaps not realistic, that a juror may have had a reasonable doubt, but nevertheless voted to convict because that juror could not articulate a reason for his doubt.

To clarify, that statement reflects our opinion of the possible effect of the instructions given, not their actual effect. Not only does the footnote itself dismiss such a situation as not being reasonably likely, we further addressed the matter in the second paragraph quoted above from the text of our original opinion. That is, the jury's actions in convicting defendant of a lesser offense reflects that they did not, in fact, follow that unlikely course of action of convicting despite a reasonable doubt merely because the basis for that doubt could not be articulated.

Finally, the dissent suggests that in our original opinion we found that the instructions improperly shifted the burden of proof onto defendant. *Ante*, *slip op* at _____. We made no such conclusion in our original opinion. We did conclude that the improper portions of the instructions, when read in isolation, could have that effect. But, our opinion then goes on to observe that the matter was not that simple, because of the presence of the proper instructions as well. Ultimately we concluded that, when the instructions are read as a whole, and in light of the actual actions of the jury in this case, there was not a reasonable likelihood that the jury actually shifted the burden of proof to defendant.

In conclusion, the United States Supreme Court in *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994), reiterated that jury instructions, when read as a whole, must convey the correct concept of reasonable doubt. But the appropriate inquiry is not whether the instructions could have been applied in an improper manner, but whether there was a reasonable likelihood that the jury did, in fact, understand the instructions to permit conviction on less than proof beyond a reasonable doubt. *Id.* at 6. We again reaffirm our original holding that there was "no reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution." *Id.* at 22-23.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy