

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UNPUBLISHED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.

COOPER, P.J. (*dissenting*).

I must, once again, respectfully dissent from the majority's opinion affirming defendant's convictions. After considering *Victor v Nebraska*,¹ as ordered by the Michigan Supreme Court on remand to this Court,² I would find that there is a reasonable likelihood that the jury applied the reasonable doubt instructions in a manner that lowered the government's burden of proof.

In *Victor*, the United States Supreme Court upheld the convictions of two criminal defendants in a consolidated case. In each case, the jury instructions regarding reasonable doubt intertwined faulty elements with instructions properly defining reasonable doubt. The Court found that “‘taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.’”³ In instructing the jury, the trial court “must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.”⁴ Reversal is warranted where “there is a reasonable likelihood that the jury *did* so apply it.”⁵

The majority asserts that these questions were answered in their original opinion. However, the majority fails to separate the proper from the improper instructions regarding the

¹ *Victor v Nebraska*, 511 US 1; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

² *People v Braxton*, 470 Mich 872; 674 NW2d 380 (2004).

³ *Victor*, *supra* at 5, quoting *Holland v United States*, 348 US 121, 140; 75 S Ct 127; 99 L Ed 150 (1954).

⁴ *Id.* at 22.

⁵ *Id.* at 6 (emphasis in original).

definition of reasonable doubt to determine if the jury actually *did* apply the proper definition. I would find that the jury could not apply a proper standard given the confusing jury instructions containing multiple erroneous elements.

Michigan's standard jury instructions describe reasonable doubt as follows:

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.^[6]

As stated by the majority in their original opinion, the challenged instructions of the trial court did not comport with the standard jury instructions. The trial court's instructions were quoted in that opinion as follows:

Now, I think I briefly explained to you about the meaning of reasonable doubt. Reasonable doubt is defined as exactly what the word specified. Doubt that is based on reason, on common sense. There is nothing mysterious about any of the words. It's English language.

And a reasonable doubt means a doubt that's based on reason and common sense. A fair, honest and reasonable doubt. *A doubt that you should have a—that you have a reason for having.*

Now, reasonable doubt is not merely an imaginary, fictitious [sic] or flimsy doubt. It's not a hunch or a feeling or a possibility of innocence. It's a fair, honest and reasonable doubt. A doubt that's based on reason and common sense. And you decide that by applying your everyday experience and common sense to help you decide if such a reasonable doubt exist[s].

⁶ CJI2d 3.2.

The foregoing instruction was preceded by the court's instruction on defendant's alibi defense, wherein the court instructed the jury that "if you have a reasonable doubt that he was there, then find him not guilty. If you have no such reasonable doubt, then *it is your duty to bring back a verdict of guilty.*" Following the "reasonable doubt" instruction, the court further stated "[I]f you have a reasonable doubt, it is your duty to acquit the defendant. If you do not have a reasonable doubt, you should—*it's your duty to convict* the defendant."^[7]

The majority ultimately affirmed defendant's convictions. However, they originally found that the reasonable doubt instruction called upon the jury to justify its decision, and therefore, improperly shifted the burden of proof onto defendant to provide a reason to doubt his guilt. The majority specifically found: "When a court instructs a jury to base its decision 'on a reason,' however, it calls upon the jury to justify its decision. Such an instruction improperly shifts the burden of proof to the defendant by requiring the jurors to have a reason to doubt the defendant's guilt."⁸ Now that the matter has been remanded for reconsideration under *Victor v Nebraska*, the majority now states that there is no reasonable likelihood that the jury applied the reasonable doubt instructions in a manner that lowered the government's burden of proof. It was, and still is, disingenuous for the majority to find that these instructions were harmless when they in fact lowered the government's burden of proof. The government's burden of proof is not subject to theoretical possibilities. If the government does not meet its burden, acquittal by the jury is required.

The trial court erroneously defined reasonable doubt as "a doubt that you should have a reason for having." Additionally, the trial court, a neutral forum, instructed the jury that it had a duty to convict defendant if the jury failed to find a reasonable doubt.⁹ Furthermore, as I noted in my original dissent, the trial court's instruction concerning defendant's alibi defense was inaccurate.

The jury was instructed that it must convict defendant if it rejected his claim that he was not present at the scene of the crime. In this manner, the trial court effectively minimized the prosecution's burden of proving each element of the offense beyond a reasonable doubt. This error prejudiced defendant because it permitted the jury to find him guilty on the basis of his mere presence.^[10]

The jury was instructed that defendant must be convicted if they rejected his alibi defense. Combined with the instruction that reasonable doubt to acquit must be justified by "a

⁷ *People v Braxton*, unpublished opinion per curiam of the Court of Appeals (Docket No. 232830, issued July 8, 2003), slip op at 7 (emphasis in original).

⁸ *Id.* (emphasis in original).

⁹ See *People v Cooper*, 236 Mich App 643; 601 NW2d 409 (1999) (finding a prosecutor's argument that a jury is duty-bound to convict to be error).

¹⁰ *Braxton*, *supra* (Cooper, PJ, dissenting) at 3, citing *People v Gaydosh*, 203 Mich App 235, 238-239; 512 NW2d 65 (1994).

reason,” it is impossible to ascertain that the jury actually applied the instructions accurately defining reasonable doubt. Jurors come to a trial uninformed about the law; they are triers of fact, not triers of law. Jurors must look to the court to provide guidance and instruction. The standard jury instructions ask the trial judge to inform the jury of the judge’s duty as follows:

It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say. . . . You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.^[11]

If a trial court improperly states the burden of proof, on *multiple* occasions, it is reasonably likely that the incorrect standard will be applied in the jury room.

Accordingly, I would find that there is a reasonable likelihood that the jury applied the reasonable doubt instructions in a manner that violated defendant’s constitutional rights. Therefore, I continue to find that we should reverse defendant’s convictions and remand for a new trial.

/s/ Jessica R. Cooper

¹¹ CJI2d 3.1(4).