IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THADES S. RICH II, Appellant.	No. 40629-2-II UNPUBLISHED OPINION

Hunt, J. — Thades S. Rich II appeals his jury conviction for second degree assault. He argues that (1) retrial after the first jury was unable to reach a verdict constituted double jeopardy; (2) the trial court erred in concluding that he had voluntarily waived his *Miranda*[1] rights before giving statements to the police; and (3) the trial court's "reasonable doubt" jury instruction was reversible error because it relieved the State of its burden to prove each element of the crime beyond a reasonable doubt. We affirm.

FACTS

I. Background

Rich and his girlfriend, Briahn Ballas, were at a bar when Ballas began kissing another

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

woman, Carmen Johnson. Rich, who had been drinking throughout that evening, became upset and left the bar. Ballas and Johnson also left the bar and sat on a bench outside, where, according to Johnson, Ballas kissed her again.

When Rich returned to the bar to retrieve his debit card from Ballas, Johnson stood up and Rich pushed her back down. Rich walked away; Johnson followed, shouting at Rich to stop. Bystanders saw Johnson hit Rich in the back or in the back of the head and then saw Rich pick up Johnson and "slam" her to the ground, after which Johnson did not move. This altercation injured Johnson's face. City of Port Angeles Police Officer John Nutter responded and observed Johnson "bleeding from the face area[,] kind of crumpled in a pile on the ground[,] crying." Report of Proceedings (RP) (Mar. 22, 2010) at 86. Officer Dallas Maynard located Rich entering a taxi and activated his patrol car's overhead lights. Rich then began walking toward Maynard and said, "I'm the one you're looking for." RP (Mar. 23, 2010) at 48. Maynard took Rich into custody, searched him incident to arrest, placed him in the back of his patrol vehicle, and read him his *Miranda* rights.

Maynard then asked Rich what had happened with Johnson. Rich explained that Johnson had "grabbed" him and then, "without even thinking, [he had] used a . . . strong arm move to grab her wrist and force her down . . . to the ground so that she landed on her chest." RP (Mar. 23, 2010) at 58-59. Detecting a strong odor of alcohol coming from Rich, Maynard asked if Rich was willing to provide a portable breath alcohol test (PBT) sample. Rich voluntarily agreed and Maynard administered the PBT in the back of his police car. Rich's PBT result was a 0.140.

Maynard transported Rich to the police station, where he again advised Rich of his *Miranda* rights and interviewed him. After signing a formal waiver of his *Miranda* rights, Rich

met with Corporal Robert Ensor who conducted two interviews with Rich, one recorded and one not. Ensor took notes during the unrecorded interview, during which Rich stated that he "did . . . a strong arm take down and placed [Johnson] on the pavement." RP (Mar. 23, 2010) at 79. Rich made similar statements during the recorded part of the interview.[2]

II. Procedure

The State charged Rich with second degree assault. After his first trial ended in a mistrial, he went to trial again, at the end of which the jury convicted him as charged.

A. First Trial—Mistrial

In his first trial, Rich requested a jury instruction on the lesser included offense of fourth degree assault. The trial court held a CrR 3.5 hearing, during which Maynard testified that (1) he had advised Rich of his *Miranda* rights after arresting him and placing him in the back of the patrol car; and (2) he had again advised Rich of his *Miranda* rights after escorting Rich to the interview room at the police station, at which point Rich had signed an "advice of rights" form.

Rich testified that he did not believe his waivers of his *Miranda* rights in Maynard's patrol car and at the police station had been voluntary, knowing, and intelligent because he had been "too intoxicated" and he "would not have waived [his] rights if [he] had been sober."[3] RP (Jan. 5, 2010) at 78-79. Disagreeing, the trial court orally ruled that Rich had given a "valid waiver" of his *Miranda* rights, despite his intoxication. RP (Jan. 5, 2010) at 86.

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[2] The record before us on appeal does not contain the audio recording or the transcript of the recorded interview.

[3] Rich also testified that while he was in Maynard's patrol vehicle, he (Rich) had "made a comment about [] probably going to be kicked out of the Coast Guard" because of the incident with Johnson. RP (Jan. 5, 2010) at 80. Rich testified that Maynard's response was "coasties (sic) always say that but nothing ever happens to them." RP (Jan. 5, 2010) at 80.

This first trial ended in a mistrial when the jury was unable to reach a verdict and both Rich and the State agreed that the trial court should not send the jury back for further deliberations. Rich did not ask the trial court to poll the jurors, and he agreed to the trial court declaring a mistrial.

B. Retrial

The State retried Rich in front of a different judge. When Maynard began to testify about what Rich had said after he was under arrest and sitting in the back of the patrol car, Rich objected, "I don't believe that these statements have been qualified for admission." RP (Mar. 23, 2010) at 49. The trial court then held a CrR 3.5 hearing out of the jury's presence. Maynard testified that (1) after placing Rich in the back of the patrol car, he advised Rich of his *Miranda* rights; (2) he (Maynard) could detect an alcoholic beverage odor on Rich's breath; (3) Rich never "indicate[d] any confusion about his rights," "indicate[d] that he wanted to exercise his [*Miranda*] rights," or "ask[ed] for an attorney"; and (4) Rich "was able to talk, answered [Maynard's] questions, [and] appeared to understand [Maynard's] questions." RP (Mar. 23, 2010) 52, 55. The trial court ruled that Rich's custodial statements "were made voluntarily with an understanding of his right to remain silent if he chose and those statements will be admissible." RP (Mar. 23, 2010) at 56-57.

When Rich elicited from Officer Maynard on cross-examination that he had administered a PBT to Rich, the State objected that a PBT is not admissible as a breath test or as substantial evidence in a driving while intoxicated trial. The trial court overruled the objection and admitted the test result.

Later in the trial, the State offered, and the trial court admitted, an audio recording of

Ensor's interview with Rich. Although the State also offered the transcript of this interview, the trial court allowed the jury to see it only while listening to the recording; the trial court did not allow the jury to take the transcript into the jury room.

Rich took the witness stand at trial and testified that he had grabbed Johnson's hand and "flipped [her] over" but that he did not know it was Johnson at the time. RP (Mar. 23, 2010) at 242. Four eyewitnesses also testified about Rich's altercation with Johnson.

The trial court instructed the jury on reasonable doubt. Rich objected to instruction 3's omission of the last sentence of 11 *Washington Practice: Washington Pattern Jury Instructions*: *Criminal* 4.01, at 85 (Suppl. 2011) (WPIC) pattern instruction, "[T]he defendant has no burden of proving that a reasonable doubt exists." RP (Mar. 24, 2010) at 73. The trial court overruled Rich's objection and read instruction 3 to the jury. The jury found Rich guilty as charged. He appeals.[4]

ANALYSIS

I. No Double Jeopardy

Rich argues that we should reverse his conviction and dismiss his case with prejudice because "the [trial] court's decision to discharge the jury [in the first trial] violated [his] constitutional right to receive a verdict from the jury he selected" and his second trial unconstitutionally placed him in double jeopardy. Br. of Appellant at 14. This argument fails.

A party who invites court action below cannot raise such action as an error on appeal, even when it is constitutional in nature. *See City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58

[4] Our court commissioner initially considered Rich's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

P.3d 273 (2002). Because Rich consented to the trial court's declaration of a mistrial without first polling the jury, he cannot now claim that the trial court lacked a factual basis for declaring a mistrial and that his subsequent retrial placed him in double jeopardy.[5]

A. Invited Error

Rich first contends that the trial court erred in granting a mistrial because (1) it did not determine "if the other *jurors* agree[d] with" the presiding juror that there was no reasonable probability of the jury reaching a verdict within a reasonable time (Br. of Appellant at 12 (citing *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982)); and (2) the trial court lacked a factual basis for declaring a mistrial without first consulting the other jurors, which rendered his first trial the equivalent of an acquittal. We do not address this argument because Rich agreed to, and thus invited, the mistrial.

When the jury announced that it was unable to reach a verdict at the end of Rich's first trial, the trial court asked Rich and the State, "[I]f I discuss probability of the verdict and the foreman indicates there's no probability, do you want me to send them out and discuss a mistrial or simply declare a mistrial?" Suppl. RP (Jan. 6, 2010) at 4. The State responded, "I would—I don't think that I would see much point in making them debate further. Usually with this kind of case we see something within a couple of hours." Suppl. RP (Jan. 6, 2010) at 5. Rich's counsel agreed, saying, "That's pretty much my thought." Suppl. RP (Jan. 6, 2010) at 5.

The trial court then stated to the deadlocked jury, "[I]n discussions with counsel, we've

[5] Accordingly, we do not address Rich's argument that he may raise his double jeopardy claim for the first time on appeal under the RAP 2.5(a)(3) "manifest error affecting a constitutional right" exception to the general rule requiring preservation of error below as a prerequisite to raising issues on appeal.

agreed that if you are unable to reach an opinion at this time we are going to declare a mistrial and send you home." Suppl. RP (Jan. 6, 2010) at 6. The trial court then dismissed the jury and commenced discussions with Rich and the State about setting a new trial date. At no time did Rich attempt to withdraw his agreement or object to the trial court's declaration of a mistrial. Accordingly, we hold that Rich cannot now claim for the first time on appeal that this mistrial, to which he agreed, was reversible error.

B. Double Jeopardy

Nor did the retrial following the agreed mistrial place Rich in double jeopardy. Double jeopardy bars retrial of a defendant where (1) jeopardy has previously attached, (2) *jeopardy has been terminated*, and (3) the defendant is again being put in jeopardy for the same offense. *State v. Daniels*, 160 Wn.2d 256, 261-62, 156 P.3d 905 (2007).[6] Here, the second part of the test is not met because jeopardy continued, and did not terminate, when the trial court granted the agreed mistrial.

"Jeopardy may be terminated by acquittal, final conviction, or, in some circumstances, when the court dismisses the jury *without the defendant's consent* and dismissal is not in the interest of justice." *State v. Hall*, 162 Wn.2d 901, 906-07, 177 P.3d 680 (2008) (emphasis added) (citing *State v. Ervin*, 158 Wn.2d 746, 752-53, 147 P.3d 567 (2006)). Unless dismissal of a jury is necessary to the proper administration of justice,[7] discharge of the jury, *without the*

[6] Washington courts interpret the double jeopardy clause of the Washington and United States constitutions identically. *Daniels*, 160 Wn.2d at 261. Therefore, we do not need to engage in separate state and federal double jeopardy analyses.

[7] Because jeopardy did not terminate when the trial court declared a mistrial with Rich's consent, we do not address his argument that the trial court lacked "manifest necessity" or "extraordinary and striking circumstances" justifying a mistrial. *See* Br. of Appellant at 12.

defendant's consent, serves as the equivalent of an acquittal. *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982). Here, however, the record shows that Rich consented to the mistrial; therefore, discharging the deadlocked first jury did not serve as an acquittal and jeopardy did not terminate. Instead, the single ongoing jeopardy of the first trial continued forward into the retrial. We hold that retrying Rich following his agreed mistrial did not constitute double jeopardy.

II. Voluntariness of Custodial Statements

Rich argues that "[t]he trial court violated [his] constitutional privilege against self incrimination by admitting his custodial statements" because his intoxication rendered his waiver of *Miranda* rights invalid. Br. of Appellant at 15 (emphasis omitted). This argument also fails.

We review de novo whether Rich validly waived his *Miranda* rights. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185, *review denied*, 169 Wn.2d 1021 (2010). Under the Fifth Amendment to the United States Constitution and article I, section nine of the Washington Constitution,[8] absent waiver of *Miranda* rights, a suspect's statements during a custodial interrogation are presumed involuntary.[9] *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). "But 'a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning [his *Miranda*] rights and the defendant then *knowingly*, voluntarily and intelligently waives those rights.'" *Hickman*, 157 Wn. App. at 772 (quoting *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996)). To be voluntary, a defendant's waiver must

[8] The Washington Supreme Court interprets both provisions equivalently. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

[9] Unless curative measures are taken before the non-waiving suspect's statement is made, courts must exclude the suspect's statements. *Missouri v. Seibert*, 542 U.S. 600, 622, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

be the product of rational intellect and free will. *State v. Brown*, 158 Wn. App. 49, 61, 240 P.3d 1175 (2010), *review denied*, 171 Wn.2d 1006 (2011). In determining voluntariness, we evaluate the totality of the circumstances, including Rich's physical and mental condition, his experience, and the conduct of the police. *Brown*, 158 Wn. App. at 61. Evidence of intoxication is a factor that we consider in determining the validity of a waiver of *Miranda* rights. *State v. Reuben*, 62 Wn. App. 620, 625-26, 814 P.2d 1177 (1991).

In *Rueben*, Division Three of our court held that "intoxication was not a significant factor affecting cognition" (and thus voluntariness) because the defendant gave "coherent information" to law enforcement, which indicated that the defendant "understood exactly what was going on." *Reuben*, 62 Wn. App. at 625-26. Division Three also noted that the defendant reacted when he was told he was under arrest, maintained his attention while law enforcement read him his rights, and was an "alcohol seasoned person who could show less than usual impairment" when intoxicated. *Reuben*, 62 Wn. App. at 626.

Here, the State demonstrated similar facts. First, it was obvious to Maynard that Rich understood what was happening when Rich reacted to Maynard's arrival by volunteering to Maynard, "I'm the one you're looking for." RP (Mar. 23, 2010) at 48. Rich did not appear confused, he was able to understand and to answer Maynard's questions, and he (Rich) spoke in "coherent sentences" and never slurred his words. RP (Mar. 23, 2010) at 55. Ensor also testified that, when he asked Rich if he was aware of his rights and was willing to talk to him, Rich said that he was. And Rich himself testified that the police officers did not threaten to make him talk to them or make any promises to induce him to waive his rights. These facts demonstrate that Rich's intoxication "was not a significant factor affecting cognition." *Reuben*, 62 Wn. App. at

626. Accordingly, we hold that the trial court did not err by admitting Rich's custodial statements.

III. Reasonable Doubt Jury Instruction

Lastly, Rich argues that the trial court violated his state and federal due process rights in giving the reasonable doubt instruction because its language lacked one sentence from WPIC 4.01. We disagree.

A. Standard of Review

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Castillo*, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Bennett*, 161 Wn.2d at 307. It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *Bennett*, 161 Wn.2d at 307.

An erroneous jury instruction is "generally subject to a constitutional harmless error analysis." *State v. Lundy*, 162 Wn. App. 865, 871, 256 P.3d 466 (2011). We may hold the error harmless if we are satisfied "'beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Lundy*, 162 Wn. App. at 872 (quoting *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010)). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *Lundy*, 162 Wn. App. 872.

B. Instruction 3 Harmless, if Error

The trial court gave the following jury instruction on reasonable doubt:

> The Defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of

> proving each element of the crime beyond a reasonable doubt.
>
> 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, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 26.

Rich argues that the reasonable doubt jury instruction 3's omission of one sentence from the language of WPIC 4.01 was reversible error under our Supreme Court's *Bennett* decision. *Bennett* "instructed" trial courts "to use the WPIC 4.01 instruction . . . until a better instruction is approved." 161 Wn.2d at 318. The *Bennett* court, however, did not decide whether the failure to give the entire WPIC 4.01 was automatically reversible or instead subject to harmless error analysis.

Division One in *Castillo* concluded that such failure was grounds for automatic reversal. *See* 150 Wn. App. at 472. Based on *Bennett* and *Castillo*, the State here initially "concede[d the] error" that the trial court deviated from the language of WPIC 4.01 and asked us to "remand for further proceedings." Br. of Resp't at 24.

Two years after Division One filed *Castillo* and after the parties filed their briefs here, we reached the opposite conclusion in *Lundy*, disagreeing with *Castillo* and holding that failure to give WPIC 4.01 verbatim was subject to harmless error analysis and that the deviating reasonable doubt instruction in *Lundy* was harmless error. *Lundy*, 162 Wn. App. at 872-73. We ordered the parties here to submit supplemental briefing in light of *Lundy*. In so doing, the State changed its position and no longer concedes that the instruction was reversible error. Although Rich does not

argue that we should depart from our holding in *Lundy*, he continues to argue that the instructional error here was not harmless. After considering this additional briefing, we hold that the trial court's slight deviation from WPIC 4.01 was harmless error.

As we have already noted, the reasonable doubt jury instruction here differed from WPIC 4.01 only in its omission of the following sentence: "The defendant has no burden of proving that a reasonable doubt exists." Rich contends that this omission was not harmless error. Rich points out that the reasonable doubt instruction in *Lundy*, which we held was harmless error, deviated from WPIC 4.01 only in that it reversed the order of the first two paragraphs of WPIC 4.01 and modified the first three sentences of the paragraph on the State's burden of proof.[10] Rich suggests that the *Lundy* reasonable doubt instruction even may have "be[en] an improvement on WPIC 4.01" because it "emphasiz[ed] the presumption of innocence." Suppl. Br. of Appellant at 2 & n.2. Rich then avers that the *Lundy* instruction at least contained the "defendant has no burden" sentence, which the instruction here lacked.

Next, Rich compares the instruction here with the *Castillo* instruction, which also omitted

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[10] Specifically, the *Lundy* reasonable doubt instruction read,

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.
>
> Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> 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.

162 Wn. App. at 870-71.

the "defendant has no burden" sentence;[11] he argues that, because Division One reversed Castillo's conviction, we should also reverse Rich's conviction. We disagree.

In *Castillo*, the omission of the "defendant has no burden" sentence was significant because the State's cross-examination and closing argument "suggested Castillo needed to explain why [the victim] might be lying." 150 Wn. App. at 473. Here, in contrast, the State never made any such suggestion. Because the State never attempted to shift its burden of proof here, as it did in *Castillo*, the reasonable doubt instruction did not prejudice Rich like it prejudiced Castillo.

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[11] The *Castillo* reasonable doubt instruction read,

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the Plaintiff and has the burden of proving each element of a crime charged beyond a reasonable doubt. While the rule as to reasonable doubt extends to each element of a crime charged, each particular fact advanced by the State which does not amount to an element need not be established beyond a reasonable doubt. For example, evidence of a person's motive for the doing of an act might, in some cases, be allowed by the court to be admitted in a trial since a person who is motivated to commit an act might be more likely to have actually committed the act. But motive is never an element of a crime, and therefor[e], if motive evidence is allowed in a trial, one's motive need not be proved beyond a reasonable doubt.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a "reasonable doubt", [sic]
>
> A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by insufficiency of proof of guilt. Proof beyond a reasonable doubt does not mean proof to an absolute or mathematical certainty, but it does mean proof which leaves you firmly convinced of the defendant's guilt. The proof need not exclude every hypothesis or possibility of innocence, but proof beyond a reasonable doubt must exclude every fair and rational hypothesis except that of guilt. A "reasonable doubt" is a doubt as would exist in the mind of a reasonably prudent person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, on the whole evidence, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

150 Wn. App. at 470-71 (alterations in original).

Furthermore, the trial court, Rich, and the State repeatedly made it clear to the jury that the State had the burden to prove Rich guilty beyond a reasonable doubt.[12] And unlike the potentially confusing *Castillo* instruction,[13] the reasonable doubt instruction here did not contain any such potentially misleading or confusing language or alterations. It deviated from WPIC 4.01 only in a single, limited respect, which as explained above, was not harmful because the State never attempted to shift the burden of proof to Rich. More importantly, instruction 3 included the following language establishing that the State clearly bore the burden of proof beyond a reasonable doubt: "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP at 26.

Moreover, the evidence that Rich committed second degree assault was overwhelming: Four eyewitnesses testified that they saw Rich slam Johnson to the ground. And Rich also did not deny that he had grabbed and flipped Johnson over onto the ground; rather, he testified at trial that he had not realized at the time that it was Johnson.

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[12] RP (Mar. 24, 2010) at 78 (before closing arguments, the trial court advised the jury that "the State has the burden of proof in this case . . . Ms. Lundwall who has the burden of proof"); RP (Mar. 24, 2010) at 78 (during closing arguments, the State explained, "[T]here's certain things that the State needs to prove in order for you to find the Defendant guilty in this case."); RP (Mar. 24, 2010) at 85 (Rich's counsel stated during closing argument, "[M]y client has no burden to prove anything. He doesn't have to prove anything.")

Additionally, the reasonable doubt instruction stated, "The *State* . . . has the burden of proving each element of the crime beyond a reasonable doubt." CP at 26 (emphasis added). The instruction on the lawful-use-of-force defense also made clear that the State bore the burden of proof. *See* CP at 37 ("The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.").

[13] The *Castillo* trial judge drafted the instruction and described "reasonable doubt," in part, as "not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt." 150 Wn. App. at 470. Division One concluded that there was a "potential for confusion in using the . . . ingenious" language because the dictionary contained different definitions of the word. *Castillo*, 150 Wn. App. at 474.

Rich fails to demonstrate that the omission of this sentence from the instruction caused him prejudice, especially in light of the fact that the State never attempted to shift the burden of proof to Rich, the jury was aware that the State bore the burden, and the evidence supporting Rich's second degree assault conviction was overwhelming. We are satisfied beyond a reasonable doubt that the jury verdict would not have differed had the trial court included the additional "defendant has no burden" sentence in its reasonable doubt instruction. Accordingly, we hold that omission of this sentence from WPIC 4.01 in instruction 3 was harmless error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Johanson, J.