

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEREMY LEE TAFT,

Appellant.

No. 40843-1-II

UNPUBLISHED OPINION

Worswick, A.C.J. — A jury found Jeremy Taft guilty of two counts of third degree assault. On appeal, he contends that the trial court committed reversible error when it failed to use WPIC 4.01¹ to instruct the jury on the burden of proof and the reasonable doubt standard our Supreme Court mandated in *State v. Bennett*, 161 Wn.2d 303, 307-08, 165 P.3d 1241 (2007). Taft also argues that the trial court improperly calculated his offender score because it included a crime in his criminal history that had washed out. The State concedes the sentencing error. Because Taft did not preserve review of the instruction as CrR 6.15 requires and because a violation of our Supreme Court’s mandate in *Bennett* is not a manifest error implicating a specifically identified constitutional right, we affirm his convictions. We accept the State’s concession that Taft’s offender score was miscalculated and remand for resentencing.

¹ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008) (WPIC).

FACTS

On December 24, 2009, Taft attacked an intercity transit driver, grabbing him by his coat collar and shaking him. He also attacked an Olympia police officer who responded to the incident. The State charged Taft with two counts of third degree assault, and a jury found him guilty as charged on both counts.

At sentencing, the trial court found that Taft's criminal history included a July 8, 1997 felony; a May 2, 1999 gross misdemeanor; a February 22, 2005 misdemeanor; and a December 22, 2009 misdemeanor. Based on this criminal history, the court calculated Taft's offender score as two. The trial court sentenced Taft to nine months confinement on each count to be served concurrently followed by 30 days of community custody.

DISCUSSION

I. Jury Instruction

Initially, we note that Taft did not comply with CrR 6.15(c) and failed to timely object to the trial court's instruction on the burden of proof and the definition of reasonable doubt. CrR 6.15(c) requires timely and well-stated objections to jury instructions "in order that the trial court may have the opportunity to correct any error." *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988) (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

Notwithstanding his failure to comply with CrR 6.15(c), Taft insists that he can raise, for the first time on appeal, the trial court's failure to use WPIC 4.01 to instruct the jury on the burden of proof and the reasonable doubt standard. Generally, an error cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3);

State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

For the RAP 2.5(a)(3) exception to apply, Taft must show that the error is both manifest and that it implicates a specifically identified, constitutional right. *O'Hara*, 167 Wn.2d at 98. The error is “manifest” if Taft can “show that the asserted error had practical and identifiable consequences at trial.” *State v. Grimes*, 156 Wn. App. 172, 186-87, 267 P.3d 454 (2011). It is Taft’s burden to identify this type of error. *See State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Taft has the additional burden of establishing that the error implicates a specifically identified constitutional interest. *See O'Hara*, 167 Wn.2d at 98-99.

Here, Taft does not identify a manifest error in the challenged instruction. In 2007, our Supreme Court directed that trial courts use WPIC 4.01 to instruct the jury on the burden of proof and the definition of reasonable doubt. *Bennett*, 161 Wn.2d at 317-18. Although the trial court failed to use WPIC 4.01 in instructing the jury on the reasonable doubt standard as *Bennett* directs, the differences between the trial court’s instruction and WPIC 4.01 are not significant enough to establish that “practical and identifiable consequences” resulted at trial.

WPIC 4.01 states,

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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.

Here, the trial court instructed the jury:

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.

Clerk's Papers at 31.

By failing to use WPIC 4.01 to instruct the jury on the definition of reasonable doubt, the trial court violated the *Bennett* court's directive to use WPIC 4.01. But the Supreme Court's primary concern in *Bennett* was the definition of reasonable doubt. The instruction at issue in *Bennett* used ambiguous language such as "possible" doubts and "real possibility" that the defendant was guilty. 161 Wn.2d at 309. The *Bennett* court noted that the presumption of innocence "can be diluted" if reasonable doubt is defined so as to be "illusory or too difficult to achieve." 161 Wn.2d at 316. In Taft's case, however, the definition section of the instruction followed the language of the definition section in WPIC 4.01 exactly. Accordingly, Taft has failed to identify a manifest error.

We note, moreover, that Taft fails to meet the additional burden of establishing that the trial court's instruction implicated his constitutional right to due process or deprived him of his right to a fair trial. In directing trial courts to use the WPIC 4.01 to instruct juries on the standards for burden of proof and reasonable doubt, our Supreme Court did not invoke its

constitutional error-correcting authority. Instead, after holding the challenged instruction was constitutionally sufficient, our Supreme Court expressly stated that it was exercising its supervisory power to enact procedural rules. *Bennett*, 161 Wn.2d at 318. In result, Taft has not shown that a manifest error occurred at trial or that a manifest error implicated one of his specifically identified constitutional rights. Because of this, his challenge fails to fall within the very limited scope of RAP 2.5(a)(3) and, as such, we will not address the challenge for the first time on review. *See Scott*, 110 Wn.2d at 687. (“We agree with the Court of Appeals that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’ The exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”) (Citations omitted).

We are aware that Division One of this court has disciplined trial courts for failing to use WPIC 4.01 by refusing to apply a harmless error standard. In *State v. Castillo*, 150 Wn. App. 466, 474-45, 208 P.3d 1201 (2009), Division One held that the trial court committed reversible error when it refused Castillo’s request that it instruct the jury using WPIC 4.01. In making its ruling, the court considered (1) the length of time the trial courts had already had to learn of the Supreme Court’s directive; (2) the clarity of that directive; and (3) several deficiencies in the instruction used, and held that the trial court’s failure to use WPIC 4.01 over the defendant’s objection was reversible error. *Castillo*, 150 Wn. App. at 472-75.

Here, unlike in *Castillo*, Taft did not propose WPIC 4.01 nor did he object to the trial court’s instruction. In addition, unlike the instruction at issue here, the *Castillo* instruction

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included an ambiguous definition of reasonable doubt. More important, the *Castillo* instruction left out the admonition that “[t]he defendant has no burden of proving that a reasonable doubt exists.” 150 Wn. App. at 473 (quoting WPIC 4.01). The *Castillo* court found the omission particularly significant because the prosecutor’s closing argument suggested that Castillo had some responsibility to explain why the victim might be lying. 150 Wn. App. at 473. In contrast, the instruction here tracked WPIC 4.01 and included the sentence omitted in *Castillo* as well as the definition of reasonable doubt expressly approved by our Supreme Court in *Bennett*. Furthermore, in a similar situation, we previously declined to follow *Castillo* noting that “[a]lthough the *Bennett* court cautioned against altering WPIC 4.01, the court did not hold that modifying WPIC 4.01 automatically constitutes reversible error.” *State v. Lundy*, 162 Wn. App. 865, 872, 256 P.3d 466 (2011).

Accordingly, Taft’s challenges to the differences between the trial court’s reasonable doubt jury instruction in this case and WPIC 4.01 are constitutionally insignificant and may not be raised for the first time on appeal. The instruction in Taft’s case switched the order of the first two paragraphs, added a statement that the elements of each crime would be explained in subsequent instructions, and omitted language advising the jury that the defendant had pleaded not guilty and that the not guilty plea put every element of each crime at issue. The reorganization and the added language had no impact on the meaning or clarity of the instruction. The omitted reference to the defendant’s not guilty plea in this instruction was informational and cumulative of the trial court’s earlier oral instructions. Moreover, the “to convict” instructions given at trial clearly told the jury that to find Taft guilty, it needed to decide the State proved each

element of third degree assault beyond a reasonable doubt.

The jury clearly knew that the charges were accusations, that Taft had pleaded not guilty, that the State had to prove every element of every crime beyond a reasonable doubt, and that the defendant had no burden to prove that a reasonable doubt exists. The instruction was a constitutionally correct statement of the law and was not confusing. Although the trial court failed to sua sponte follow the *Bennett* court's supervisory directive to use WPIC 4.01, Taft did not object to the trial court's instruction which correctly defined reasonable doubt and was neither erroneous nor defective. Thus, Taft's argument fails.

II. Offender Score

Taft's July 8, 1997 conviction was a class C felony that washed out of his offender score because Taft spent five consecutive years in the community without committing another crime. RCW 9.94A.525(2)(c). The State concedes that it did not produce any evidence showing that Taft was not in the community for five years between his May 2, 1999 gross misdemeanor and his February 22, 2005 misdemeanor offenses. Accordingly, his offender score should have been calculated excluding his 1997 class C felony conviction.

On remand, the State may present evidence of Taft's past convictions to enable the trial court to accurately calculate Taft's correct standard range. RCW 9.94A.530(2). When, as is the case here, there is "no objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at sentencing." *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009). Moreover, this remedy is consistent with RCW 9.94A.530(2) which provides, "On remand for resentencing . . . the parties

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shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.”

At sentencing, Taft did not specifically object to his criminal history or offender score calculation and the sentencing court never had an opportunity to correct any errors. Thus, we affirm Taft’s convictions and remand for resentencing with a full opportunity for both parties to present evidence of the defendant’s accurate criminal history and offender score. RCW 9.94A.530(2).

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.

Worswick, A.C.J.

I concur:

Armstrong, J.

Quinn-Brintnall, J. (concurring) — Although I concur in the result reached by my colleagues, I write separately to stress, as I did in an analogous situation in my concurrence in *State v. Bertrand*, ___ Wn. App. ___, 267 P.3d 511 (2011), that in the present case a “manifest error” occurred: the trial court did not instruct the jury using 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01*, at 85 (3d ed. 2008) (WPIC), as directed by our Supreme Court in *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.2d 1241 (2007).

Having first shown that a manifest error—a “plain and indisputable” error in disregard “of the controlling law”—occurred at trial, Jeremy Lee Taft then has the additional burden of showing how that “error affected a specifically identified constitutional right.” *Bertrand*, 267 P.3d at 523. But as the majority notes, “our Supreme Court did not invoke its constitutional error-correcting authority” when it instructed trial courts to use WPIC 4.01. Majority at 4. Accordingly, Taft cannot meet the second burden placed before appellants seeking review under RAP 2.5(a)(3) and has failed to preserve the issue for this court’s review.

Having failed to establish *both* that a manifest error occurred and that the error affected a specifically identified constitutional right, Taft is not entitled to harmless error review and our inquiry ends. *Bertrand*, 267 P.3d at 523.

Because my colleagues have separately determined that Taft may not challenge the jury instruction at issue in this case for the first time on review, I concur in the result.

QUINN-BRINTNALL, J.