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Jury Instructions

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JURY INSTRUCTIONS

Assuring the accused a fair trial by maintaining the proper allocation of the burden of proof and requiring the standard of proof to be beyond a reasonable doubt were the dominant issues in the jury instruction cases decided during the survey period by the West Virginia Supreme Court of Appeals. The general trend of the decisions was one of close scrutiny to unique or nonstandard instructions to determine if such instructions maintained the proper allocation of the burden of proof and the proper standard to fulfill this burden. The court re-emphasized the desirability of utilizing its standard instructions in this area of law.

I. PRESUMPTIONS AND INFERENCES

State v. Keffer, 281 S.E.2d 495 (W. Va. 1981)
State v. Greenlief, 285 S.E.2d 391 (W. Va. 1981)

In *State v. Keffer*,[1] the defendant challenged a jury instruction on the grounds that it presumed intent.[2] The court recognized that such an instruction was held to be a violation of due process by the United States Supreme Court in *Sandstrom v. Montana*,[3] since it allowed the material element of criminal intent to be presumed, and not proven beyond a reasonable doubt, as is constitutionally required.[4] The instruction presumed intent and shifted to the defendant the burden of rebutting such presumption.

A similar issue involving the use of presumptions and inferences in instructions was raised by the defendant in *State v. Greenlief*.[5] The court compared the permissive nature of the inference in this instruction with the mandatory tone of the condemned instructions in *Sandstrom v. Montana* and *O'Connel v. State*.[6] The permissive nature of this instruction did not shift the burden of proof to the defendant or invade the province of the jury.[7] The court also found support for this distinction in the dictionary definitions of the two words, and characterized such distinction as "apparent".[8] Thus, a permissive inference in jury instructions, is constitutionally valid, while the mandatory presumption is constitutionally barred.[9]

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[1] 281 S.E.2d 495 (W. Va. 1981).

[2] "The [c]ourt instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequence of his act . . . ." 281 S.E.2d at 496.

[3] 442 U.S. 510 (1979).

[4] Mullaney v. Wilbur, 421 U.S. 684 (1975). *Accord*, State v. O'Connell, 256 S.E.2d 429 (W. Va. 1979).

[5] 285 S.E.2d 391 (W. Va. 1981). The challenged instruction read: "The court instructs the jury that there is a permissible inference of fact that a man intends that which he does, or which is the immediate and necessary consequence of his act." 285 S.E.2d at 395.

[6] *Cf.* the instruction in *Keffer, supra* note 2, with the instruction in *Greenlief, supra* note 5.

[7] 285 S.E.2d at 395. *See* F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 81(F), at 546-47 (1978) [hereinafter cited as F. CLECKLEY].

[8] 285 S.E.2d at 395.

[9] Although the court failed to note it, the concurring opinion in *Sandstrom* by Justice Rehnquist specifically stated that "surely if this charge had, . . . 'merely described a permissive infer-

One question raised by these cases is whether, in fact, a juror in the context of a jury instruction recognizes the difference between a presumption and an inference. The defendant's constitutional rights depend on the jury making this distinction.[10] Unfortunately, the distinction between presumptions and inferences, even in legal writing, is far from "apparent."[11] Whether a layman can make the distinction from the words themselves, without any explanation, seems questionable.

This is not to say that inferences have no place in jury instructions in criminal cases. Indeed, the use of inferences is absolutely essential to instruct the jury how they are to determine the defendant's mental state from his outward manifestations and actions. It is submitted, however, that jury instructions dealing with inferences should explicitly impart to the jury the permissive nature of such inferences and the purposes furthered by their usage.[12] Such a procedure will provide a fair accommodation between the necessary role of inferences in jury instructions and the constitutional requirement of maintaining the burden of proof on the prosecution of every element of the offense.

II. Beyond a Reasonable Doubt

State v. Greenlief, 285 S.E.2d 391 (W. Va. 1981)
State v. McCourt, 283 S.E.2d 918 (W. Va. 1981)
State v. Keffer, 281 S.E.2d 495 (W. Va. 1981)

From the constitutional command of proof beyond a reasonable doubt spring fundamental issues in the nature and form of jury instructions. One of the issues repeatedly dealt with by the court in the survey period was the propriety of trial courts' attempts to define the concept of reasonable doubt in their jury instructions.

In *State v. Greenlief*,[13] the defendant objected to an instruction that attempted to define a reasonable doubt.[14] The court implicitly recognized this

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ence,' . . . it could not have conceivably have run afoul of the constitutional decision cited by the Court in its opinion." Sandstrom v. Montana, 442 U.S. 510, 527 (1979) (Rehnquist, J., concurring).

[10] "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom*, 442 U.S. at 514.

[11] *See* E. Branson, Law of Instructions to Jurys 50 (A.H. Reid 3d ed. 1962), in which it is stated that "[i]f anything is well-settled in the usage of the terms 'inference and presumption' it is that there is no settled usage." *See also* F. Cleckley, *supra* note 7, at 530-35.

[12] An example of such an instruction is as follows:

> Intent ordinarily may not be proven directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of his acts knowingly done or knowingly omitted.
>
> As I have said, it is entirely up to you to decide what facts to find from the evidence.

1 Devitt & Blackmar, Federal Jury Practice and Instructions § 14.13 (1977).

[13] 285 S.E.2d 391 (W. Va. 1981).

[14] "The court instructs the jury . . . if you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty, though you also believe it is possible he is not guilty, you

instruction as erroneous, but held that other instructions "cured the defect."[15] The court noted erroneous instructions of this type, while long discouraged, were not held to be grounds for a reversal.[16]

In *State v. McCourt*,[17] the defendant claimed that two instructions erroneously defined the concept of reasonable doubt. The court agreed and reversed the conviction. The first challenged instruction[18] told "the jury that they may convict the defendant even if they think it's possible that the defendant is not guilty."[19] This was error because the jury cannot convict unless the proof establishes every element of the offense beyond a reasonable doubt and, if they think it is possible the defendant is not guilty, they are not convinced beyond a reasonable doubt.[20] The court also condemned the second challenged instruction[21] as an impermissible attempt to allow the jury to use a personal standard in defining what is a reasonable doubt.[22] The jury may have convicted on a standard less stringent than the legally defined standard of proof beyond a reasonable doubt, and that is error.[23]

In *State v. Keffer*,[24] the court condemned as reversible error three of the jury instructions that attempted to define the standard of proof beyond a reasonable doubt.

The first of the erroneous instructions directed the jury not to find a reasonable doubt unless a good and substantial reason can be given for such doubt.[25] The court flatly stated that

> In order to entertain a reasonable doubt, it is not necessary for a juror to be able to articulate a good and substantial reason for his or her doubt. Because the state's burden is "beyond a reasonable doubt," the existence of any reasonable doubt is sufficient to bar a conviction.[26]

Apparently, a reasonable doubt may or may not be a doubt that is articulable

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should convict the defendant." *Id.* at 395.

[15] *Id.* at 395-96.

[16] *Id. See* State v. Belcher, 245 S.E.2d 161 (W. Va. 1978).

[17] 283 S.E.2d 918 (W. Va. 1981).

[18] "The court instructs the jury that to prove beyond a reasonable doubt does not mean that the state must make the proof by an eye witness or to a positive and absolute certainty. This measure of proof is not required in any case. If, from all the evidence, the jury only believes it is possible, or that it may be, or that perhaps the defendant is not guilty, this degree of uncertainty alone would not amount to such a reasonable doubt as to entitle the defendant to an acquittal. All that is required for a conviction is that the jury should believe from all the evidence beyond a reasonable doubt that the defendant is guilty." *Id.* at 919.

[19] *Id.* at 920. Compare this instruction with the instruction in *Greenlief, supra* note 5.

[20] *Mullaney*, 421 U.S. 684 (1975); State v. Starr, 216 S.E.2d 242 (W. Va. 1975).

[21] "If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the defendant is guilty with such a degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty." 283 S.E.2d at 919.

[22] *But see* F. CLECKLEY, *supra* note 7, at 478.

[23] *McCourt*, 283 S.E.2d at 920; State v. Byers, 224 S.E.2d 726 (W. Va. 1976).

[24] 281 S.E.2d 495 (W. Va. 1981).

[25] *Id.* at 497.

[26] *Id.*

by an individual juror. In any event, this is not the legal standard for ascertaining such doubt.

The second erroneous instruction in *Keffer* was similar to the instruction in *McCourt*[27] in that it told the jury that they could convict even if they believed it possible the defendant was not guilty.[28]

The court noted the difference between telling the jury that proof beyond all possibility of doubt was required and allowing them to vote to convict even if they held a belief that it was possible the defendant was not guilty.[29] The beyond a reasonable doubt standard is not equivalent to absolute certainty, but in an attempt to convey this fact to the jury, a trial court must take care not to imply a lesser standard of proof.

The third erroneous instruction in *Keffer* failed to impart clearly and distinctly to the jury the necessity, in order to bring back a guilty verdict, of being convinced beyond a reasonable doubt.[30] This type of instruction is inherently suspect. The jury cannot be left to its own discretion in imposing the standard of proof it will apply in a criminal case.[31]

The court concluded that all three challenged instructions in *Keffer* fell prey to the same defect by inviting the jury to convict on a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt.[32] The tenor and underlying rationale of the above decisions is in accord with the "ancient" and authoritative maxim that all definitions of reasonable doubt are dangerous and should not be given.[33] The United States Supreme Court has said that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[34] Yet, as the present cases indicate, trial courts continue to give such instructions.

The new direction of the West Virginia Supreme Court of Appeals as reflected in these opinions is that the court will not be as hesitant, as in the past, to overturn convictions on the basis of these erroneous instructions, "where the State's instructions attempt to define reasonable doubt and such definitions

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[27] *See supra* note 18.

[28] "The court instructs the jury that if, after considering all the evidence, you have a fixed conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and it is your duty to convict the defendant. The doubt which will justify an acquittal must be actual and substantial, not all fanciful or imaginary doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty, though you also believe it possible she is not guilty, you should convict the defendant." *McCourt*, 283 S.E.2d at 498.

[29] 281 S.E.2d at 498. Compare State v. Byers, 224 S.E.2d 726 (W. Va. 1976), where the court approved an instruction that "[t]he law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake."

[30] *See* 281 S.E.2d at 498. "If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the defendant is guilty then it is your duty to so find."

[31] State v. Williams, 40 W. Va. 268, 21 S.E. 721 (1895).

[32] 281 S.E.2d at 498.

[33] McCormick on Evidence 799 (2d ed. 1972) and authorities cited therein. *See also* State v. Young, 134 W. Va. 771, 61 S.E.2d 734 (1950).

[34] Miles v. United States, 103 U.S. 304, 312 (1880).

are in substantial variance from the customary reasonable doubt language so that the jury may well have convicted on a lesser standard of proof, such instructions will constitute reversible error."[35] In all these cases dealing with jury instructions[36] the court has pleaded with the trial courts to follow the standard instructions that were announced in *State v. Goff*.[37] In *State v. Greenlief*, the court said specifically that "[t]hose involved in criminal trials throughout the state must utilize the standard instructions which are set forth by this court."[38] If not, the instructions used must meet the test set forth in *Keffer*[39] and failure of this test will likely result in reversal of the conviction.

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[35] 281 S.E.2d at 498.

[36] *Id.* at 495; State v. Duncan, 283 S.E.2d 855 (W. Va. 1981); State v. Greenlief, 285 S.E.2d 391 (W. Va. 1981).

[37] 272 S.E.2d 457, 463 n.9 (W. Va. 1980). The standard instruction is as follows:

> The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
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> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitant to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.
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> The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.
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> The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
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> So, if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should, of course, adopt the conclusion of innocence.

[38] 285 S.E.2d at 396.

[39] 281 S.E.2d at 495. *See supra* text accompanying note 35.