

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37432

STATE OF IDAHO,)	2011 Unpublished Opinion No. 636
)	
Plaintiff-Respondent,)	Filed: September 27, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
SYLVAN SCOTT BROWN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Judgment of conviction for possession of a controlled substance and unlawful possession of a firearm, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

Sylvan Scott Brown appeals from the judgment of conviction following a jury trial at which he was found guilty of one count of possession of a controlled substance, I.C. § 37-2732(c), and one count of unlawful possession of a firearm, I.C. § 18-3316. Brown asserts that the district court erred in instructing the jury. We affirm.

On the first day of Brown’s jury trial the district court, in its pre-proof instructions, gave the then-current pattern jury instruction on reasonable doubt. It said:

 A defendant in a criminal action is presumed to be innocent. This presumption places upon the state the burden of proving the defendant guilty beyond a reasonable doubt. Thus, a defendant, although accused, begins the trial with a clean slate with no evidence against the defendant. If, after considering all the evidence and my instructions on the law, you have a reasonable doubt as to the defendant’s guilt, you must return a verdict of not guilty.

 Reasonable doubt is defined as follows: It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is

open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charges.

During the third day of trial, after the jury had heard all of the parties' evidence, the district court read to the jurors its post-proof instructions. Included in those instructions was Instruction No. 25 which read:

The law does not require demonstration of that degree of proof which, excluding all possibility of error, produces absolute certainty for such degree of proof is rarely possible. Moral certainty only is required, which is that degree of proof which produces conviction in an unprejudiced mind.

Brown did not object to any of the instructions given by the district court.¹ When the jury retired for its deliberations, along with the original packet of all pre-proof and post-proof instructions, each juror was given his or her own copy of the given instructions. The jury returned a guilty verdict on both counts against Brown. The district court entered a judgment of conviction and sentenced Brown to concurrent unified sentences of twelve years with five years determinate. Brown then filed this appeal.

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

On appeal, Brown challenges the district court giving Instruction No. 25. Specifically, Brown now asserts for the first time that Instruction No. 25 lowered the state's burden of proof below the reasonable doubt standard creating a reasonable likelihood that the jury could have believed that it could convict Brown based on insufficient proof. Brown also claims that Instruction No. 4 is inadequate to cure the purported deficiencies of the post-proof instruction.

¹ At the post-proof jury instruction conference, after the district court had added three instructions and removed one, counsel for Brown was specifically asked whether he had any objection to the instructions to which he replied, "I do not." Neither party contends that this constitutes invited error.

Because Brown failed to object to the instructions below, he asserts the error is fundamental and structural in order to obtain appellate review.

Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Idaho decisional law, however, has long allowed appellate courts to consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error. *See State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court abandoned the definitions it had previously utilized to describe what may constitute fundamental error. The *Perry* Court held that an appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

The first element of a claim of fundamental error is that the error is constitutional. As such, Brown must show that the jury instructions mislead the jury and in doing so violated his right to a fair trial. In a criminal matter the law requires that the state prove beyond a reasonable doubt every element of the charge offense. *In re Winship*, 397 U.S. 358 (1970). In reviewing a claim that a reasonable doubt jury instruction is unconstitutional, the "proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (emphasis in original). As in *Victor*, the question in Brown's case is whether Brown has shown a reasonable likelihood that the jury understood the instructions as a whole to allow a conviction based on proof insufficient to meet the reasonable doubt standard.

Reasonable doubt instructions, similar to those used here, have recently been addressed by the Ninth Circuit. In *Rhoades v. Henry*, 598 F.3d 495 (9th Cir. 2010), Rhoades challenged his instructions asserting that using the terms "moral evidence" and "moral certainty" diminished the state's burden of proving each element beyond a reasonable doubt. Upon reviewing the instructions as a whole, the Ninth Circuit concluded that "given the entire set of instructions" there was "no reasonable probability that the jury convicted Rhoades ignoring the presumption

of innocence or using a standard of proof lower than beyond a reasonable doubt.” *Rhoades*, 598 F.3d at 508. We come to the same conclusion here.

In Brown’s case, Instruction No. 4 and Instruction No. 25 contain language virtually identical to that upheld in *Rhoades*. Instruction No. 4 was the then-pattern jury instruction on reasonable doubt. In addition to these instructions, at least five more instructions addressed the jury’s duty to only find Brown guilty if the state had proven its case beyond a reasonable doubt. Specifically, the jury was instructed that it, “could only base a decision on evidence received in the trial,” “that (Brown) was presumed innocent unless and until proved guilty beyond a reasonable doubt,” “that the state had to prove every material allegation in the charge beyond a reasonable doubt,” and that it was the jury’s duty to acquit Brown if it entertained a “reasonable doubt of the truth of the allegations.” Instruction Nos. A, 3, 18 and 19 all referenced the state’s burden of proving its case beyond a reasonable doubt or the jury’s duty to find Brown not guilty.

On appeal, Brown emphasizes the timing of the given instructions asserting that the jury must have put more weight on Instruction No. 25 because it was a post-proof instruction, whereas Instruction No. 4 was a pre-proof instruction given three days earlier. Brown fails to acknowledge, however, that an entire set of jury instructions was given to each juror in a packet at the end of the trial for use in their deliberations. In those instructions the jurors were further instructed “to not single out any sentence, or any individual point or instruction, and ignore the others,” but “to consider all the instructions as a whole,” and “to regard each in light of all of the others.” The district court also told the jury, “[t]he order in which the instructions are given has no significance as to their relative importance.”

We are not convinced that the jury understood Instruction No. 25, when read with the entire set of jury instructions, as lowering the standard of proof and not requiring the state to prove its case beyond a reasonable doubt. Therefore, Brown has failed to show error, let alone error which rises to a constitutional violation, in his claim that there is a reasonable probability that he was convicted on proof insufficient to meet the reasonable doubt standard. Accordingly, Brown has not met the first prong of the fundamental error test in challenging the unobjected to instruction for the first time on appeal.

Brown’s judgment of conviction is affirmed.

Judge LANSING and Judge MELANSON **CONCUR.**