

2004

Utah v. Reyes : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff/Petitioner-
Cross Respondent,

v.

GERMAN CRUZ REYES,
Defendant/Respondent-
Cross Petitioner.

Case No. 20040078-SC

BRIEF OF PETITIONER

**ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS**

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BRIEF OF PETITIONER

JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court granted certiorari to review the Utah Court of Appeals' ruling that the reasonable doubt instruction given in this case violated this Court's "constitutionally flawed" three-part test. *State v. Reyes*, 2004 UT App 8, ¶ 22, 84 P.3d 841 (addendum A).¹

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a) (2002).

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

Is this Court's three-part test governing reasonable doubt instructions "constitutionally flawed," as the court of appeals unanimously concluded?

¹ This Court also granted defendant's cross-petition challenging the court of appeals' holding that refusing to repeat certain instructions at the close of evidence was harmless error. The State will respond to defendant's argument on that issue in its Brief of Cross-Respondent.

On a writ of certiorari, this Court will “review the court of appeals’ decision for correctness and give its conclusions of law no deference.” *Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 267 (Utah 1997).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The question presented does not require this Court to interpret any constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE

Defendant was charged by information dated 24 March 2002 with aggravated sexual assault, a first degree felony in violation of Utah Code Ann. § 76-5-405 (1999). R. 6-8. The information was later amended to include a second count of aggravated sexual assault. R. 34-36.

A jury found defendant guilty on both counts. R. 184-86. He was sentenced to two concurrent terms of 15 years to life. R. 197-98. Defendant timely appealed. R. 203-04. This Court transferred the case to the court of appeals, which reversed and remanded. R. 225; *Reyes*, 2004 UT App 8. The State petitioned for certiorari to challenge the court of appeals’ ruling that the reasonable doubt instruction given in this case violated the United States Constitution. Defendant cross-petitioned for certiorari to challenge the court of appeals’ ruling that the timing of the jury instructions, though erroneous, was harmless. This Court granted both petitions.

STATEMENT OF THE FACTS²

On Valentine's Day 2002, Ashley and three friends went to Bricks, a Salt Lake City dance club. R. 229: 20-21. About an hour and a half after arriving, Ashley stepped outside because she was expecting a phone call from her boyfriend. R. 229: 21-22. She was wearing a tank top and black leather pants and feeling "kind of tipsy" from some tequila she had consumed earlier. R. 229: 22.

Defendant drove up, waved Ashley over, and said, "Come here." R. 229: 23-25, 46-47. He was not a typical Bricks patron: his head was shaved, and he was wearing a "hoodie."³ R. 229: 25, 71, 74. Ashley walked over and said, "Can I bum a cigarette?" R. 229: 47. He said, "Yeah, come around to the passenger side." R. 229: 26. Ashley walked around to the passenger side and sat down in the car, but left the door open and let her feet "dangle out." R. 229: 26, 74. She had no intention of going anywhere. R. 229: 26.

Defendant started driving away, so Ashley put her feet in and shut the door. Defendant said he had no cigarettes, but would go to a gas station and buy her some. R. 229: 27. As they drove, the two told each other their names and ages. R. 229: 27. Ashley was 18; defendant, who is 40, said he was 26. R. 229: 28-29, 149. They did not discuss sex. R. 229: 44, 51. Ashley does not speak Spanish, but defendant, who spoke in broken English, "definitely knew enough to communicate." R. 229: 28, 47.

² Except as otherwise noted, the facts are recited in the light most favorable to the jury's verdict. *State v. Dunn*, 850 P.2d 1201, 1205-06 (Utah 1993).

³ A "hoodie" is a hooded sweatshirt.

Ashley directed defendant to a nearby 7-Eleven. R. 229: 28. When they were about halfway there, she received a call from her boyfriend. R. 229: 28, 52. When they got to the store, Ashley told defendant to get Camel Lights, and he went in to buy them. R. 229: 29. After he got back into the car, Ashley, who was starting to get nervous, asked, “Are we going back to Bricks now?” Defendant said, “Yeah.” R. 229: 29.

On the way back to Bricks, defendant stopped the car in an alley near the railroad tracks. R. 229: 32. A factory, warehouses, and a loading dock were in the area. R. 229: 32. No other cars were around. R. 229: 33. Ashley was still on the phone with her boyfriend. R. 229: 34. Defendant got out of the car. R. 229: 34. He opened her door, pulled out a knife, and held it to her stomach. R. 229: 35, 129. The blade was six to eight inches long, and an inch or an inch and a half wide. R. 229: 35. He grabbed the phone and threw it on the ground, breaking it. R. 229: 35.

Defendant motioned Ashley out of the car; she obeyed. R. 229: 36. He “started trying to take off [her] belt” and then started “motioning [her] to take [her] pants down.” R. 229: 36. Ashley started taking off her pants, but defendant “ended up . . . ripping them down.” R. 229: 36-37. He pulled her pants and underpants down around her ankles. R. 229: 37. Ashley “was like crying, kind of,” asking him “why he was doing it,” and “telling him to stop.” R. 229: 36-37. Defendant said only, “shut up.” R. 229: 38.

Defendant pulled his own pants down and touched Ashley’s vagina with his fingers. “He just kind of—he kind of tried to put them in a little bit and was feeling around.” R. 229:

39. He turned her around, bent her over the car, and penetrated her “a little bit” with his penis. R. 229: 38-40. Defendant then got back in the car and drove away. The entire episode lasted three to four minutes. R. 229: 40.

Ashley pulled up her pants. She picked up her phone, put it back together, called her boyfriend, and told him what happened. R. 229: 41, 59. Ashley was “hysterical” or “in shock,” “crying and freaking out.” R. 229: 65, 133, 59. He told her to calm down and get back to the club, because she was “like hyperventilating.” R. 229: 65. He said, “Walk back to Bricks, walk back to Bricks, find a cop.” R. 229: 42. It was a four-block walk on a cold night without a coat; Ashley “wasn’t really thinking about that, though.” R. 229: 43.

When Ashley arrived at Bricks, a security guard there noticed that she “looked like she had been in a scuffle.” R. 229: 75. She was “very visibly upset”: “[v]ery upset, very shaken, very red, bloodshot eyes, she had been crying”; she had the appearance of someone who “had been through something traumatic.” R. 229: 85. She did not want to talk and she was cold. R. 229: 76. Ashley told the guard that she had been raped. R. 229: 77.

Defendant spoke with police. When asked if he thought it was okay to have sex with Ashley, he responded, “She said no.” R. 229: 93. However, defendant claimed that because the car door was open and she did not leave, she wanted to have sex with him. R. 229: 93-94. When asked why he did this, defendant answered “that the reason that [he] went out and had sex that night was because [he] was married with children and [he] had a hard time sleeping.” R. 229: 154.

Defendant gave his version of events at trial. He testified that Ashley had mentioned sex, and so, after parking the car, he got out and said, “You like sexo?” R. 229: 141, 144-45. He testified that she first said “no,” but he asked her again and “that’s when she said okay, okay” and started pulling her pants down. R. 229: 145-46. She asked him if he preferred inside or outside the car, and he told her outside; “that’s when we had that moment.” R. 229: 146-47. Defendant denied using the knife. R. 229: 147, 157.

SUMMARY OF ARGUMENT

This Court should overrule *State v. Robertson*’s three-part test. It meets all the criteria announced in *Menzies* for overruling precedent: the test was devised without considering all relevant authority, a majority of this Court adopted it without analysis, and the test does not work well—in fact, reasonable doubt cases have largely ignored or criticized it. But the test’s most salient flaw is that it misstates the constitutional standard. The United States Supreme Court has been clear that, so long as the trial court instructs the jury that the defendant must be proven guilty beyond a reasonable doubt, trial courts need not use any particular form of words or even define reasonable doubt at all.

In any event, the instruction given here was sound. It satisfied all requirements of the United States Constitution and the flawed three-part test.

ARGUMENT

THE *ROBERTSON* THREE-PART TEST GOVERNING REASONABLE DOUBT INSTRUCTIONS IS CONSTITUTIONALLY FLAWED AND SHOULD BE OVERRULED

Defendant argued in the court of appeals that the trial court’s “instruction defining reasonable doubt was defective because it did not require the State to ‘obviate’ all reasonable doubt and it erroneously stated that reasonable doubt was not merely a ‘possibility.’” Br. Aplt. at 13. Accordingly, defendant argued, it violated his “due process and jury trial rights” and, as “structural error,” required reversal. *Id.* at 13, 16.⁴

The court of appeals held that “[t]he reasonable doubt instruction that the trial court gave to the jury clearly did not comport with the first and third prongs of the three-part test as announced in *State v. Robertson*, 932 P.2d 1219, 1232 (Utah 1997), *overruled on other grounds* by *State v. Weeks*, 2002 UT 98, ¶ 25 n.11, 61 P.3d 1000.” *Reyes*, 2004 UT App 8, ¶ 30. Although the court concluded that “*Robertson* is not consistent with United States Supreme Court precedent,” it nevertheless reversed and remanded for a new trial, noting that “this court does not have the authority to overrule *Robertson*.” *Id.*

This Court does have the authority to overrule *Robertson* and should do so.

A. The three-part test should be overruled.

The three-part test first appeared in a majority opinion in *State v. Robertson*:

⁴ “Defendant never argued, either at trial or on appeal, that his rights under the Utah Constitution had been violated.” *State v. Reyes*, 2004 UT App 8, ¶ 14, n.2.

First, “the instruction should specifically state that the State’s proof must obviate all reasonable doubt.” *Ireland*, 773 P.2d at 1381 (Stewart, J., dissenting). Second, the instruction should not state that a reasonable doubt is one which “would govern or control a person in the more weighty affairs of life,” as such an instruction tends to trivialize the decision of whether to convict. *Id.* (Stewart, J., dissenting). Third, “it is inappropriate to instruct that a reasonable doubt is not merely a possibility,” although it is permissible to instruct that a “fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt.” *Id.* at 1382 (Stewart, J., dissenting).

Robertson, 932 P.2d at 1232. This portion of *Robertson* should be overruled.

Stare decisis imposes on those seeking to overturn prior precedent “a substantial burden of persuasion.” *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) (citing *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986)), *cert. denied* 513 U.S. 1115 (1995). An American court of last resort “will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.” *Id.* at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill.L.Rev. 367, 367 (1957)). In overruling *Crawford v. Manning*, 542 P.2d 1091 (Utah 1975), the *Menzies* Court noted three flaws in Justice Ellett’s opinion: (1) he “not only failed to explain why he was abandoning the long-established *Hopt* rule, but failed to cite that line of cases altogether”; (2) he adopted a new rule “with little analysis and without reference to authority”; and (3) his rule “does not work very well.” *Menzies*, 889 P.2d at 399-400

(citations omitted). *Robertson*'s three-prong test suffers from each of these shortcomings. In addition, it misstates the constitutional standard.

1. The three-part test was devised without considering relevant authority.

The three-part test announced in *State v. Robertson*, 932 P.2d 1219 (Utah 1997), *overruled in part on other grounds*, *State v. Weeks*, 2002 UT 98, ¶ 25, n.11, 61 P.3d 1000, originated in a 1989 dissent in *State v. Ireland*, 773 P.2d 1375 (Utah 1989). By 1989, the Supreme Court of Utah and the Supreme Court of the United States had produced a line of cases analyzing reasonable doubt instructions. These cases discussed such issues as “weighty affairs” language and “possible or imaginary” doubts. The *Ireland* dissent not only failed to explain its departure from these cases, it “failed to cite that line of cases altogether.” *Menzies*, 889 P.2d at 399.

Hopt v. People, 120 U.S. 430 (1887), is a United States Supreme Court case originating in the Territory of Utah. Hopt attacked a reasonable doubt instruction that instructed the jury that if “you can truthfully say that you have an abiding conviction of the defendant’s guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.” *Id.* at 439. The Supreme Court approved the language, calling it “as just a guide to practical men as can well be given; and if it were open to criticism, it could not have misled the jury” when read in the context of the entire instruction. *Id.* at 441.

State v. Neel, 23 Utah 541, 65 P. 494 (1901), involved an attack on “weighty affairs” language in a reasonable doubt instruction materially identical to that approved in *Hopt*. 65 P. at 495. This Court held that it was very probable that the “weighty affairs” language “would, if standing alone, have been of questionable sufficiency, yet, whether correct or not, it could do no harm with the aid of, and in connection with, other parts of that and other instructions given on that subject.” *Id.* The Court cautioned against delving into subtleties requiring “a trained classical mind”:

Jurors are presumed to have common sense, and to understand the English language, and if they cannot understand their duty when instructed that they should not convict when they have a reasonable doubt of the prisoner’s guilt, or of any fact necessary to prove it, they will seldom get any assistance from such subtleties as require a trained classical mind to distinguish.

Id.

In *Holland v. United States*, 348 U.S. 121 (1954), the Supreme Court expressed discomfort with an instruction comparing reasonable doubt to “the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.” *Id.* at 138. Nevertheless, the Court concluded that “the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some.” *Id.*

In *State v. Sullivan*, 6 Utah 2d 110, 307 P.2d 212 (1957), this Court rejected a sufficiency challenge to a burglary conviction. In describing proof beyond a reasonable doubt, this Court stated, “Where circumstances otherwise strongly suggest guilt, the doubt

should be real and substantial and not one that is merely possible or imaginary.” 6 Utah 2d at 114, 307 P.2d at 215. It continued, “All that is required is that the jurors have an abiding conviction of the defendant’s guilt such as they would be willing to act upon in the more weighty and important matters relating to their own affairs.” *Id.*

In *State v. McClain*, 706 P.2d 603 (Utah 1985), this Court reviewed a conviction for issuing bad checks. In the course of rejecting McClain’s claim that she was entitled to a “reasonable alternative hypothesis” instruction, the court found no reason to suppose that the jury “gave undue weight to the evidence by being instructed that reasonable doubt ‘is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life . . . Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.’” *Id.* at 606.

In *State v. Tillman*, 750 P.2d 546 (Utah 1987), this Court affirmed Tillman’s conviction and death sentence. It reviewed a challenge to a jury instruction containing “weighty and important matters” and “possible doubt” language:

But if after such impartial consideration and comparison of all the evidence you can truthfully say that you have an abiding conviction of the defendant’s guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. A reasonable doubt must be real, substantial doubt and not one that is merely possible or imaginary.

Id. at 573. A unanimous court approved the instruction. *Id.* It acknowledged the difficulty of defining reasonable doubt, but held that “defendant has not come close to a showing of

a denial of due process because of the language used at his trial.” *Id.* at 573, 577, 582, 583, 591.

This was the state of the law in 1989, when *State v. Ireland* reached this Court. Ireland challenged a reasonable doubt instruction containing “weighty affairs” and “mere possibility” language:

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the mind of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

Ireland, 773 P.2d at 1379-80. Because this instruction was “almost identical” to the instruction approved in *Tillman*, a majority of the court rejected Ireland’s challenge. *Id.* at 1380.

Justice Stewart dissented on the ground that “the instruction defining proof beyond a reasonable doubt was erroneous.” *Id.* at 1380. His dissenting opinion leveled three criticisms at the instruction. First, the instruction equated proof beyond a reasonable doubt with “an abiding conviction of the truth of the charge.” *Id.* at 1381. Without citation to authority, the dissent declared, “That is not the law.” *Id.* Rather, “the instruction should specifically state that the State’s proof must obviate all reasonable doubt.” *Id.* Second, the dissent asserted that “it is not proper to instruct a jury that a reasonable doubt is one which ‘would govern or control a person in the more weighty affairs of life.’” *Id.* Finally, the

dissent asserted “that it is inappropriate to instruct that a reasonable doubt is not merely a possibility.” *Id.* at 1382.

The *Ireland* dissent ignored at least five controlling cases—*Hopt*, *Neel*, *Sullivan*, *McClain*, and *Tillman*—that had approved reasonable doubt instructions containing the very elements the dissent described as “clearly erroneous.” *Id.* The dissent did cite *Holland v. United States*. See *id.* at 1381, n.1. However, it did so as if *Holland* supported the dissent. In fact, *Holland* held that a reasonable doubt instruction “correctly conveyed the concept of reasonable doubt” despite equating reasonable doubt with the kind of doubt jurors might be willing to act upon in their more serious and important affairs. *Holland*, 348 U.S. at 138. The dissent made no attempt to reconcile this holding with its assertion that such an instruction is “not proper.” 773 P.2d at 1381 (Stewart, J., dissenting).

Despite the dissent’s failure to analyze or even acknowledge controlling case law, the majority wrote approvingly of its conclusions, and even invoked the Court’s “supervisory capacity” to direct trial courts to comply with two of the three requirements:

We do acknowledge, however, that the dissent’s criticisms of the “more weighty affairs of life” language is justified and share Justice Stewart’s concern that the “possible or imaginary” language might, by implication, be understood to diminish the prosecution’s standard of proof. Therefore, in our supervisory capacity, we direct the trial courts to discontinue use of that language in their instructions on the definition of reasonable doubt.

Ireland, 773 P.2d at 1380. Other than relying on *Tillman*, the majority made no reference to the case law cited above.

2. A majority of this Court adopted the *Ireland* dissent without analysis and without reference to authority.

The following week, Justice Stewart picked up two votes. In *State v. Johnson*, 774 P.2d 1141 (Utah 1989), the reasonable doubt instruction contained the “weighty affairs” language condemned in the *Ireland* dissent. *Id.* at 1146. However, Johnson did not challenge that instruction; he argued rather that the trial court should have supplemented its reasonable doubt instruction with his proposed instruction. The lead opinion, which represented only two justices, rejected Johnson’s claim that the trial court erred in not giving his “redundant or repetitive” proposed supplemental instruction. *Id.* These justices saw no need for it where the jury was instructed “that they must acquit unless each and every element is established by the evidence and beyond a reasonable doubt . . .” *Id.*

Justice Stewart concurred in the result. *Id.* at 1147. His opinion criticized the reasonable doubt instruction actually given in the case as incorrect, yet concluded that its flaws “do not rise to the level of reversible error.” *Id.* at 1148. The opinion spoke favorably of Johnson’s proposed instruction, although it hardly embodied the principles espoused in his *Ireland* dissent.

Justice Stewart’s concurring opinion quoted the portion of Johnson’s proposed supplemental instruction stating that reasonable doubt “is not mere possible doubt . . . It is the state of the case which after the entire comparison and consideration of all of the evidence leaves the mind[s] of the Jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.” *Id.* (omission in original).

Ironically, this excerpt from Johnson’s proposed instruction contains the very “abiding conviction” language that Justice Stewart had in *Ireland* declared was “not the law.” *Ireland*, 773 P.2d at 1381 (Stewart, J., dissenting). Johnson’s instruction also states that reasonable doubt “is not mere possible doubt,” yet the *Ireland* dissent declared it “inappropriate to instruct that a reasonable doubt is not merely a possibility.” *Id.* at 1382. Finally, Johnson’s proposed instruction does not state that “the State’s proof must obviate all reasonable doubt,” as required by the *Ireland* dissent. *See id.* In short, Johnson’s proposed instruction violated every stricture of the *Ireland* dissent except one (it contained no “weighty affairs” language). Yet Justice Stewart’s concurrence concluded that, while Johnson’s proposed instruction “also leaves something to be desired, it comes closer to conveying the essential meaning of the legal concept of proof beyond a reasonable doubt.” *Johnson*, 774 P.2d at 1148 (Stewart, J., concurring).

Two justices joined this concurrence, effectively making it the majority opinion on this point. *See id.* at 1149. No justice noted the contradiction between the *Johnson* concurrence and the *Ireland* dissent, and no justice analyzed or even acknowledged the long line of controlling authority cited above.

Four years later, the *Ireland* dissent, through *Johnson*, was cited in a majority opinion of this Court. *See State v. Young*, 853 P.2d 327 (Utah 1993). *Young* attacked a reasonable doubt instruction that stated, “[Y]ou must have greater assurance of the correctness of such a decision than you would normally have in reaching the weighty decisions affecting your own life.” *Id.* at 346. Citing Justice Stewart’s *Johnson* concurrence, the Court rejected

Young's challenge on the ground that the instruction "impressed upon the jurors that the reasonable doubt standard requires *greater* proof than such decisions." *Id.* The Court added, "No talismanic phraseology is required to articulate the reasonable doubt standard. An instruction must merely impress upon the jurors the heavy burden the prosecution must meet to prove guilt beyond a reasonable doubt." *Id.* No justice dissented from this portion of the opinion.

However, in *State v. Robertson*, 932 P.2d 1219, 1232 (Utah 1997), the *Ireland* dissent hardened into a test. Writing for the Court, Chief Justice Zimmerman observed that in *Johnson* a majority of the court had "essentially adopted" the *Ireland* dissent, which he proceeded to distill into a "three-part test":

First, "the instruction should specifically state that the State's proof must obviate all reasonable doubt." *Ireland*, 773 P.2d at 1381 (Stewart, J., dissenting). Second, the instruction should not state that a reasonable doubt is one which "would govern or control a person in the more weighty affairs of life," as such an instruction tends to trivialize the decision of whether to convict. *Id.* (Stewart, J., dissenting). Third, "it is inappropriate to instruct that a reasonable doubt is not merely a possibility," although it is permissible to instruct that a "fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt." *Id.* at 1382 (Stewart, J., dissenting).

Robertson, 932 P.2d at 1232. The instruction at issue in *Robertson* "met all three tests." *Id.*

In the case at bar, defendant argued in the court of appeals that this three-part test is constitutional in nature and thus "defines the test for determining the constitutionality of reasonable doubt instructions in Utah . . ." Reply at 2-3, 7. The court of appeals agreed.

See *Reyes*, 2004 UT App 8, ¶¶ 14, 14 n.2, 16-22. Thus did a dissent with “weak analytical underpinnings” metamorphose, “with little analysis and without reference to authority,” into a three-part constitutional test. *Menzies*, 889 P.2d at 399-400.

3. The three-part test does not work well.

In addition to its “weak analytical underpinnings,” *Robertson*’s three-part test “does not work very well,” as demonstrated by its subsequent history. *Id.* Since *Robertson*, Utah courts have decided three cases challenging reasonable doubt instructions: one affirmed without analysis on the ground that the instruction at issue was identical to the *Robertson* instruction, one ignored *Robertson* altogether, and one—the court of appeals here—applied but criticized the three-part test.

The first is *State v. Jaeger*, 1999 UT 1, 973 P.2d 404 (Utah 1999). It involved a challenge to the same instruction the Court had just upheld in *Robertson*. The instruction was accordingly upheld without discussion. *Id.* at ¶ 40.

The second is *Carter v. Galetka*, 2001 UT 96, 44 P.3d 626. Carter argued that his appellate counsel had been ineffective for failing to challenge a reasonable doubt instruction stating that “[a] reasonable doubt must be a real, substantial doubt and not one that is merely possible or imaginary.” *Id.* at ¶ 51. Ignoring *Robertson* altogether, this Court found “no constitutional deficiency in the instruction.” *Id.*

The third is *State v. Reyes*, the case at bar. The court of appeals reluctantly applied *Robertson*'s three-part test as a matter of *stare decisis* despite concluding that it "is not consistent with United States Supreme Court precedent." *Reyes*, 2004 UT App 8, ¶ 30.

4. The three-part test misstates the constitutional standard.

The court of appeals was correct. While the three-part test suffers from "weak analytical underpinnings" and "does not work very well," *Menzies*, 889 P.2d at 399-400, its most salient flaw is that it misstates the constitutional standard.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The burden of proof rests upon the government. *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952). The requirement of proof beyond a reasonable doubt in criminal cases is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

However, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887)). "Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising

the jury of the government's burden of proof." *Id.* (citations omitted). "The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* at 6.

All three prongs of the three-part test misapply these principles. The first prong declares that "the instruction should specifically state that the State's proof must obviate all reasonable doubt." *Robertson*, 932 P.2d at 1232 (citation omitted). This directly contradicts *Victor*, which states that "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor*, 511 U.S. at 5.⁵

Though not at issue here, the second prong of the test also misstates the constitutional standard. The second prong forbids stating "that a reasonable doubt is one which 'would

⁵ Even if some form of words were required, it is far from clear that *obviate* is the best choice. *Obviate* means "To prevent by anticipating" or "make unnecessary." THE AMERICAN HERITAGE DICTIONARY at 861 (2d college ed. 1991). Pennsylvania is the only other American jurisdiction to use the term as *Ireland* does. See *Commonwealth v. Crawford*, 718 A.2d 768, 773 (Pa. 1998); *Commonwealth v. D.J.A.*, 800 A.2d 965, 974 (Pa. Super. 2002). Cf. *Gray v. Netherland*, 518 U.S. 152, 163 (1996) (stating that "it violated due process for a jury instruction to obviate the requirement that the prosecutor prove all the elements of the crime beyond a reasonable doubt"). One Utah district judge recently recounted his experience with the word:

Judges are timid about changing "approved" instructions. The bravest I have been with this particular [reasonable doubt] instruction is to change the word "obviate" to "eliminate," because when I first saw it, I didn't know what "obviate" meant, and no jurors I asked in two straight felony trials knew what it meant.

Judge Robert T. Braithwaite, *Real World Descriptions of Legal Terms*, Utah Bar Journal, Vol. 16, No. 2 (March 2003) p.32.

govern or control a person in the more weighty affairs of life,’ as such an instruction tends to trivialize the decision of whether to convict.” *Robertson*, 932 P.2d at 1232 (citation omitted). Although such formulations are “strongly disfavored,” *Tillman v. Cook*, 215 F.3d 1116, 1126 (10th Cir. 2000), the United States Supreme Court has “repeatedly approved” them. *Victor*, 511 U.S. at 20; *see also id.* at 18 (“‘Reasonable doubt’ is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate . . .”); *Holland*, 348 U.S. at 140 (“the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon”); *see also Tillman v. Cook*, 215 F.3d at 1123 (“if . . . you have an abiding conviction of the defendant’s guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt”); *State v. Tillman*, 750 P.2d at 573 (same).

Robertson’s third prong also misstates the constitutional requirement. It holds that “it is inappropriate to instruct that a reasonable doubt is not merely a possibility.” *Robertson*, 932 P.2d at 1232 (citation omitted). Again, this directly contradicts *Victor*. In *Victor*, one of the defendants objected “to the portion of the charge in which the judge instructed the jury that a reasonable doubt is ‘not a mere possible doubt.’” *Victor*, 511 U.S. at 17. The United States Supreme Court rejected the challenge. *Id.* at 17. Similarly, the Utah Supreme Court, without citing *Robertson*, found no constitutional deficiency in an instruction that distinguished a reasonable doubt from “one that is merely possible or imaginary.” *Carter v. Galetka*, 2001 UT 96, ¶ 51, 44 P.3d 626 (citing *Victor*, 511 U.S. at 19-20).

To the extent *Robertson* purports to graft technical requirements onto the established constitutional test for reasonable doubt instructions, it should be overruled as unnecessary and incorrect. *See Menzies*, 889 P.2d at 398-400.

B. The reasonable doubt instruction given here satisfies both the Constitution and the three-part test.

The reasonable doubt instruction given here was proper. The trial court addressed the presumption of innocence and reasonable doubt in Instruction no. 15:

All presumptions of law, independent of evidence, are in favor of innocence. A defendant is presumed innocent until proven guilty beyond a reasonable doubt. Where you are satisfied that a reasonable doubt exists as to a defendant's guilt, he/she is entitled to acquittal.

The burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is a degree of proof that satisfies your mind and convinces your conscientious understanding. Reasonable doubt is doubt entertained by reasonable men and women and arises from the evidence, or lack of evidence, in the case.

R. 165 (addendum B). This instruction exceeds constitutional requirements and satisfies the three-part test.

1. The reasonable doubt instruction satisfies constitutional requirements.

The absence of any reference to "obviating" all reasonable doubt does not render the instruction constitutionally infirm. As noted above, "so long as the court instructs the jury

on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor*, 511 U.S. at 5.

There is no "reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond a reasonable doubt] standard." *Id.* at 6. The jury was instructed that "[a] defendant is presumed innocent until proven guilty beyond a reasonable doubt. Where you are satisfied that a reasonable doubt exists as to a defendant's guilt, he/she is entitled to acquittal. The burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt." R. 165. Moreover, Instruction no. 14 instructed the jury that "[t]he presumption of innocence must prevail unless and until you are satisfied beyond a reasonable doubt of the guilt of the defendant. The defendant is entitled to acquittal where there is reasonable doubt as to his/her guilt." R. 164.

The "mere possibility" language in Instruction no. 15 does not offend the Due Process Clause. In *Carter v. Galetka*, this Court found "no constitutional deficiency" in the following language from a reasonable doubt instruction: "[a] reasonable doubt must be a real, substantial doubt and not one that is merely possible or imaginary." 2001 UT 96, ¶ 51 (citing *Victor*, 511 U.S. at 5). In *Victor v. Nebraska*, the United States Supreme Court approved a reasonable doubt instruction containing similar language:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.

511 U.S. at 7 (emphasis omitted). This instruction was challenged on the ground that it instructed the jury that a reasonable doubt is “not a mere possible doubt.” 511 U.S. at 17. The Court noted that “[a] fanciful doubt is not a reasonable doubt.” *Id.* “That this is the sense in which the instruction uses ‘possible’ is made clear from the final phrase of the sentence, which notes that everything is open to some possible or imaginary doubt.” *Id.*

The portion of Instruction no. 15 challenged here is indistinguishable from those approved by the Utah Supreme Court and the United States Supreme Court:

Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt . . . Reasonable doubt is doubt entertained by reasonable men and women and arises from the evidence, or lack of evidence, in the case.

R. 165 (addendum B) (challenged portion emphasized). Like the *Carter* and *Victor* instructions, this instruction contrasts reasonable doubt arising from the evidence with “merely possible doubt,” meaning, in context, “imaginary” doubt, or, in *Ireland*’s parlance, “fanciful or wholly speculative” doubt. 773 P.2d at 1382 (Stewart, J., dissenting).

It thus created no “reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [reasonable doubt] standard.” *Victor*, 511 U.S. at 6. Nothing more is required.

2. The reasonable doubt instruction satisfies *Robertson*’s three-part test.

In the event this Court determines that the *Robertson* three-part test is an appropriate expression of the constitutional standard or is otherwise binding upon trial courts in this state,

it should still reverse the court of appeals. Without analysis, the court of appeals declared that “the trial court's reasonable doubt jury instruction failed to comport with the requirements of the three-part test set forth in *Robertson* and constituted a structural error requiring reversal.” *Reyes*, 2004 UT App 8, ¶ 22. In fact, the instruction satisfied the three-part test and, to any extent it did not, any error was harmless.

First, the trial court instructed the jury that the prosecution was required to eliminate all reasonable doubt. Defendant claimed that the trial court’s reasonable doubt instruction “never required the State to obviate all reasonable doubt.” Br. Appt. at 14. However, the trial court instructed the jury that “[a] defendant is presumed innocent until proven guilty beyond a reasonable doubt. *Where you are satisfied that a reasonable doubt exists as to a defendant’s guilt, he/she is entitled to acquittal.* The burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt.” R. 165 (emphasis added). Moreover, Jury Instruction no. 14, “Presumption of Innocence,” instructed the jury that “[t]he presumption of innocence must prevail unless and until you are satisfied beyond a reasonable doubt of the guilt of the defendant. The defendant is entitled to acquittal where there is reasonable doubt as to his/her guilt.” R. 164.

These instructions informed the jury of the prosecution’s burden of proving defendant’s guilt, and that, if a reasonable doubt remained, they must acquit. Nothing more is required. That the reasonable doubt instruction did not include the word *obviate* is of no moment. “No talismanic phraseology is required to articulate the reasonable doubt standard.” *Young*, 853 P.2d at 346.

Second, the court's reasonable doubt instruction properly distinguished between a "reasonable doubt" and an "imaginary doubt." It drew a clear line between "doubt entertained by reasonable men and women and aris[ing] from the evidence, or lack of evidence, in the case" and "possible or imaginary doubt" or doubt that is "merely possible":

Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt . . . Reasonable doubt is doubt entertained by reasonable men and women and arises from the evidence, or lack of evidence, in the case.

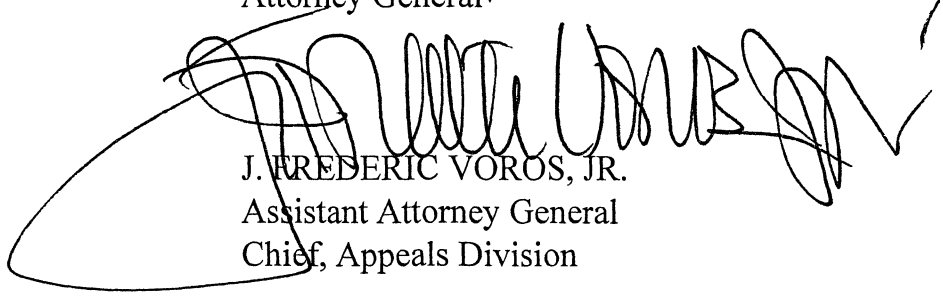
R. 165 (addendum B). Defendant asserted that Instruction no. 15 "erroneously communicated to the jury that a possibility may never constitute a reasonable doubt." Br. Aplt. at 15-16. On the contrary, even a juror with a "trained classical mind" could not have teased out of this instruction the rule that a possible doubt cannot be a reasonable doubt.

CONCLUSION

This Court should reverse the court of appeals' order reversing defendant's conviction. It should also do expressly what it did implicitly in *Carter*: repudiate the *Robertson* three-part test as incorrect and unnecessary.

RESPECTFULLY submitted on 22 August 2004.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Appellee were this 20
August 2004 hand-delivered to an agent for the following:

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A handwritten signature in cursive script, reading "Lee Nakamura", is written over a horizontal line.

Addenda

Addendum A

C

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
 v.
 German Cruz REYES, Defendant and Appellant.

No. 20030051-CA.

Jan. 15, 2004.

Background: Defendant was convicted in the Third District Court, Salt Lake Department, William Barrett, J., of aggravated sexual assault, and he appealed.

Holdings: The Court of Appeals, Greenwood, J., held that:

(1) trial court's "reasonable doubt" instruction which failed to require the State to obviate all reasonable doubt and incorrectly stated that reasonable doubt was not doubt which was merely possible constituted a structural error requiring reversal;

(2) trial court erred when, at the end of the trial, it failed to reinstruct the jury on the law as it related to defendant's fundamental rights, given rule mandating that trial court instruct the jury at the close of evidence; and

(3) court's error was harmless.

Reversed and remanded.

West Headnotes

[1] Criminal Law ⚡1134(3)
 110k1134(3) Most Cited Cases

[1] Criminal Law ⚡1158(1)
 110k1158(1) Most Cited Cases

Whether jury instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's

ruling.

[2] Criminal Law ⚡1134(3)
 110k1134(3) Most Cited Cases

Determining the propriety of the instructions submitted to the jury presents a question of law, which appellate court reviews for correctness.

[3] Criminal Law ⚡789(4)
 110k789(4) Most Cited Cases

[3] Criminal Law ⚡1172.2
 110k1172.2 Most Cited Cases

Trial court's "reasonable doubt" instruction which failed to require the State to obviate all reasonable doubt and incorrectly stated that reasonable doubt was not doubt which was merely possible failed to comport with the requirements of the test set forth in *Robertson* and, thus, constituted a structural error requiring reversal; under *Robertson*, reasonable doubt instruction should specifically state that State's proof must obviate all reasonable doubt, and it is inappropriate to instruct that a reasonable doubt is not merely a possibility.

[4] Constitutional Law ⚡266(7)
 92k266(7) Most Cited Cases

Due process clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged, and this beyond-a-reasonable-doubt requirement applies in state as well as federal proceedings. U.S.C.A. Const.Amend. 5, 14.

[5] Constitutional Law ⚡266(7)
 92k266(7) Most Cited Cases

[5] Criminal Law ⚡561(1)
 110k561(1) Most Cited Cases

The Fifth Amendment due process requirement of proof beyond a reasonable doubt and the Sixth

Amendment requirement of a jury verdict are interrelated so that the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. U.S.C.A. Const.Amends. 5, 6.

[6] Criminal Law ⚖️1175
110k1175 Most Cited Cases

Denial of the right to a jury verdict of guilt beyond a reasonable doubt qualifies as "structural error," thereby requiring reversal.

[7] Constitutional Law ⚖️268(11)
92k268(11) Most Cited Cases

Although the beyond a reasonable doubt standard is a requirement of due process, the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. U.S.C.A. Const.Amends. 5, 14.

[8] Criminal Law ⚖️789(2)
110k789(2) Most Cited Cases

So long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.

[9] Courts ⚖️85(2)
106k85(2) Most Cited Cases

Appellate court interprets a court rule by examining the rule's plain language and resorts to other methods only if the language is ambiguous.

[10] Criminal Law ⚖️801
110k801 Most Cited Cases

Rule permitting trial court to provide jurors, as part of their orientation, with preliminary instructions on matters that the court believes will assist the jurors in comprehending the case does not supersede the plain and unambiguous mandate contained in another rule that the jury be instructed at the close of evidence. Rules Crim.Proc., Rules 17(g)(6), 19(a).

[11] Criminal Law ⚖️801

110k801 Most Cited Cases

[11] Criminal Law ⚖️806(1)
110k806(1) Most Cited Cases

While it is permissible, and appropriate, for a trial court to provide the jury with preliminary instructions on matters of law vital to the rights of a defendant, such as the presumption of innocence and the State's burden of proof, in order to fully comply with rule mandating that trial court instruct the jury at the close of evidence, the court must repeat these instructions at the close of evidence. Rules Crim.Proc., Rules 17(g)(6), 19(a).

[12] Criminal Law ⚖️801
110k801 Most Cited Cases

[12] Criminal Law ⚖️806(1)
110k806(1) Most Cited Cases

Trial court erred when, at the end of the trial, it failed to reinstruct the jury on the law as it related to defendant's fundamental rights, given rule mandating that trial court instruct the jury at the close of evidence. Rules Crim.Proc., Rule 17(g)(6).

[13] Criminal Law ⚖️1162
110k1162 Most Cited Cases

In order for an error to be harmful, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict. Rules Crim.Proc., Rule 30(a).

[14] Criminal Law ⚖️1172.1(5)
110k1172.1(5) Most Cited Cases

Trial court's error in failing to repeat its preliminary jury instructions at the close of evidence was harmless because this did not affect the jury's verdict; time period separating the trial court's reading of the preliminary instructions from the close of evidence was less than twenty-four hours, and when the jurors retired to deliberate, they were provided with a written copy of every preliminary and final jury instruction. Rules Crim.Proc., Rule 17(g)(6).

*843 Kent R. Hart, Lisa J. Remal, Salt Lake City, for Appellant.

Mark L. Shurtleff, atty. gen., and J. Frederic Voros Jr., asst. atty. gen., Salt Lake City, for Appellee.

Before BENCH, Associate P.J., DAVIS and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

¶ 1 Defendant, German Cruz Reyes, appeals his conviction of two counts of aggravated sexual assault, first degree felonies, in violation of Utah Code Annotated section 76-5-405 (Supp.2002). Specifically, Defendant argues that this court should reverse and remand for a new trial because (1) the trial court violated Defendant's due process and jury trial rights when it misstated the law in the jury instruction defining reasonable doubt, and (2) the trial court violated Utah law and Defendant's due process right to a fair trial when it failed to instruct the jury on the law at the close of evidence. We reverse and remand.

BACKGROUND

¶ 2 On the evening of February 14, 2002, the victim, an eighteen-year-old female, went to Bricks nightclub in Salt Lake City, Utah, to go dancing. At approximately midnight, she went outside the club to wait for her boyfriend to call her on her cellular phone. Because the victim had consumed a few shots of tequila, she was feeling "kind of tipsy" at the time.

¶ 3 While the victim was waiting for her boyfriend's call, Defendant drove up to the front of the nightclub and motioned for the victim to approach his car. The victim walked over to Defendant and asked him for a cigarette. Defendant instructed the victim to walk around to the passenger side of his car. The victim got into Defendant's car but left the passenger door open with her feet hanging outside the car. Defendant then started to drive away and the victim put her feet inside the car and closed the door.

¶ 4 Defendant told the victim that he was taking her to a gas station to buy cigarettes. On the way to

buy the cigarettes, Defendant and the victim spoke very little because Defendant did not speak English very well. Their conversation was limited to exchanging their names and ages. According to the victim, Defendant told her he was twenty-six. In fact, Defendant was approximately forty-years-old at the time.

¶ 5 When they were about halfway to a nearby 7-Eleven convenience store, the victim's boyfriend called her on her cellular phone. When Defendant and the victim arrived at the 7-Eleven, Defendant bought cigarettes while the victim continued to speak on the phone with her boyfriend. However, *844 the victim never informed her boyfriend that she was in Defendant's car.

¶ 6 When Defendant got back in the car, the victim, who was starting to feel nervous, asked Defendant if they were going back to the nightclub. Defendant told her that they were. On the way back, Defendant stopped the car in an alley located in an industrial area several blocks from Bricks nightclub. While the victim was still on the phone to her boyfriend, Defendant got out of the car and opened the rear passenger door and started to look for something on the floor behind the victim's seat. Defendant then opened the front passenger door and started to search the area around the victim's feet. The victim shut the passenger door and Defendant continued his search in the back seat. According to the victim, Defendant then opened her door again, held a knife to her stomach, and threw her phone to the ground, causing it to break into pieces. Next, Defendant made the victim get out of the car and forced her to pull her pants down. The victim started to cry and asked Defendant to stop. Moments later, Defendant pulled his own pants down and proceeded to penetrate the victim's vagina with his fingers. Defendant then turned the victim around and slightly penetrated the victim's vagina with his penis. The entire incident lasted about three or four minutes. Defendant then got back in his car and drove away.

¶ 7 After Defendant left, the victim dressed, put her phone back together, and called her boyfriend and informed him that she had just been raped. She then walked back to the nightclub and told a friend what had happened. The friend located a security guard who observed that the victim appeared to

have been recently involved 'in a scuffle " According to the security guard, the victim's clothes appeared "tattered," her hair was "messed up," and she was crying and very emotional When the security guard asked the victim if she had been raped, she answered "yes "

¶ 8 During Defendant's trial, he admitted he had engaged in sexual relations with the victim, but claimed she had consented According to Defendant, he asked the victim if she liked "sexo," and while she initially answered "no," the second time he asked the question, she said "yes " Defendant further claimed the victim exited his car of her own accord and he and the victim then "tried to have sex " Defendant denied using a knife to force Defendant to have sex with him

¶ 9 On March 21, 2002, the State filed an information charging Defendant with one count of aggravated assault During Defendant's preliminary hearing, the victim testified that Defendant had penetrated her vagina using his fingers, an allegation that the State had not known previously Based on this new allegation, the trial court allowed the State to add a second count of aggravated sexual assault to the information

¶ 10 Defendant's trial began on October 31, 2002 Prior to opening statements, the trial court proposed reading the jury eighteen preliminary instructions These instructions included instructions on the presumption of innocence and on the definition of proof beyond a reasonable doubt Defense counsel objected to the trial court giving the jury these preliminary instructions without also rereading the instructions at the end of the trial The basis for the objection was that instructing the jury in this manner violated Utah law and Defendant's due process rights

¶ 11 Defense counsel also objected to the wording of the trial court's proposed jury instruction defining reasonable doubt That instruction read as follows

All presumptions of law, independent of evidence, are in favor of innocence A defendant is presumed innocent until proven guilty beyond a reasonable doubt Where you are satisfied that a reasonable doubt exists as to a defendant's guilt, he/she is entitled to acquittal

The burden is upon the prosecution to prove the

defendant guilty beyond a reasonable doubt Proof beyond a reasonable doubt does not require proof to an absolute certainty Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt Proof beyond a reasonable doubt is a degree of proof that satisfies your mind and convinces your conscientious understanding *845 Reasonable doubt is doubt entertained by reasonable men and women and arises from the evidence, or lack of evidence, in the case

Defense counsel claimed that this instruction was improper because it did not meet the requirements of the three-part test announced by the Utah Supreme Court in *State v Robertson*, 932 P 2d 1219 (Utah 1997), *overruled on other grounds* by *State v Weeks*, 2002 UT 98, ¶ 25 n 11, 61 P 3d 1000 Specifically, defense counsel argued that under *Robertson*, the instruction was required to contain the phrase "proof beyond reasonable doubt obviates all reasonable doubt" and could not contain the phrase "reasonable doubt cannot merely be a possibility "

¶ 12 The trial court overruled both of defense counsel's objections and proceeded to read the jury eighteen preliminary instructions Each juror was given a written copy of these preliminary instructions The following day, immediately prior to closing arguments, the trial court read the jury the remaining fourteen instructions [FN1] Again, each juror was provided with a written copy of these additional instructions

FN1 These fourteen instructions did not include an instruction on Defendant's presumption of innocence or on the definition of reasonable doubt

¶ 13 After deliberating for approximately four hours, the jury found Defendant guilty on both counts The trial court sentenced Defendant to two concurrent terms of fifteen years to life Defendant timely filed his notice of appeal

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 14 Defendant argues that the trial court

violated his "due process and jury trial rights" under the United States Constitution [FN2] because the trial court's jury instruction defining reasonable doubt did not require the State to " 'obviate' all reasonable doubt" and erroneously stated that "reasonable doubt is not doubt which is merely possible " "Whether [a jury] instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's ruling " *State v Archuleta*, 850 P 2d 1232, 1244 (Utah 1993) (footnote omitted)

FN2 Although at the beginning of his brief Defendant cites to Article I, Section 7 of the Utah Constitution (guaranteeing that "[n]o person shall be deprived of life, liberty or property, without due process of law") and Article I, Section 12 of the Utah Constitution (guaranteeing criminal defendants "the right to a speedy and public trial, by an impartial jury"), Defendant never argued, either at trial or on appeal, that his rights under the Utah Constitution had been violated Therefore, we only address Defendant's constitutional claims that arise under the United States Constitution *See State v Seale*, 853 P 2d 862, 873 n 6 (Utah 1993) (noting that when party fails to make separate argument under state constitutional provision, his or her claim will only be addressed under federal constitution)

[2] ¶ 15 Defendant further argues that when the trial court failed to reread the preliminary jury instructions at the close of evidence, it violated Utah law and his due process right to a fair trial Determining the propriety of the instructions submitted to the jury presents a question of law, which we review for correctness *See Ames v Maas*, 846 P 2d 468, 471 (Utah Ct App 1993)

ANALYSIS

I Jury Instruction Defining Reasonable Doubt

[3][4][5][6] ¶ 16 Defendant argues that the trial court violated his due process and jury trial rights because it failed to adequately instruct the jury on the definition of reasonable doubt Specifically,

Defendant claims that the trial court's jury instruction on reasonable doubt was unconstitutional because the instruction failed to require the State to " 'obviate' all reasonable doubt" and incorrectly stated that "reasonable doubt is not doubt which is merely possible " "[T]he Due Process Clause protects the accused against conviction except upon *proof beyond a reasonable doubt* of every fact necessary to constitute the crime with which he is charged " *In re Winship*, 397 U S 358, 364, 90 S Ct 1068, 1073, 25 L Ed 2d 368 (1970) (emphasis added) "This beyond-a-reasonable-doubt requirement applies in state as well as federal proceedings " *846 *Sullivan v Louisiana*, 508 U S 275, 278, 113 S Ct 2078, 2080-81, 124 L Ed 2d 182 (1993) (citation omitted) In addition, "the Fifth Amendment [due process] requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated" so that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt " *Id* at 278, 113 S Ct at 2081 "Denial of the right to a jury verdict of guilt beyond a reasonable doubt" qualifies as "structural error," thereby requiring reversal *Id* at 281-82, 113 S Ct at 2083

[7][8] ¶ 17 Although "[t]he beyond a reasonable doubt standard is a requirement of due process, the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course " *Victor v Nebraska*, 511 U S 1, 5, 114 S Ct 1239, 1243, 127 L Ed 2d 583 (1994) (citation omitted) "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof " *Id*, 114 S Ct at 1243 (citations omitted)

¶ 18 In *Victor*, the United States Supreme Court considered the constitutionality of two reasonable doubt jury instructions One of these instructions defined reasonable doubt in part as follows " 'It is *not a mere possible doubt*, because everything relating to human affairs is open to some possible or imaginary doubt' " [FN3] *Id* at 7, 114 S Ct at 1244 The Court concluded that this definition of reasonable doubt was constitutional *See id* at 17, 114 S Ct at 1248-49

FN3. The definition of reasonable doubt at issue in this case used almost identical language. It stated: "Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt."

¶ 19 Despite the Supreme Court's holding in *Victor* and its initial determination that no particular words are required when instructing the jury on the government's burden of proof, the Utah Supreme Court in *State v. Robertson*, 932 P.2d 1219 (Utah 1997), *overruled on other grounds* by *State v. Weeks*, 2002 UT 98, ¶ 25 n. 11, 61 P.3d 1000, without mentioning *Victor*, explained that it had "essentially adopted the analysis of Justice Stewart's dissent in *State v. Ireland*, 773 P.2d 1375, 1380-82 (Utah 1989), for reviewing the appropriateness of a reasonable doubt instruction." *Robertson*, 932 P.2d at 1232. According to our supreme court, this analysis required the following three-part test:

First, "the instruction should specifically state that the State's proof must obviate all reasonable doubt." Second, the instruction should not state that a reasonable doubt is one which "would govern or control a person in the more weighty affairs of life," as such instruction tends to trivialize the decision of whether to convict. Third, "it is inappropriate to instruct that a reasonable doubt is not merely a possibility," although it is permissible to instruct that a "fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt."

Id. (citations omitted). Therefore, under *Robertson*, the trial court's jury instruction on reasonable doubt was improper because it stated that "reasonable doubt is required, not doubt which is merely possible" and it failed to mention that the State's burden of proof "must obviate all reasonable doubt." *Id.* (citations omitted).

¶ 20 The State attempts to diminish the significance of the three-part test in *Robertson* by arguing that the test is not based on any constitutional authority. First, the State claims that the first prong of the test is inconsistent with the United States Supreme Court's determination that a reasonable doubt instruction does not require any particular form of words. *See Victor*, 511 U.S. at 5,

114 S.Ct. at 1243. Second, the State claims that the third prong of the test misstates the standard for analyzing the constitutionality of a reasonable doubt instruction because "mere possibility" language was approved by the United States Supreme Court, *see id.* at 17, 114 S.Ct. at 1248-49, and by the Utah Supreme Court. *See Carter v. Galetka*, 2001 UT 96, ¶ 51, 44 P.3d 626. Accordingly, in its brief, the State asks this court to overrule *Robertson*, and during oral argument, the State went so far as to suggest *847 that *Carter* had effectively overruled *Robertson*.

¶ 21 Although we agree that *Victor* cannot be reconciled with the three-part test in *Robertson*, we simply do not have the authority to overrule *Robertson*. Only the Utah Supreme Court can correct any deficiencies in *Robertson*. *See Sentry Investigations v. Davis*, 841 P.2d 732, 735 (Utah Ct.App.1992) ("The Court of Appeals simply cannot overrule the law as announced by the highest court in the state...."). Moreover, while it is true that in *Carter* the Utah Supreme Court found "no constitutional deficiency" in a reasonable doubt jury instruction that stated "a reasonable doubt must be a real, substantial doubt and not one that is merely possible or imaginary," *Carter*, 2001 UT 96 at ¶ 51, 44 P.3d 626, we do not agree with the State's claim that this meant that *Robertson* had been effectively overruled. The reason that the *Carter* court upheld the reasonable doubt instruction at issue was because a similar jury instruction that contained the term "substantial doubt" had been previously deemed constitutional by the United States Supreme Court. [FN4] *See id.* at ¶ 51 n. 4. More importantly, when analyzing the reasonable doubt instruction in *Carter*, the court did not reference *Robertson* or its three-part test. Therefore, we may not infer that when the court held that the challenged reasonable doubt jury instruction was constitutional, it was overruling *Robertson*. *See State v. Menzies*, 889 P.2d 393, 398-99 (Utah 1994) (noting that under the principle of stare decisis, a court of last resort "will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent" (citation omitted)).

FN4. As noted earlier, the Supreme Court reviewed two sets of reasonable doubt jury instructions in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). One instruction was challenged based on reasonable doubt being defined in part as " 'not a mere possible doubt.' " *See id.* at 7, 114 S.Ct. at 1244. The other instruction was challenged based on reasonable doubt being defined in part as an " 'actual and substantial doubt.' " *See id.* at 18, 114 S.Ct. at 1249. It was the latter instruction which provided the basis for the court's decision to uphold the reasonable doubt instruction at issue in *Carter v. Galetka*, 2001 UT 96, 44 P.3d 626. *See id.* at ¶ 51 n. 4.

¶ 22 In this case, it is clear that the trial court's reasonable doubt jury instruction failed to comport with the requirements of the three-part test set forth in *Robertson* and constituted a structural error requiring reversal. Although this test may be constitutionally flawed, it is not within our power to overrule it. Accordingly, on this issue, we reverse and remand for a new trial.

II. Failure To Reinstruct The Jury

[9] ¶ 23 Defendant also argues that when the trial court failed to reread all of the preliminary jury instructions at the close of evidence, it violated rule 17(g)(6) of the Utah Rules of Criminal Procedure and his due process right to a fair trial. "We interpret a [court] rule by examining the rule's plain language and resort[] to other methods ... only if the language is ambiguous." *State v. Quinonez-Gaiton*, 2002 UT App 273, ¶ 11, 54 P.3d 139 (second and third alterations in original) (quotations and citation omitted). Rule 17(g) provides in relevant part as follows:

After the jury has been impaneled and sworn, the trial shall proceed in the following order:

....

(g)(6) When the evidence is concluded *and* at any other appropriate time, the court shall instruct the jury;

....

Utah R.Crim. P. 17(g)(6) (emphasis added).

¶ 24 The plain language of this rule indicates that a trial court must instruct the jury at the close of evidence. Although the trial court is also required to instruct the jury at "any other appropriate time," we do not construe this to mean, as the State contends, that a trial court can adhere to the rule by giving the jury some of its instructions before opening statements (an "appropriate time") and the rest of its instructions before closing arguments ("[w]hen the evidence is concluded"). Utah R.Crim. P. 17(g)(6). The *848 use of the mandatory word "shall" along with the conjunction "and" demonstrates that such an interpretation is not plausible. *Id.* Were we to accept the State's argument, a trial court could comply with rule 17(g)(6) by reading all but one of the jury instructions at the beginning of the trial and save one remaining instruction for after the close of evidence; a result clearly not allowed by the drafters of the rule.

¶ 25 The State also argues that because rule 19(a) of the Utah Rules of Criminal Procedure expressly allows a trial court to provide the jury with preliminary instructions prior to opening statements, [FN5] the trial court in this case was not required to repeat these instructions to the jury after the close of evidence. Again, we find the State's argument unpersuasive. In *State v. Marquez*, 135 Ariz. 316, 660 P.2d 1243 (Ct.App.1983), the court considered whether the trial court erred when it instructed the jury on the State's burden of proof at the opening of the trial but failed to do so after the close of evidence. *See id.* at 1247. As part of its analysis, the court examined Arizona Rule of Criminal Procedure 18.6(c), which contains language similar to Utah Rule of Criminal Procedure 19(a). Rule 18.6(c) states: " 'Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern proceedings.' " *Marquez*, 660 P.2d at 1248 (citation omitted). The court interpreted this rule as follows:

FN5. Rule 19(a) of the Utah Rules of Criminal Procedure provides in relevant part as follows:

After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct,

the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter the court in its discretion believes will assist the jurors in comprehending the case.

In order that there be no further confusion, we hold that the preliminary instruction of the jury, authorized by Rule 18 6(c), Rules of Criminal Procedure, is for the purpose of preparing the jury for the trial and constitutes an orientation process by which the jury is made to understand its duties and responsibilities. Where elementary legal principles that will govern the proceedings are given to the jury as a part of the orientation, the trial judge must repeat all such legal principles in its charge to the jury, where such legal principles include matters of law vital to the rights of a defendant.

Id. at 1249, *see also State v. Comen*, 50 Ohio St 3d 206, 553 N E 2d 640, 644 (1990) (noting that "[i]f the preliminary or cautionary instructions include matters of law vital to the rights of a defendant, the trial court is not excused from including or repeating all such instructions after the arguments are completed")

[10][11][12] ¶ 26 Like Arizona's rule 18 6(c), Utah's rule 19(a) permits a trial court to provide jurors, as part of their orientation, with preliminary instructions on matters that the court "believes will assist the jurors in comprehending the case." Utah R Crim P 19(a). Although the rule authorizes a trial court to instruct the jury not only on procedural matters but also on matters relating to the fundamental rights of a defendant, such as "the elements and burden of proof for the alleged crime," *id.*, it does not supercede the plain and unambiguous mandate contained in rule 17(g)(6) that the jury be instructed at the close of evidence. In other words, while it is permissible, and we believe appropriate, for a trial court to provide the jury with preliminary instructions on "matters of law vital to the rights of a defendant," *Marquez*, 660 P 2d at 1249, such as the presumption of innocence and the State's burden of proof, in order to fully comply with rule 17(g)(6), the court must repeat these instructions at the close of evidence [FN6] *Id.* Accordingly, we hold *849 that the trial court erred

when, at the end of the trial, it failed to reinstruct the jury on the law as it related to Defendant's fundamental rights [FN7]

FN6 We note that requiring a trial court to reinstruct the jury at the end of the trial is consistent with the approach taken by courts in other jurisdictions that have interpreted rules similar to rule 17(g)(6) of the Utah Rules of Criminal Procedure. *See e.g., State v. Jackson*, 144 Ariz 53, 695 P 2d 742, 743 (1985) (concluding that trial court is required, under Arizona Rules of Criminal Procedure, to "instruct the jury at end of evidence and oral argument"), *Bennett v. State*, 302 Ark 179, 789 S W 2d 436, 438 (1990) (concluding that statute, which read "'When the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case,'" was "so clear that it did not need interpretation" (citation omitted)), *Little v. State*, 230 Ga App 803, 498 S E 2d 284, 287 (1998) (noting that in light of statute that provided that "the trial court shall instruct the jury in the law after the closing arguments are completed," preliminary instructions could not "serve as a substitute for a complete jury charge, as the statute requires, after the evidence is closed and arguments concluded" (quotations and citations omitted)), *State v. Comen*, 50 Ohio St 3d 206, 553 N E 2d 640, 644 (1990) (holding, under Ohio Rules of Criminal Procedure, that although trial court may give jury preliminary instructions, "[a]fter arguments are completed, [the] trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as fact finder"), *State v. Nelson*, 587 N W 2d 439, 444 (S D 1998) (construing word "shall" as "a mandatory directive" in a statute that read "'The court shall read its instructions to the jury' at the close of the evidence and before final argument" (citation omitted))

FN7. Because we hold that the trial court's failure to reinstruct the jury violated rule 17(g)(6) of the Utah Rules of Criminal Procedure, we do not address Defendant's argument that the trial court's failure to reinstruct the jury also violated his due process right to a fair trial.

[13][14] ¶ 27 Having determined that the trial court erred when it failed to repeat its preliminary jury instructions at the close of evidence, we must ascertain whether this error was harmful. In order for an error to be harmful, "the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *State v. Knight*, 734 P.2d 913, 920 (Utah 1987); *see also* Utah R.Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.").

¶ 28 Based on our review of the record, we cannot say that had the trial court repeated the preliminary jury instructions at the close of evidence, the verdict in this case would have been any different. The time period separating the trial court's reading of the preliminary instructions from the close of evidence was less than twenty-four hours. Moreover, when the jurors retired to deliberate, they were provided with a written copy of every preliminary and final jury instruction. Finally, despite Defendant's assertions to the contrary, this case was not a close credibility contest over the issue of consent. Other than Defendant's testimony, all of the relevant evidence demonstrates that the victim engaged in sex against her will. The victim had known Defendant for less than half-an-hour. She immediately reported the incident to her boyfriend and told him and the security guard at Bricks nightclub that she had just been raped. Finally, the security guard confirmed that it appeared that the victim had recently been in "a scuffle" when he saw her and that she appeared to him to be extremely upset and emotional.

¶ 29 Therefore, we conclude that although the trial court erred when it failed to reinstruct the jury at the close of evidence, this did not affect the jury's verdict. Accordingly, the trial court's error was harmless.

CONCLUSION

¶ 30 The reasonable doubt instruction that the trial court gave to the jury clearly did not comport with the first and third prongs of the three-part test as announced in *State v. Robertson*, 932 P.2d 1219, 1232 (Utah 1997), *overruled on other grounds* by *State v. Weeks*, 2002 UT 98, ¶ 25 n. 11, 61 P.3d 1000. Although *Robertson* is not consistent with United States Supreme Court precedent, this court does not have the authority to overrule *Robertson*. Therefore, we reverse and remand for a new trial.

¶ 31 In addition, we conclude that the trial court violated rule 17(g)(6) of the Utah Rules of Criminal Procedure when it failed to repeat those preliminary jury instructions that related to Defendant's fundamental rights. However, in light of the evidence in this case, the short time between the preliminary instructions and the close of evidence, and the fact that the jurors were provided with written copies of all of the jury instructions, we are confident that the trial court's error did not influence the jury verdict. Therefore, the trial court's error was harmless.

*850 ¶ 32 WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and JAMES Z. DAVIS, Judge.

84 P.3d 841, 491 Utah Adv. Rep. 5, 2004 UT App 8

END OF DOCUMENT

Addendum B

INSTRUCTION NO. 15

BURDEN OF PROOF

All presumptions of law, independent of evidence, are in favor of innocence. A defendant is presumed innocent until proven guilty beyond a reasonable doubt. Where you are satisfied that a reasonable doubt exists as to a defendant's guilt, he/she is entitled to acquittal.

The burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Reasonable doubt is required, not doubt which is merely possible, since everything in human affairs is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is a degree of proof that satisfies your mind and convinces your conscientious understanding. Reasonable doubt is doubt entertained by reasonable men and women and arises from the evidence, or lack of evidence, in the case.