IN THE COURT OF APPEALS OF IOWA

No. 0-906 / 10-0475
Filed January 20, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LONNIE SHAYNE TABOR,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

A defendant appeals following his conviction for criminal transmission of human immunodeficiency virus in violation of Iowa Code section 709C.1 (2009). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Lonnie Tabor appeals following his conviction for criminal transmission of human immunodeficiency virus (HIV) in violation of Iowa Code section 709C.1 (2009). He asserts the district court should have instructed the jury that a "reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act." Because we believe the reasonable doubt instruction given was an accurate statement of the law, we affirm Tabor's conviction.

I. Background Facts and Proceedings.

Tabor was diagnosed with HIV in 1999. In February 2006, Tabor met K.R. According to K.R., Tabor did not tell her he had HIV, and over the next three years they had a relationship where they engaged in unprotected sex. Tabor had ongoing health issues such as lung problems and skin rashes, but K.R. denies she was ever told of the underlying cause of his medical problems. On April 27, 2009, K.R. met with a police officer on another matter. The officer told K.R. that Tabor was HIV positive. K.R. was very shocked and upset. She was subsequently tested and discovered she had contracted HIV.

The State charged Tabor with criminal transmission of human immunodeficiency virus in violation of Iowa Code section 709C.1. A jury trial was held on January 11-13, 2010. At the conclusion of the evidence, the jury was instructed as follows regarding reasonable doubt:

> The burden is on the State to prove Lonnie Shayne Tabor guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.

> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and should find the defendant not guilty.

See Iowa Crim. Jury Inst. 100.10 (1973).

Tabor objected to this instruction and urged the court to give the new model jury instruction approved by the Iowa State Bar Association jury instruction committee in March 2009. The new State Bar model instruction contains the following additional paragraph between the second and third paragraphs quoted above:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate 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. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The district court declined to utilize the new model instruction, reasoning that the "hesitate to act language does appear to instruct the jury of a heightened burden in this matter, and for that reason, the court finds that is not an accurate statement of the law."

The jury found Tabor guilty as charged. Tabor appeals and challenges the district court's refusal to give the new model State Bar reasonable doubt jury instruction.

II. Standard of Review.

We review challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). "Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence. Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party." *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

III. Reasonable Doubt Jury Instruction.

We find no error in the instruction that was actually given. In *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980), the supreme court expressly approved a similar jury instruction. That decision is binding on us; we are required to follow it.

In *McFarland*, the supreme court stated the instruction was adequate because it "set out an objective standard for measuring the jurors' doubts. It was not deficient for failing to provide more than one standard." 287 N.W.2d at 163. The new State Bar model instruction now incorporates an additional standard, "hesitate to act," borrowed from the Eighth Circuit's model criminal jury instructions.[1] The Eighth Circuit's model instruction, though, uses "hesitate to act" as its only standard.

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[1] Eighth Circuit Model Criminal Jury Instruction 3.11 on reasonable doubt provides:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate 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. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

In the new State Bar model instruction, a reasonable doubt is defined both as (1) a doubt that fails to leave one "firmly convinced of the defendant's guilt" (the old standard) and (2) "the kind of doubt that would make a reasonable person hesitate to act" (the new, additional standard). We are not in a position to say that two standards for a jury are better than one, let alone that two standards are required to convey an accurate statement of the law. Two standards can potentially be more confusing. Some jurors may follow one; some the other.

We are not saying, of course, that it would have been error for the district court to use the additional language from the new model instruction. Although trial courts are not bound by the uniform instructions, generally the preference is for the trial courts to instruct the jury according to the uniform instructions. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). And the United States Supreme Court has approved the use of the phrase "hesitate to act" within a reasonable doubt instruction that appeared to contain several different standards. *Victor v. Nebraska*, 511 U.S. 1, 20–21, 114 S. Ct. 1239, 1250, 127 L. Ed. 2d 583, 599 (1994) ("[T]he instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved . . . .").[2] Nevertheless, our job is not to

[2] Although the district court believed "hesitate to act" erected *too high* a barrier to conviction, some of the Justices writing separately in *Victor* appeared to take the opposite view:

> A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives-choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike

determine whether Tabor's proposed instruction *also* would have been an accurate statement of law, but whether the instruction actually given was.

A trial court is not required to use any particular language in instructing the jury.

> Trial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury. Unless the choice of words results in an incorrect statement of law or omits a matter essential for the jury's consideration, no error results.

Stringer v. State, 522 N.W.2d 797, 800 (Iowa 1994). "If an instruction correctly states the applicable law it will be deemed proper even though an alternative wording is possible." *State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985). "It is sufficient if the instruction states the applicable law so that a jury composed of nonlawyers can understand it." *Id. at* 175–76. The instruction given was adequate explanation of reasonable doubt. Because the jury was instructed according to the law, Tabor cannot establish prejudice. *Cf. Holtz*, 548 N.W.2d at 164 (holding that although the trial court should have instructed according to the uniform instruction, no prejudice resulted from not doing so). Therefore, we affirm.

AFFIRMED.

> the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18–19 (1987) (commentary on instruction 21).

Victor, 511 U.S. at 24, 114 S. Ct. at 1251, 127 L. Ed. 2d at 601-02 (Ginsburg, J., concurring in part and concurring in the judgment) (also characterizing the "hesitate to act" formulation as "unhelpful"). Justice Blackmun noted his "general agreement with Justice Ginsburg's observation that the 'hesitate to act' language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives." *Id.* at 34, 114 S. Ct. at 1257, 127 L. Ed. 2d at 608 (Blackmun, J., concurring in part and dissenting in part).