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When Will They Ever Learn?

By Gregory Ward

Once again the Fourth District Court of Appeal (Second Division) has found no error in the trial court's elaboration of the jury instruction on reasonable doubt, this time in *People v. Muniz* (Aug. 31, 2011, E049333), __ Cal.App.4th __ [2011 DJDAR 13459].

In *Muniz* the trial judge read the standard instruction and then added, "What does this mean in plain English, abiding conviction? Jurors have to have an abiding conviction of the truth of the charge. It means a long-lasting belief when you come to a verdict you will be comfortable with it the day you do it, two months or a year from now. That's an abiding conviction."

Defendant (and dissenting Justice Miller) argued that by telling the jury that it need only feel "comfortable" with its verdict the instruction devalued the rule that the truth of the charge must be "deeply felt" by the jurors. But Presiding Justice Ramirez wrote that when the court used the word "comfortable" it "was not addressing the deeply held nature of the conviction, but the duration of it." There was no reasonable likelihood, said the court, that the jurors "interpreted the trial court's use of the word 'comfortable' to mean that they did not have to have an abiding conviction."

In *People v. Moore* (2011) 193 Cal.App.4th 746 the appellate court excused the trial judge's efforts to clarify the instruction on reasonable doubt by offering the jury a few examples. See "He's Just Trying to Help," posted April 11, 2011. Presiding Justice Ramirez also wrote the majority opinion in *Moore* (with Justice Miller dissenting). The Supreme Court has granted review.

In *Moore*, and now *Muniz*, the opinion quoted extensively from *People v. Johnson* (2004) 119 Cal.App.4th 976, which urged trial courts not to deviate from the standard instruction and to "heed the two English bards: ... 'Let it be.'" But at least until the Supreme Court decides *Moore*, in the Fourth District it appears that trial judges have considerable leeway to let their creative juices flow.