NO. 43995-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RONALD HOLTZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 11-1-03845-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant invited any alleged instructional error where he proposed or approved the instructions given by the court?

B. STATEMENT OF THE CASE.

1. Procedure

On September 20, 2011, the Pierce County Prosecutor's Office (State) filed an information that charged Ronald Holtz (defendant) with one count of domestic violence court order violation and one count of assault in the fourth degree. CP 1–2. On September 6, 2012, the State amended the Information to include, in the alternative, one count of violation of a court order (protection/other). CP 124–125. The case was assigned to the Honorable Kathryn J. Nelson. 1 RP 1.[1]

At the conclusion of trial, the jury found defendant guilty of domestic violence court order violation and not guilty of assault in the fourth degree. CP 126; CP 128; 4 RP 362.

[1] The verbatim report of proceedings consists of 13 volumes, each titled by its corresponding date. Defendant's jury trial was held on August 30, 2012, September 4, 2012, September 5, 2012, and September 6, 2012. Each of the four volumes of jury trial transcript is sequentially paginated and will be referred to as "RP." All other volumes will be referred to by date.

On September 21, 2012, defendant was sentenced to a standard range sentence of 60 months confinement. CP 158–171; 9/21/12 RP 23. Defendant's offender score was a nine. CP 158–171.

Defendant filed this timely notice of appeal on September 25, 2012. CP 158–171.

2. Facts

On September 19, 2011, Ms. Connie Elliot overheard yelling coming from one of the motel rooms at the Sunshine Motel in Fife. 3 RP 259–60. Ms. Elliot, the motel's desk clerk, recognized both parties involved in the verbal altercation as Clare Strain and defendant. 3 RP 258–59. Fifteen minutes later, Ms. Elliot again heard yelling and observed the defendant shove Ms. Strain in the chest. 3 RP 263. Ms. Elliot dialed 911. 3 RP 265.

Police Officers arrived and learned that defendant had a protective order prohibiting contact with Ms. Strain. 3 RP 146. Defendant was arrested and transported to Fife Jail. 3 RP 146.

C. ARGUMENT.

1. IF THE INSTRUCTIONS ARE ERRONEOUS, IT WAS INVITED ERROR AS THEY WERE PROPOSED OR APPROVED BY DEFENDANT.

"The invited error doctrine 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" ***State v. Ellison***, __ Wn. App. ___, 291 P.3d 921, 924 (2013) (quoting ***State v. Pam***, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). The doctrine bars challenges to jury instructions where the court gives the instruction proposed by the defendant. *See, e.g.*, ***State v. Henderson***, 114 Wn.2d 867, 869, 792 P.2d 514 (1990); ***State v. Boyer***, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). This is true even where the defendant proposes an identical instruction to the instruction the trial court ultimately gives. ***State v. Summers***, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), *modified on other grounds*, 43 P.3d 526 (2002).

Defendant argues that the to-convict instructions were erroneous because they allegedly misled the jury on its power to acquit. Brief of Appellant at 4–5. But this argument ignores that each of defendant's proposed jury instructions included the challenged language, "it will be your duty to return a verdict of guilty." CP 138, 139. Indeed, defendant cited WPIC 36.51.02 in his proposed instruction regarding the domestic violence court order violation charge, and WPIC 36.51 in his proposed

instruction for the violation of a court order charge. Both pattern jury instructions contain the language "it will be your duty to return a verdict of guilty." Defendant invited any alleged error, and cannot now complain that giving the instructions that he proposed was error.

Even if this Court were to consider the merits of this argument, several courts—including this Court—have repeatedly rejected defendant's argument. *See, e.g.*, ***State v. Brown***, 130 Wn. App. 767, 770–71, 124 P.3d 663 (2005) (*see* holding, infra p. 4); ***State v. Bonisisio***, 92 Wn. App. 783, 964 P.2d 1222 (1998); ***State v. Meggyesy***, 90 Wn. App. 693, 958 P.2d 319 (1998) *overruled on other grounds in* ***State v. Recuenco***, 154 Wn.2d 156, 110 P.3d 188 (2005). Specifically, this court in ***Brown*** held:

> [Defendant] argues that ***Bonisisio*** and ***Meggyesy*** are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict. Here, [defendant] argues that the language of the "to convict" instruction [which stated the jury had a "duty" to convict] affirmatively misleads the jury about its power to acquit. . . . . We find no meaningful difference between [defendant]'s argument and the issues raised in ***Bonisisio*** and ***Meggyesy***.

Brown, 130 Wn. App. at 770–71. The defendants in ***Bonisisio*** and ***Meggyesy*** sought jury instructions informing the jury that it "may" convict upon a finding of proof beyond a reasonable doubt. Here, defense counsel proposed an instruction that informed the jury of its "duty" to convict upon

a finding of proof beyond a reasonable doubt. Here, as in ***Brown***, defendant challenges the "duty" portion of the jury instruction. Brief of Appellant, 18. It is unnecessary to reexamine this issue as it has been adequately considered by the courts in ***Bonisisio***, ***Meggyesy***, and ***Brown***.

Defendant also seeks relief under the state constitution, applying the six-step analysis under ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986). However, it is unnecessary for the State to repeat the ***Gunwall*** analysis conducted by the Court of Appeals in ***Meggyesy***. *See* 90 Wn. App. at 701–04; *see also* ***Bonisisio***, 92 Wn. App. at 794 (accepting the ***Meggyesy*** court's analysis and concluding that "the instruction did not implicate the federal constitutional right to trial by jury or misstate the law, and that neither the state nor federal constitutions prohibited the instruction."). Neither the state nor federal constitutions support this argument.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests this Court to affirm defendant's conviction.

DATED: MAY 23, 2013

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/23/13
Date Signature

PIERCE COUNTY PROSECUTOR

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