73398-2

No. 73398-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ROBERT MORTENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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Washington Cases

A. ARGUMENT IN REPLY

1. Mr. Mortenson did not invite the court's error in failing to exercise its discretion to bifurcate the proceedings.

Defense counsel did not invite the court's error in failing to exercise its discretion to bifurcate the proceedings because counsel proposed bifurcated jury instructions and argued in favor of presenting the prior conviction evidence in a separate proceeding. Although counsel misstated the law regarding the law of the case doctrine, counsel's erroneous understanding of the doctrine was the same as the court's. It is *the court's* duty to know the law and apply it correctly. When a party asserts an erroneous view of the law that is the same as the court's, this is not invited error. Moreover, counsel argued that the court *could* bifurcate the proceedings, but the court denied the request based on its erroneous view that it was bound by the law of the case doctrine. Under these circumstances, Mr. Mortenson did not invite the error and may challenge the court's decision on appeal.

Generally, the invited error doctrine precludes a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The policy behind the doctrine is as follows:

> The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The invited error doctrine applies only where counsel sets up the error through some *affirmative action* rather than by simply asserting a mistaken view of the law. Washington courts apply the invited error doctrine to erroneous jury instructions only where the appellant *affirmatively requested* or *proposed* the erroneous instruction at issue. See, e.g., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they *proposed* erroneous instructions); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel *proposed* instructions identical to instructions given to jury that defendant later challenged on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel *participated in drafting* instructions later challenged on appeal).

In the cases cited by the State, the courts similarly applied the invited error doctrine only where defense counsel set up the error

though some affirmative action, by either *requesting* an erroneous instruction or by *affirmatively opposing* the court's proposal to provide a particular instruction. None of the cases cited involved a situation where counsel merely asserted a misstatement of the law. See Henderson, 114 Wn.2d at 868 (defense counsel requested instructions later challenged on appeal); State v. Boyer, 91 Wn.2d 342, 244-45, 588 P.2d 1151 (1979) (instruction at issue was one defendant himself proposed); State v. Carson, 179 Wn. App. 961, 973-75, 320 P.3d 185, aff'd, 184 Wn.2d 207, 357 P.3d 1064 (2015) (defense counsel strenuously objected to trial court's proposal to provide Petrich jury instruction).

Here, defense counsel proposed bifurcated jury instructions and affirmatively argued the court should allow the prior conviction evidence to be presented to the jury in a separate proceeding. CP 66-80, 93-94; 2/04/15RP 11-15; 2/05/15RP 44-45; 2/11/15RP 64-66. Counsel repeated the argument on two separate days prior to trial, and again after the testimony had concluded. Counsel reiterated his position after the testimony had concluded because he wanted to make sure his position was "clear." 2/11/15RP 64. He stated his position as follows,

> defense's request [i]s to bifurcate the instructions. In essence to take section 3 out of the to-convict instruction for felony DUI, hold that back from the instruction packet as well as the stipulation. If the jury returns a verdict as to driving under the influence, then have a second verdict form then provide the stipulation—sorry—permit the stipulation, provide the additional instruction of felony DUI regarding the four prior offenses, and then allow them to enter a second verdict as to felony DUI.

2/11/15RP 64-65.

As argued in the opening brief, the judge summarily denied counsel's request to bifurcate the proceedings based on her erroneous view that she was bound by the law of the case doctrine. Contrary to the State's argument, she did not consider the merits of counsel's proposal or issue a ruling based on the merits. She stated, "Judge Smith's trial jury was instructed as to sub-3 under WPIC 92.26. Parties had an opportunity to raise that to the court of appeals, they did not. The jury will be so instructed." 2/04/15RP 15.

After the close of evidence, the judge again stated her erroneous view that she was required by the law of the case doctrine to deny the request to bifurcate. She said she would provide the same instructions that Judge Smith provided in the previous trial because "any jury instructions were submitted and reviewed by the court of appeals and had that opportunity were the ones I have considered." 2/11/15RP 66.

Because the judge did not consider the merits of counsel's proposal to bifurcate the evidence, she failed to exercise her discretion. Thus, her decision was an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

It is true defense counsel initially stated, "I believe the case law directs the Court to adopt all prior rulings." 2/04/15RP 12. But at the same time, counsel argued the court *could* issue a different ruling. Counsel stated, "my first request would be to completely bifurcate the proceedings and, if not, certainly in the event to follow the previous court's ruling and at least bifurcate the instructions." 2/04/15RP 11.

Counsel's statements show counsel did not *affirmatively request* the court allow the prior conviction evidence to be presented in a single proceeding with the other evidence, and did not *affirmatively request* a to-convict jury instruction that included the prior conviction element. Thus, under the authorities cited above, the invited error doctrine does not apply. Counsel was simply operating under an erroneous view of the law. Counsel mistakenly believed the court was bound by the law of the case doctrine "to adopt all prior rulings." 2/04/15RP 12.

Defense counsel's mistaken belief that the court was bound by the law of the case doctrine was shared by both the judge and the deputy prosecutor. As stated, the judge summarily denied the request for bifurcation because she believed she was bound by the law of the case doctrine to apply the same procedure as was used in the previous trial. 2/04/15RP 15; 2/11/15RP 66. The deputy prosecutor also believed the court was bound by the law of the case doctrine. The prosecutor stated, the previous jury was "instructed on sub-part 1. The jury did consider it. I'm unaware of Mr. Mortenson raising that as a challenge and so I would ask, Your Honor, to adopt the instructions and to instruct this jury—this jury panel as the jury was instructed in the second trial." 2/04/15RP 14.

There is no authority for the position that the invited error applies when counsel merely states an erroneous view of the law that is shared by both the judge and the prosecutor. Ultimately, it is *the judge's* responsibility to know the law and apply it correctly. See In re Welfare of Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975); Burbo v. Harvey C. Douglass, Inc., 125 Wn. App. 684, 692, 106 P.3d 258 (2005).

Counsel did not set up the error in this case because counsel was merely echoing a mistaken view of the law that was shared by both the court and the prosecutor. The invited error doctrine does not apply.

2. Any request that costs be imposed on Mr. Mortenson for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, __ Wn. App. __, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1).

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at *6. Here, the trial court did not require Mr. Mortenson to pay what it deemed to be discretionary legal obligations. CP 121. The trial court found he is indigent and lacks the ability to pay any of the expenses of appellate review. Sub #235.

As this Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition.

2016 WL 393719 at *7. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

As in Sinclair, there is no trial court record showing Mr. Mortenson's financial condition has improved or is likely to improve in the future.

Given Mr. Mortenson's continued indigency and the likelihood he will not be able to pay appellate costs, this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

B. CONCLUSION

For the reasons provided above and in the opening brief, the trial court abused its discretion in summarily denying the motion to present the prior conviction evidence in a separate proceeding and to bifurcate the jury instructions. The conviction must be reversed.

Respectfully submitted this 7th day of April, 2016.

/s/ Maureen M. Cyr

_____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHRIS MORTENSON, Appellant.	)	NO. 73398-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] IAN ITH, DPA [paoappellateunitmail@kingcounty.gov] [ian.ith@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] CHRIS MORTENSON 701 2ND ST NE PUYALLUP, WA 98372	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF APRIL, 2016.

X_____

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