

FILED
SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT NO. 96023-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CHARLES WHITAKER,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Whitaker, No. 76128-5-I, filed June 11, 2018 (unpublished).

C. ADDITIONAL ISSUE PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issue the State raised in the Court of Appeals, which was not reached by that court:

1. The Court of Appeals concluded that the trial court's response to a jury question regarding justifiable homicide was an accurate statement of the law. As an alternative ground to affirm, the State renews its argument that because Whitaker advocated for and approved the original instruction on justifiable homicide and approved the answer to the jury question, any error in the answer was invited error.

D. STATEMENT OF THE CASE

Defendant Richard Whitaker was convicted of murder in the second degree with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 65-67, 81-82. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 3-8.

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Whitaker, 76128-5-1 (Wash. Ct. App. June 11, 2018) (unpublished).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Whitaker in his petition for review.

If review is accepted, the State seeks cross-review of an alternative argument it raised in the Court of Appeals but that the court's decision did not address. RAP 13.4(d); Whitaker, slip op. at 8 n.2. The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court

also should grant review of the alternative argument raised by the State in the Court of Appeals, that any instructional error was invited error. RAP 1.2(a); RAP 13.7(b). That argument is set forth below.

1. ANY ERROR IN THE ANSWER TO THE JURY QUESTION WAS INVITED BY WHITAKER AND CANNOT BE THE BASIS FOR REVERSAL.

Even if the answer to the jury question could have been confusing and was error, Whitaker is precluded from seeking reversal on that basis, because he invited the claimed error. Instruction 15, which defines justifiable homicide, was the instruction that he proposed. CP 24, 48. He joined in the drafting of the answer to the jury question about the components of justifiable homicide and specifically agreed to the language used. 10/13/16 (corrected) RP 7-8.¹

A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars relief even as to an instructional error of constitutional

¹ As to the report of proceedings for October 13, 2016, pages 125-31 were replaced by a version of the transcript corrected by the trial court, by order of the Court of Appeals; that corrected transcript is referenced as 10/13/16 (corrected) RP.

magnitude. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The invited error doctrine applies to self defense instructions. Studd, 137 Wn.2d at 546-47; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007).

Invited error is not a bar to review of a separate claim of ineffective assistance of counsel. Studd, 137 Wn.2d at 550-51. That claim must be analyzed separately.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issue identified in Sections C and E, supra.

DATED this 9th day of July, 2018.

Respectfully submitted,

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