SUPREME NO. 101031-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY JOSEPH WILLIAMS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

COURT RULES

I. IDENTITY OF RESPONDENT

The State of Washington, Respondent, asks the court to deny the defendant's petition for discretionary review of the Court of Appeals ruling.

II. STATEMENT OF THE CASE

The facts of the case relevant to those issues considered by the lower court have been adequately set out in the unpublished decision of the Court of Appeals appended to the defendant's petition for review. Additional facts relevant to claims not previously considered by the Court of Appeals are contained in Ex. 1 and detailed in Am. Br. of Resp't, Statement of the Case, at 2-39.

III. ARGUMENT

This court may accept, in its discretion, review of a decision of the Court of Appeals if the decision (1) conflicts with a decision of this court or the Court of Appeals, (2) presents a significant question of

constitutional law, or (3) involves an issue of substantial public interest that this court should decide. RAP 13.4(b).

As detailed below, none of the above factors support this court granting review of the Court of Appels decision.

A. THE COURT OF APPEALS PROPERLY APPLIED THE DOCTINE OF INVITED ERROR TO THE DEFENDANT'S CLAIM OF PREJUDICE ARISING FROM JURY INSTRUCTION UNDER SETTLED AND CLEAR WASHINGTON JURISPRUDENCE.

The defendant, in the Court of Appeals, argued that Washington Constitutional jurisprudence regarding instruction on each of the alternative means in a "to convict" instruction as to the *completed* crime should be extended to *attempted* crimes where the alternatives are not elements, but mentioned only in an accompanying definitional instruction.

Based on this legal claim, the defendant argued that reversal was warranted because insufficient evidence

supported two of the three claimed "alternative means" in the definition the jury was instructed upon.

The Court of Appeals did not reach the substance of the defendant's legal claim, noting simply that defendant's underlying contention that the attempted crime was to be treated the same as a completed crime was "by no means clearly established under the law[.]" Slip. Op. at 5-6.

Rather, the Court of Appeals held that, given the defendant himself had proposed the definitional instruction giving rise to the prejudice he claimed, he had waived appellate review under the doctrine of "invited error," citing precedent including State v. Carson, 179 Wn. App. 961, 320 P.3d 185 (2015); State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010); State v. Holt, 119 Wn. App. 712, 82 P.3d 688 (2004) and State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005).

While defendant argues that this Court should reach and resolve the underlying issue of 'alternative means'

and attempted crime jury instruction, this case is not the appropriate vehicle to do so. The Court of Appeals correctly applied the doctrine and modifying the doctrine as the defendant now proposes would result in law that conflicts with prior clear precedent and uncertainty as to application of that doctrine overall.

Defendant claims that the doctrine of invited error was inapplicable and the Court of Appeals erred. This is not the case. The defendant's arguments against "invited error" here conflate that doctrine with that of "waiver on appeal." The doctrines are distinct in present jurisprudence and must remain so.

Under the "waiver-on-appeal" doctrine, a claim of error may be waived by a party on appeal where that party did not object to the error at the trial court level. RAP 2.5(a). A mere failure to object below, however, will not be deemed to waive an appellate claim premised on a "manifest error affecting a constitutional right." RAP

2.5(a)(3). The same considerations apply to claims of prejudice and error predicated on the jury instructions provided.

> In general, parties must contemporaneously object to proposed jury instructions. CrR 6.15(c). However, RAP 2.5(a)(3) allows a party to object for the first time on appeal where there is a manifest error affecting a constitutional right. Application of RAP 2.5(a)(3) depends on the answers to two questions: (1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest? In this case, the answer to both questions is no.

State v. Grott, 195 Wn.2d 256, 267, 458 P.3d 750 (2020) (internal citation omitted).

The doctrine of "invited error," applicable here, however, is different than the doctrine of "waiver-on-appeal" addressed in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 1998) and State v. Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011).

First, its application depends on more than merely not objecting to an instruction. The party against whom it is applied must have taken some form of affirmative action that helped induce the lower court into giving the error generating instruction. State v. Hood, 196 Wn. App. 127, 133, 382 P.2d 710 (2016) (Denying application of the doctrine against the defendant because the record did not reveal the defendant formally stipulated to the erroneous instruction proposed by the State.) The requirement of affirmative action does not include simple failure to object to an instruction proposed by the other party. State v. Goble, 131 Wn. App. 194, 203, Fn. 5, 126 P.3d 821 (2005) ("[M]ere failure to object to an instruction proposed by the other party does not establish invited error.")

In Hickman, there is no indication that the defendant *affirmatively proposed* the instruction in question and the court never examined the doctrine of invited error. Rather, the court only examined the separate issue of

waiver-on-appeal by failing to object to the instruction below. In doing so it dismissed the State's argument that the lack of objection below waived appellate review giving the underlying issue of sufficiency of the evidence was a manifest error of constitutional magnitude. Id. at 103, fn. 3, citing State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995).

In Sweany, 162 Wn. App. at 228, the sufficiency issue arising from the jury instruction was also a question whether there was "waiver on appeal" due to lack of objection below. Sweany, 162 Wn. App. at 228 ("[N]or did they object to the jury instruction[.]")

In both Hickman and Sweany, despite the failure to object, the defendants were allowed to proceed with their claims on appeal because sufficiency, the issue that arose from the instructions, was a manifest error of constitutional right. "Invited error" is different. The

doctrine of invited error *will preclude* appellate review of even constitutional errors.

> The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights.

Carson, 179 Wn. App. 961, 973, 320 P.3d 185, 190 (2014).

Moreover, it applies to only claims of error or prejudice to which the defendant "materially contributed," by his or her *affirmative* actions, as opposed to merely failure to object regardless how defendant labels the prejudice.

> In determining whether the invited error doctrine applies, our courts consider whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. The doctrine appears to require affirmative actions by the defendant.

State v. Hood, 196 Wn. App. 127, 133, 382 P.3d 710 (2016).

Defendant's attempt to label his claim as solely one of sufficiency of the evidence is not supported. He does not and cannot challenge that the jury did not have sufficient evidence to support the verdict as they were actually instructed here, to include the to-convict instruction. His claim is *necessarily* that the Washington Constitution requires that the jurors should have been instructed differently, and *if they had been so instructed*, there would have been insufficient evidence under such instructions and he would not have suffered the prejudice he now claims.

Ultimately, jurisprudence reveals the invited error doctrine precludes constitutional claims applies specifically to sufficiency of the evidence prejudice that the defendant helped create by proposing the relevant jury instructions.

> Winings asserts that his conviction must be reversed because the jury was instructed on each alternative means of committing assault,

> and one of these means—attempted battery—was not supported by sufficient evidence. ... Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.

Winings, 126 Wn. App. at 89.

The defendant in this matter helped create the sufficiency issue he complains of on appeal by affirmatively proposing the supposedly erroneous instruction that gave rise to it.

The doctrine of invited error applies, not waiver-on-appeal. The defendant is therefore precluded from raising even constitutional error his proposed instruction helped create.

> A party cannot submit the instructions on a certain theory of law and then when the verdict goes against him complain that there is a lack of evidence to support the giving of an instruction which he himself requested.

Burnett v. Hunt, 5 Wn. App. 385, 393, 486 P.2d 1129 (1971). See also, Winings, 126 Wn. App. at 89.

The defendant's separate attempt to escape the doctrine by arguing that the State submitted, in effect, the same instruction is also unavailing.

While the State would be precluded from arguing court error premised on the instruction under the doctine of invited error, that does not mean the defendant does not remain separately precluded. Whether or not the doctrine applies to *the defendant* turns on, as above, whether or not *the defendant* took affirmative action that *helped create* the issue he now complains of on appeal, full stop. Id. at 546-47.

The defendant is not somehow relieved where the State may have separately also helped create the same issue by proposing the same instruction. This is additionally seen in the numerous cases applying the invited error doctrine against the defendant where the State was the one that proposed the underlying instruction, and the defendant merely affirmatively agreed

to it. See, e.g., State v. White, 186 Wn. App. 1046, *2 (2015) (Unpublished) (Invited error doctrine precluded the defendant's unanimous jury based appellate claim where the defendant indicated to the trial court it was adopting State's jury instructions which did not include a unanimity instruction); State v. Jamison, 181 Wn. App. 1032, *1 (2014) (Unpublished) ("[Defendant] expressed affirmative agreement to the instructions by joining in the State's proposed instructions. She cannot now challenge that instruction."); State v. Clardy, 180 Wn. App. 1030, *6 (2014) (Unpublished)[1]

Defendant now also cites to State v. Weaver, 198 Wn.2d 459, 496 P.3d 1183 (2021). Here, the defendant's present claim appears to be that Weaver stands for the proposition that the State's proposal or acquiescence to

[1] Pursuant to GR 14.1, the State cites to these unpublished opinions solely for the persuasive value of their reasoning.

the jury instruction giving rise to the claimed prejudice precludes the application of "invited error" where the defendant also proposed the instruction. Weaver, however, does not stand for that proposition. There the defendant did not propose the instruction specifically giving rise to the claimed prejudice. Id. at 465 ("The invited error doctrine does not apply here because Mr. Weaver did not propose the challenged jury instruction.")

This Court of Appeals did not err in determining that the defendant was precluded under the doctrine of invited error from raising a sufficiency of the evidence claims on appeal given he helped create the resulting error by affirmatively proposing an instruction that necessarily gave rise to the error. This court should not modify the clear jurisprudence applying the doctrine in these circumstances.

B. REVIEW SHOULD NOT BE GRANTED ON THE DEFENDANT'S LATE-RAISED SEPARATE CLAIM OF INEFFECTIVE ASSISTANCE.

Defendant, in his motion for reconsideration to the Court of Appeals after its ruling, urged as a new claim that, should the appellate court maintain its position that he is precluded on appeal from raising his underlying claim of error by the invited error doctrine, it should consider whether trial counsel's proposal of the instruction so precluding that appellate claim constituted ineffective assistance of counsel.

The Court of Appeals denied reconsideration. Defendant now raises this argument in his petition for review before this court.

1. This Court Should Not Hear This New Claim.

Defendant seeks review in this court of a matter never considered by the trial court or Court of Appeals previously. Whether a matter never raised until a motion for reconsideration in the Court of Appeals was

appropriate for Supreme Court review was previously addressed in a civil matter, Connor v. Universal Utilities, 105 Wn.2d 168, 712 P.2d 849 (1986). There:

> The Conners contend that the due process issue should not be addressed because Universal Utilities did not raise it at trial or in the Court of Appeals until its motion for reconsideration. RAP 2.5(a), however, provides that a party may raise a claim of "manifest error affecting a constitutional right" for the first time in the appellate court. It is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time.

Id. at 171.

There are distinctions between appeals in civil and criminal matters that would support expanding the boundaries of hearing new issues on appeal in the former but not the latter. Criminal matters are different than civil matters. Attempts to raise new claims not reviewed below should be disfavored.

In a criminal matter, the defendant retains the ability to bring a personal restraint petition raising constitutional issues after appeal. The issue will not evade review unless this court grants his petition.

Moreover, the personal restraint petition is the only vehicle to resolve claims that turn on facts outside the appellate record. The need for additional facts is often presented in a claim of ineffective assistance with the need to examine counsel's reasons for his or her actions which may not be readily apparent from the record. State v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981) ("A personal restart petition is the appropriate procedure to raise a claim of ineffectiveness of counsel based on matters outside the record on appeal.")

2. The Defendant's Claim He Was Denied Effective Assistance of Counsel Is Without Merit.

Even if the court were willing to entertain this late raised claim, the defendant was not denied effective

assistance of counsel and the petition should not be granted otherwise.

To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Grier, 171 Wn.2d 17, 32-38, 246 P.3d 1260 (2011). As detailed below, the defendant is unable to meet his burden as to either prong.

a. Counsel was not deficient

In reviewing a defendant's claim of ineffectiveness, a court starts with the "strong presumption" that counsel was not deficient. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). This presumption can be rebutted where a defendant is able to show that his or her "attorney's representation was unreasonable under prevailing professional norms." Id. at 673, quoting Kimmelman v.

Morrison, 477 U.S. 36, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Prevailing professional norms and reasonableness in light of such does not involve an examination as to whether the trial attorney failed to pursue at trial, or foreclosed the ability to pursue on appeal, "novel legal theories or arguments." State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) citing Anderson v. United States, 393 F.3d 749, 754 (8th Cir. 2005); see also, State v. Cushman, 4 Wn. App. 2d 1027, *9 (2018) (Unpublished).[2] The constitution guarantees the defendant a right to *competent* representation under professional norms, but it "does not insure that defense counsel will recognize ... every conceivable constitutional claim." Engle v. Isaac, 456 U.S. 107, 134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

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[2] Pursuant to GR 14.1, the State cites this unpublished opinion solely for its persuasive value.

In this matter, appellate counsel's claim, foreclosed by trial counsel's invited error, depends on a novel theory that Washington's due process "sufficiency of the evidence" protections extend to disjunctive clauses in the definitions of attempted crimes in the jury instructions. As the Court of appeals noted, this theory was "by no means clearly established under the law." Slip. Op. at 5-6. The State believes this is, perhaps, understatement. There is no prior authority for this claim, and what jurisprudence exists runs directly contrary as detailed in the State's Amended Response Brief at 75-81. It cannot be said that trial counsel's submission of a jury instruction that foreclosed this heretofore unrecognized claim on appeal was "unreasonable under prevailing professional norms."

The defendant attempts to shift the standard by arguing that defense counsel was not required to submit any instructions, so as a result trial counsel's instruction was not based on a "legitimate strategic decision" and

must have been ineffective because there was no tactical benefit in his actions. But constitutionally deficient performance does not lie simply because a given action or decision of counsel does not have articulable "legitimate strategic" benefit to a defendant. Deficient performance is a matter of harm and is judged against prevailing processional norms.

> The question here is not whether counsel's choice ... was an intelligent or effective decision, but rather whether his decision was an unreasonable one only an incompetent attorney would adopt.

Anderson, 393 F.3d at 754.

It was not unreasonable for defense counsel to submit jury instructions consistent with the prevailing present norms as trial counsel submitted in this case. Washington Courts have not held mere submission of lawful instruction to be deficient. This is so even where an instruction consistent with the law might otherwise preclude appellate attorney from later lodging a novel

argument to the contrary. There is *always* a novel argument that could be tendered. If appellate counsel would not be deemed ineffective for failing to raise this argument on appeal, trial counsel cannot be deemed ineffective simply because he took action that foreclosed this appellate argument.

b. Defendant was not prejudiced by the claimed deficiency.

In addition to the requirement that a defendant alleging constitutional ineffectiveness show that his counsel acted deficiently, a defendant must also show that the claimed deficient conduct resulted in actual prejudice to him or her. Grier, 171Wn.2d at 32-33.

In this matter, the prejudice would presumably be the possibility that this Court would have accepted his appellate argument that the defendant's due process guarantee of substantial evidence extends under the Washington Constitution to each disjunctive clause in the

definition of a completed crime when the defendant is actually charged with an *attempt* to commit that crime, and that he suffered because a jury returned a verdict of guilty without sufficient assurance of that. Am. Br. of Resp't at 76-77.

The defendant's novel claim is not consistent with Washington jurisprudence, and would properly have been rejected, even if he were not foreclosed from pursuing it on appeal by the invited error doctrine. Am. Br. of Resp't at 75-86. Defendant cannot prove he would have suffered the prejudice he hypothecates.

C. DEFENDANT'S LATE-RAISED CLAIM THAT INSUFFICIENT EVIDENCE SUPPORTED THE JURY'S FIREARM ENHANCMENT DETERMINATION IS WITHOUT MERIT UNDER CLEARLY ESTABLISHED PRECEDENT AND THE FACTS OF THE CASE.

The defendant did not raise his claim of error regarding the firearm enhancement in either his opening or reply briefing. The first time this claim of error was brought to Court of Appeals attention was the day prior to

scheduled oral argument. The Court of Appeals denied this attempt and did not consider this claim in reaching its decision. The defendant later included this claim in his motion for reconsideration. The court declined review.

This court should similarly decline. The defendant, as above, retains the ability to bring this claim by way of personal restraint petition. The defendant's claim is also without merit under established precedent. To prove a deadly weapon firearm enhancement, the State must show:

> (1) that a firearm was easily accessible and readily available for offensive or defense purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime.

State v. Sassen Van Elsloo, 191 Wn.2d 798, 826, 425 P.3d 807 (2018).

The nexus requirement is legally satisfied where a defendant is in actual possession of the firearm. State v. Hernandez, 172 Wn. App. 537, 544-45, 290 P.3d 1052

(2012). Whenever a firearm enhancement is based on constructive possession of the weapon, however, there must be an additional showing of a nexus. State v. Brown, 162 Wn.2d 422, 431–432, 173 P.3d 245 (2007); State v. Schelin, 147 Wn.2d 562, 567–568, 55 P.3d 632 (2002).

Legally, the crime of attempted *first degree* robbery is not completed at the moment of use or threatened use of force but extends though the perpetrator's actions that occur in "immediate flight therefrom." Am. Br. of Resp't at 81-84. The jury was certainly entitled to find that the defendant was in actual possession of the firearm during his flight from the scene after attempting to rob the defendant and after his application of force by using the Taser device.

Nonetheless, even assuming the defendant's claim as to the law is correct, the defendant is factually incorrect. The evidence before the jury was

unambiguously sufficient to find the defendant was in actual possession of the firearm *prior to and during* his application of force to the victim with the taser. Indeed, logically, no other conclusion is possible based on the evidence.

This is seen in careful examination of the video of the defendant's actions at the car wash, Ex. 1. It shows that immediately after application of the taser device, the defendant circled the vacuum cleaner stand and drew the firearm from somewhere on his person. While the firearm only became *visible* on the video once he returned and adopted his shooter's stance at the rear of the victim's vehicle (seven seconds after application of the taser), it was necessarily *on his person* earlier, prior to and during his application of force via the taser, given he never left the scene to retrieve it from anywhere else. (The relevant Ex. 1 timestamps are detailed in the Am. Br. of Resp't at 8-11, to include fn.3.)

In short, the defendant is thus incorrect to state that the defendant "retrieved" the firearm when he shot the victim. He was in actual physical possession of the firearm all along. He merely "drew" the firearm, making it visible, after the application of the taser, immediately prior to fleeing the scene.

Given the defendant was in actual possession of the firearm from the start from the start of victim contact, sufficient evidence clearly supports the jury determination even accepting the defendant's legal claims.

D. DEFENDANT'S CLAIM THAT HIS FIRST DEGREE ASSAULT AND ATTEMPTED FIRST DEGREE ROBBERY CONVICTIONS CONSTITUTE THE SAME CRIMINAL CONDUCT IS CONTRARY TO THE EXISTING LAW CORRECTLY APPLIED BY THE COURT OF APPEALS GIVEN THE FACTS BEFORE THE COURT.

The Court of Appeals correctly rejected the defendant's claims underlying his petition for review on this issue by application of the clear precedent to the

relevant facts. Respondent relies on the opinion and his briefing on this point.

E. DEFENDANT'S CLAIM THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AND PRESENT A DEFENSE WAS CORRECTLY REJECTED BY THE COURT OF APPEALS UNDER CLEARLY ESTABLISHED PRECEDENT AND THE FACTS OF THE CASE.

The Court of Appeals correctly rejected the defendant's claims underlying his petition for review on this issue by application of the clear precedent to the relevant facts. Respondent relies on the opinion and his briefing on this point.

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IV. CONCLUSION

The petition should be denied.

This brief contains 3933 words (exclusive of appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and pictorial images).

Respectfully submitted on July 20, 2022.

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Snohomish County Prosecuting Attorney

By: _____
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, TONY JOSEPH WILLIAMS, Petitioner.	No. 101031-1 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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SIGNED IN SNOHOMISH, WASHINGTON, THIS 20th DAY OF JULY, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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