

21511-4

61377-4

No. 61377-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID LAVON MELTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2009 NOV 15 11:11 AM
FILED
COURT APPEALS DIV. #1
STATE OF WASHINGTON

TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

 1. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING A POLICE DETECTIVE TO TESTIFY THAT THE STATE'S WITNESSES WERE RELUCTANT TO TESTIFY..... 1

 2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE OTHER OCCUPANTS OF THE EXPEDITION IDENTIFIED MELTON AS THE SHOOTER..... 8

 3. THE TRIAL COURT COMMENTED ON THE EVIDENCE, PREJUDICING MELTON, BY DIRECTING THE JURY TO RE-READ THE ACCOMPLICE LIABILITY INSTRUCTION 11

B. CONCLUSION..... 16

TABLE OF AUTHORITIES

Washington Cases

<u>De Wald v. Ingle</u> , 31 Wash. 616, 72 P. 469 (1903)	10
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	12
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	12
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997) 1, 2, 4, 7	
<u>State v. Boyer</u> , 91 Wn.2d 342, 588 P.2d 1151 (1979).....	13
<u>State v. Davis</u> , 116 Wn. App. 81, 64 P.3d 661 (2003), <u>aff'd</u> , 154 Wn.2d 291, 111 P.3d 844 (2005), <u>aff'd</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	5
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	8
<u>State v. Grant</u> , 83 Wn. App. 98, 920 P.2d 609 (1996).....	3, 4
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	11
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008)	3, 4
<u>State v. Smith</u> , 122 Wn. App. 294, 93 P.3d 206 (2004).....	13
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	12

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING A POLICE DETECTIVE TO TESTIFY THAT THE STATE'S WITNESSES WERE RELUCTANT TO TESTIFY

The State contends the trial court did not abuse its discretion in admitting testimony from Detective Mooney that some of the witnesses in the case were reluctant to testify due to a fear of retaliation or being labeled a snitch and that it is common in gang cases for witnesses to be reluctant to testify for those reasons. The State concedes the testimony was not admissible as substantive evidence of guilt. The State has not identified any other proper and relevant basis to admit the evidence.

In State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997), the Supreme Court recognized that testimony regarding a witness's fear or reluctance to testify can be highly prejudicial, because it can lead jurors to conclude the witness is fearful of the defendant. Before such testimony is admissible as substantive evidence of guilt, therefore, the State must establish a causal connection between the defendant's actions and the witness's reluctance to testify. Id. Alternatively, the evidence may be relevant and admissible to bolster the witness's credibility, but only if the defendant has attacked the witness's credibility. Id. at 401.

Because evidence about a witness's reluctance to testify is potentially highly prejudicial, any error in admitting the evidence is not harmless if the witness's testimony is central to the case and the erroneously admitted evidence implies the witness is afraid of the defendant. Id. at 404-05.

Here, Detective Mooney testified that almost all of the eyewitnesses who testified were reluctant to testify; that some of those individuals told him specifically they were reluctant to testify due to a fear of retaliation and being labeled a snitch; and that it was common in gang cases for witnesses to be reluctant to testify for those reasons. 12/13/07RP 627-32. Contrary to the State's argument, Bourgeois is directly on point.¹ Bourgeois establishes that: (1) Detective Mooney's testimony was not admissible as substantive evidence of guilt, because the State did not demonstrate that Melton caused the witnesses' reluctance to testify; (2) the testimony was not admissible to bolster the witnesses' credibility, because Melton did not attack their credibility; and (3) any error in admitting the evidence was not harmless, because the

¹ Also contrary to the State's argument, the detective's testimony about why the witnesses were likely reluctant to testify was not "brief" but instead involved extensive questioning by the prosecutor, covering two pages of transcript and several objections, including a standing objection, by defense counsel. 12/13/07RP 631-32.

witnesses' testimonies were central to the case and the improperly admitted evidence suggested the witnesses were afraid of Melton.

The State contends the detective's testimony about the witnesses' reluctance to testify was admissible to explain why some of the witnesses recanted their earlier statements to police. SRB at 22. But the State cites no authority for this argument.

In cases of domestic violence, courts have occasionally allowed the State to introduce evidence of a defendant's prior acts of domestic violence toward the victim in order to help the jury assess the victim's credibility at trial and understand why the victim told conflicting stories. State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). In Grant, the court explained, "[t]he jury was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Grant, 83 Wn. App. at 108. But in those cases, the State introduced concrete evidence of actual acts of violence between the defendant and the victim. Magers, 164 Wn.2d at 184 (evidence that Magers was previously arrested for acts of domestic violence against same victim); Grant, 83 Wn. App. at 104 (evidence of Grant's prior assaults against same victim). In

other words, the State was *not* permitted to introduce expert testimony about the dynamics of domestic violence relationships in the absence of evidence that the defendant and victim had an actual history of violence between them.

The holdings of Magers and Grant are consistent with Bourgeois. Again, Bourgeois holds that evidence of a witness's reluctance or fear of testifying is not admissible unless the State shows the defendant *caused* the witness's reluctance or fear, or the defendant has specifically attacked the witness's credibility. Bourgeois, 133 Wn.2d at 400-01. In Magers and Grant, the courts allowed evidence of prior acts of domestic violence of the defendants against the victims in order to assist the jury in judging the victims' credibility. Consistent with Bourgeois, the evidence showed the defendants' actions *caused* the victims to recant. The jury was not permitted to speculate about the dynamics of domestic violence relationships and their effect on a recanting victim in the absence of evidence of an actual history of violence between the defendant and the victim.

Here, in contrast, the jury was permitted to speculate about typical gang cases and the possible causes of the witnesses' recantations in the absence of any evidence showing that Melton's

actions caused the witnesses to recant. The trial court's ruling therefore conflicts with Bourgeois and was erroneous.

Finally, the State argues the detective's testimony about the reluctance of witnesses in gang cases to testify was admissible to explain why some of the witnesses who did *not* testify were absent from trial. According to the State, the evidence was admissible to overcome the likely presumption in the jurors' minds that the witnesses were absent because their testimonies would be unfavorable to the State, which might justify a "missing witness" instruction. SRB at 21-22. But a defendant is not entitled to a "missing witness" instruction, and the jury is not permitted to infer that a State witness is absent because his testimony would be unfavorable to the State, where the witness's absence is satisfactorily explained at trial and the record shows the State used all available means to locate the witness. State v. Davis, 116 Wn. App. 81, 88, 64 P.3d 661 (2003), aff'd, 154 Wn.2d 291, 111 P.3d 844 (2005), aff'd, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Here, a missing witness instruction would not be justified, because the witnesses' absence was satisfactorily explained at trial. Detective Mooney testified extensively that he used all means

at his disposal to locate the missing witnesses. 12/13/07RP 627-31. He went to the witnesses' last known addresses, contacted family members, and combed the streets looking for the witnesses. 12/13/07RP 627-28. He spoke to Jeffries's parents, who were uncooperative and "very rude" and made clear their son would not testify. 12/13/07RP 629. He could not find Degtjar, who had "disappeared" and no one would help find him. 12/13/07RP 629-30. Likewise, he could not find Terry Black or Carlos Pace. 12/13/07RP 630-31.

Consistent with the detective's testimony that he used all available means to locate the missing witnesses, Melton did not request a missing witness instruction or argue to the jury that the State failed to call the witnesses because their testimonies would be unfavorable. Because the jury was not permitted to infer the witnesses' absence was due to their unfavorable testimony, and Melton was not entitled to a missing witness instruction, the State was not permitted to introduce evidence to overcome any missing witness presumption.

As stated, evidence showing a witness is reluctant to testify is highly prejudicial in a criminal case, and any error in admitting the evidence is not harmless if the witness's testimony is central to the

case and the erroneously admitted evidence implies the witness is afraid of the defendant. Bourgeois, 133 Wn.2d at 404-05. Here, Detective Mooney testified he had great difficulty locating all of the witnesses in the Expedition and persuading them to testify.

12/13/07RP 627-30. Detective Mooney also had difficulty locating two other eyewitnesses who were at the bus stop: Terry Black and Carlos Pace. 12/13/07RP 630-31. Those witnesses' testimonies were obviously central to the case.

In addition, the detective's testimony that the witnesses were reluctant to testify because this was a gang case implied the witnesses were afraid of Melton. The testimony implied the witnesses were so afraid of Melton they were willing to hinder a criminal prosecution and even to recant their earlier testimonial statements to police. The prosecutor even urged the jury in closing argument to draw that conclusion:

Let's talk about the credibility of [Melton's] friends in the car. We heard from Detective Cobane about these men growing up in the culture of gangs. We saw that in front of us. We saw that in Jaron Cox and Dimitris Tinsley and Marcus Holmes. We saw that as witnesses who had been cooperative and giving full statements to the police came before us, all of a sudden as they're facing the defendant in a courtroom and asked about the defendant's actions on that night, they started to back off a little bit, they started to change. They had to be reminded of what happened, what was in their statements. And half the

time, uh, the cops put that in there, that's not what I said, the cops made it up. Why would they do that? Well, the defendant gave us the perfect answer yesterday, because the way of the street is to not snitch, to not testify against each other.

12/18/07RP 823-24. Later, the prosecutor continued, "Look at the prejudice and the interest of his friends on the stand, given the code of not snitching on one another. Compare their testimony to the statements they gave police." 12/18/07RP 825.

Under these circumstances, the error in admitting the testimony was not harmless.

2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE OTHER OCCUPANTS OF THE EXPEDITION IDENTIFIED MELTON AS THE SHOOTER

The State concedes Detective Solan's testimony that the other young men in the Expedition identified Melton as the shooter would ordinarily be inadmissible hearsay and in violation of the Confrontation Clause. SRB at 27. But the State contends the trial court properly ruled defense counsel opened the door to the testimony.

As argued in the opening brief, a party examining a witness does not open the door to inadmissible testimony if the witness's answers are "volunteered or unresponsive" to the question asked. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Here,

defense counsel asked the detective on cross-examination "if anyone at the scene of the arrest provided you with information as to who was identified by the witnesses transported to the show up?" 12/10/07RP 179. The detective answered, "the suspects pointed to Mr. Melton as the shooter within the vehicle. The witnesses." 12/10/07RP 179. That answer was not responsive to the question posed. Therefore, counsel did not "open the door" to the detective's later repeated statements on redirect that all of the other suspects in the vehicle identified Mr. Melton as the sole shooter. 12/10/07RP 193, 197, 204.

The State contends Melton waived the right to object to the detective's improper testimony by not renewing his first objection to it. On redirect, the prosecutor asked the detective how he came to identify Melton as the shooter, and the detective responded the other suspects in the vehicle "identified him as being the sole shooter." 12/10/07RP 192. Defense counsel objected on the basis of hearsay, which the trial court overruled finding the door was opened. 12/10/07RP 192. The prosecutor continued to pursue the same line of inquiry and the detective further testified that "[t]he other suspects in the vehicle identified Mr. Melton as the shooter." 12/10/07RP 193. A short time later, the detective again stated the

suspects in the car said Melton was the sole shooter. 12/10/07RP 197. On further redirect, the detective again repeated, Melton was identified as the shooter "[b]y six people and himself." 12/10/07RP 204. Defense counsel did not object to these last three statements.

But once a party has objected at trial to the admission of testimony and the objection has been overruled, and any further objection to similar questioning would serve only to retard the progress of the trial, the party need not renew the objection in order to preserve the right to raise the issue on appeal. De Wald v. Ingle, 31 Wash. 616, 626, 72 P. 469 (1903).

Finally, the State contends that any error in admitting the testimony was harmless, because the testimony was consistent with the witnesses' statements to police in which they identified Melton as the shooter. SRB at 33-34. But as the State recognizes, the witnesses' statements to police were admitted not as substantive evidence of guilt but only as impeachment evidence, and the jury was instructed to that effect. 12/12/07RP 426-27; CP 81. Thus, the State cannot rely upon that evidence to argue that the erroneous admission of the detective's testimony was harmless.

As a result of the trial court's erroneous ruling, the detective was permitted to testify repeatedly that all of the other suspects in

the Expedition identified Melton to police as the shooter. Moreover, the jury was permitted to rely upon that testimony as substantive evidence of Melton's guilt. But that testimony was inconsistent with the witnesses' testimonies at trial—none of the other occupants of the Expedition who testified at trial identified Melton as the shooter. See 12/06/07RP 50, 59; 12/12/07RP 416; 12/13/07RP 550; 12/17/07RP 677. Thus, the detective's testimony not only amounted to highly prejudicial evidence of Melton's guilt, but also seriously undermined the credibility of the witnesses who testified. As argued more extensively in the opening brief, given that the State's case rested heavily on the witnesses' testimonies, the error in admitting Detective Solan's improper testimony was not harmless.

3. THE TRIAL COURT COMMENTED ON THE EVIDENCE, PREJUDICING MELTON, BY DIRECTING THE JURY TO RE-READ THE ACCOMPLICE LIABILITY INSTRUCTION

First, the State contends Melton may not raise this issue for the first time on appeal, because it is not a manifest error affecting a constitutional right. SRB at 36-37.

But the Supreme Court already addressed and rejected that argument. In State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006), the court definitively held that an alleged error regarding a trial

court's comment on the evidence may be raised for the first time on appeal because it "'invades a fundamental right of the accused.'" Id. at 719 (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The court explained,

[b]ecause judicial comments on the evidence are explicitly prohibited by the Washington Constitution, we conclude that Levy raises an issue involving a manifest constitutional error, and his claim may be heard on appeal even though he did not object to the instructions at trial.

Id. at 719-20.

Second, the State argues that Melton is precluded from raising the issue because he invited the error. SRB at 37-38. The State contends Melton materially contributed to the error through acquiescence by failing to object to the court's proposed response to the jury's inquiry. SRB at 37-38.

But a party's mere failure to object to a trial court's proposed jury instruction does not amount to "invited error." In the context of an erroneous jury instruction, the Supreme Court has applied the invited error doctrine only where the appellant *requested* the 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. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (defense counsel *requested* instructions 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).

The rule applying the invited error doctrine only where the erroneous instruction at issue was proposed by the defense has been consistent over time. See, e.g., State v. Patu, 147 Wn.2d 717, 719, 721, 58 P.3d 273 (2002) (applying invited error doctrine where defense counsel proposed instruction he later challenged); State v. Boyer, 91 Wn.2d 342, 244-45, 588 P.2d 1151 (1979) (instruction at issue was one defendant himself proposed). The rule as stated in Boyer is well settled and has been regularly followed by courts in this state. Henderson, 114 Wn.2d at 870-71 (and cases cited therein).

Third, the State contends the trial court's erroneous instruction did not amount to a comment on the evidence. But by directing the jury to re-read the accomplice liability instruction in response to the jury's request to review Shawn Webster's

testimony, the trial court implicitly gave its imprimatur to the evidence of accomplice liability. Webster had testified he heard several shots come from the Expedition but he could not see who was shooting or how many people were shooting. 12/13/07RP 575, 589. The trial court's instruction suggested to the jury it need not resolve how many shooters there were, because Melton was guilty as an accomplice.

Contrary to the State's argument, accomplice liability was a contested issue in the case. The testimony of several witnesses cast doubt on the State's theory that Melton was either the sole shooter or the "ringleader" of the group. Three guns were recovered from the Expedition. 12/10/07RP 225, 227, 236-37, 240. Each gun had missing rounds. 12/10/07RP 265. As stated above, none of the young men riding in the Expedition who testified at trial identified Melton as the shooter. They also generally denied that Melton was the instigator or ringleader of the group. Tinsley testified that as they drove near the bus stop, he heard "a whole bunch of commotion, like who was that right there, that's south end cats, and then, I don't know, and let's go back around." 12/06/07RP 49. He testified he did not know who made those statements. 12/06/07RP 69. Jaron Cox testified he did not hear

Melton talk about getting revenge or shooting at the people at the bus stop. 12/12/07RP 425-29. Jeffrey Harris testified he slept through the incident. 12/13/07RP 550-51. Marcus Holmes testified that all of the young men in the car, not just Melton, were angry and wanted to go to the South End, where they assumed the person who shot at their car came from. 12/17/07RP 671-73. He further testified that after the shooting, all of the young men wanted to flee and were telling each other not to say anything. 12/17/07RP 680-81. When they left Franklin High School, both Melton and Tinsley told him to go to the South End "to find these niggers" who had shot at them. 12/17/07RP 691. Similarly, Melton testified that all of the young men in the car wanted to go to the South End. 12/17/07RP 731. He heard other shots fired from inside the car and he did not know who fired them. 12/17/07RP 733, 747, 750-51.

Moreover, testimony of witnesses at the scene suggested there was more than one shooter. Jeremiah Butler testified he saw a gun sticking out of the front passenger window, not the rear passenger window where Melton was sitting. 12/06/07RP 111, 115. Joseph Williams testified he thought that probably two guns were shooting, because the five to six shots he heard came in quick succession. 12/06/07RP 143. Officer Washington testified that two

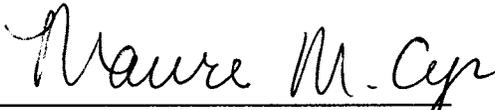
witnesses at the scene told him that shots were fired out of both passenger windows of the Expedition. 12/11/07RP 349, 357.

Because the record does not affirmatively show the trial court's comment on the evidence of accomplice liability did not prejudice Melton, the conviction must be reversed.

B. CONCLUSION

Regarding the last three issues raised in the opening brief, Melton relies upon the arguments made in that brief. For the reasons stated here and in the opening brief, Melton's conviction must be reversed and remanded for a new trial. In the alternative, his multiple firearm enhancements must be vacated.

Respectfully submitted this 3rd day of November, 2009.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 61377-4-I
v.)	
)	
DAVID MELTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF NOVEMBER, 2009, 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:

<p>[X] STEPHEN HOBBS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] DAVID MELTON 315656 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV -3 PM 4:43

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF NOVEMBER, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710