

68764-6

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NO. 68764-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

EMILO HERNANDEZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

The defendant was convicted of First-Degree Rape and First-Degree Robbery. His sole claim on appeal is his assertion that it is improper for a “to convict” jury instruction to state that the jury has a duty to return a guilty verdict if it finds that each element of a crime has been proven beyond a reasonable doubt.

Should this Court reject the defendant’s claim because he proposed the very language he now challenges on appeal, and thus, under the invited error doctrine, he is barred from raising the issue on appeal?

Should this Court reject the defendant’s argument because this case is governed by State v. Meggyesy,<sup>1</sup> a case decided 15 years ago, and the defendant has failed to prove that the holding of Meggyesy is “incorrect and harmful” as required by In re Stranger Creek,<sup>2</sup> the required standard to overturn precedent?

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<sup>1</sup> 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

<sup>2</sup> 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with Rape in the First Degree and Robbery in the First Degree. CP 10-11. A jury found the defendant guilty as charged. CP 167. The defendant received a standard range minimum term sentence of 160 months on the rape charge, consecutive to a standard range sentence of 61 months on the robbery charge. CP 226-39.

**2. THE JURY INSTRUCTIONS**

The challenged "to convict" instructions are as follows:

To convict the defendant of the crime of rape in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 28, 2010, the defendant engaged in sexual intercourse with X.S.; and

(2) That the sexual intercourse was by forcible compulsion; and

(3) That the defendant inflicted serious physical injury; and

(4) That any of these acts occurred in the State of Washington.

**If you find from the evidence that each of these elements have been proved beyond a**

**reasonable doubt, then it will be your duty to return a verdict of guilty.**

On the other hand, if, after weighing all the elements, you have a reasonable doubt as to any one of these elements (1), (2) (3) or (4), then it will be your duty to return a verdict of not guilty as to Count I.

CP 179 (emphasis added). The highlighted language is the language the defendant challenges on appeal. The “to convict” instruction for count II, robbery in the first degree, contains the elements of that crime and the exact same language as highlighted above. CP 187.

### **3. THE DEFENDANT’S PROPOSED “TO CONVICT” INSTRUCTIONS**

As to count I, the defendant proposed the following “to convict” instruction:

To convict the defendant of the crime of rape in the first degree, as charged in Count I, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 28, 2010, the defendant engaged in sexual intercourse with [XS]; and

(2) That the sexual intercourse was by forcible compulsion; and

(3) That the defendant inflicted serious physical injury; and

(4) That any of these acts occurred in the State of Washington.

**If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.**

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 148 (emphasis added). The highlighted language is word-for-word identical to the language in the “to convict” instructions given by the court. The defense proposed “to convict” instruction for count II, robbery in the first degree, contains the elements of that crime and the exact same language as highlighted above. CP 152.

C. **ARGUMENT**

**THE DEFENDANT HAS FAILED TO SHOW THAT ALL OF THE WPIC “TO CONVICT” JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.**

The defendant contends that language in the “to convict” jury instructions provided in his case rendered the instructions unconstitutional. Specifically, the defendant contends that the following language is a misstatement of the law:

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty...***

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty...

CP 179, 187 (emphasis added). The language he complains is included in every “to convict” WPIC jury instruction. See e.g., WPIC 26.02, 26.04, 26.06. This same argument has been rejected in State v. Brown,<sup>3</sup> State v. Bonisisio,<sup>4</sup> and State v. Meggyesy, supra. The Supreme Court has repeatedly denied review. Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, 77 Wn.2d at 653. The defendant has failed to make any new arguments sufficient to meet this burden. In addition, the defendant’s claim is not properly before this Court.

**1. The Invited Error Doctrine Precludes Appellate Review.**

The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). With respect to the application of the doctrine to jury instructions, the Supreme

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<sup>3</sup> 130 Wn. App. 767, 124 P.3d 663 (2005).

<sup>4</sup> 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

Court has held that “[a] party may not request an instruction and later claim on appeal that the requested instruction was given.” State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant’s proposed instruction. State v. Neher, 112 Wn.2d 347, 352-53, 770 P.2d 1040 (1989). This is true even when the error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (citing Studd, 137 Wn.2d at 546-47). In Patu, the “to convict” instructions were actually missing an element of the crime, but the Supreme Court nonetheless applied the invited error doctrine. Patu, 147 Wn.2d at 721. In Studd, multi defendants in separate case appealed from defective self-defense instructions. Despite finding the error was of constitutional magnitude and presumed prejudicial, the Supreme Court applied the invited error doctrine and denied relief to those defendants who had proposed the erroneous instruction and had not tried to remedy the instruction before the trial court. Studd, at 546-47.

Here, the defendant proposed “to convict” instructions with the exact same language he now complains. Further, although the court and parties discussed the jury instructions multiple times, the

defendant did not object to the instruction given—the one he proposed. See 8RP<sup>5</sup> 75-77; 9RP 3, 165; 10RP 4-6, 123-31; 11RP 3-4. Thus, in light of the fact that the defendant actually proposed the instructions he now complains, the substance of his argument is irrelevant, he invited any error that he now complains and under the invited error doctrine, his claim must be denied.

**2. The Defendant's Claim That Prior Case Law Is Incorrect Is Not Persuasive.**

In Meggyesy, the defendant made the same argument as made here--that the language that the jury had a duty to convict if they found beyond a reasonable doubt each element of the crime had been proven, violated the defendant's "right to trial" under the state and federal constitutions. This Court rejected this argument. In short, the defendant claims that this Court got it wrong. Specifically, he argues, like Meggyesy did, that under the state constitution, a different result is required.

In Meggyesy, this Court first noted that the challenged language appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the

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<sup>5</sup> The verbatim report of proceedings is cited as follows: 1RP—3/19/12, 2RP—3/20/12, 3RP—3/21/12, 4RP—3/22/12, 5RP—3/26/12, 6RP—3/27/12, 7RP—3/28/12, 8RP—3/29/12, 9RP—4/2/12, 10RP—4/3/12, 11RP—4/4/12, 12RP—4/5/12, 13RP—5/4/12.

offenses beyond a reasonable doubt. Meggyesy, 90 Wn. App. at 699. The Court acknowledged that with general verdicts, juries do have the power to acquit against the evidence. Meggyesy, at 700 (citing United States v. Simpson, 460 F.2d 515, 519 (9<sup>th</sup> Cir. 1972)). But the Court noted that under the federal constitution, the circuit courts have clearly held that while jury nullification is always possible, no case has held that an accused is entitled to a jury nullification instruction. Meggyesy, at 700. The defendant does not cite contrary authority here.

Meggyesy then argued that under the state constitution, the result must be different. This Court, followed by Brown, supra; and Bonisisio, supra; all rejected this argument.

In determining whether the state constitution provides broader protection in a certain area, the court considers the Gunwall factors.<sup>6</sup> Under Gunwall, the court is guided in deciding whether to conduct an independent analysis under the state constitution based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law,

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<sup>6</sup> Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

(5) structural differences, and (6) matters of particular state or local concern. Meggyesy, at 701.

As to the first Gunwall factor, there is nothing in the language of article I, section 21 that addresses the particular concern herein. See Meggyesy, at 701. In pertinent part, article I, section 21 simply provides that “[t]he right to trial by jury shall remain inviolate.”

As to the second Gunwall factor, the defendant seems to agree that while the language of article I, section 21 and the sixth amendment is different, nothing in the language of either provision-- or the difference in language--addresses the particular concern herein. See Meggyesy, at 701-02. In pertinent part, the sixth amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” In State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), the Supreme Court held that the language of the sixth amendment and article I, section 22 is substantially similar.

The third Gunwall factor, state constitutional history, also does not support an argument that the state constitution provides a

broader right to trial by jury than does the federal right. Meggyesy, at 702. The Supreme Court has previously held that “the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right.” Brown, 132 Wn.2d at 596.

In Meggyesy, this Court found that the fourth factor, preexisting state law, “does not aid the appellants.” Meggyesy, at 702. This Court noted that the Supreme Court has held that article I, section 21 preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted. Id. This Court found that Meggyesy had provided no pre-constitutional case establishing a rule prohibiting the challenged language used herein. The defendant here claims this is incorrect and cites to Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885). This claim is of no moment.

Meggyesy cited to Leonard as well, and the Court properly considered the case for its limited value. Leonard was convicted of murder and sentenced to death. He challenged a great number of the jury instructions provided in his case on a number of grounds-- none of which, the Meggyesy court noted, involved the legal challenge made by Meggyesy (or herein by the defendant).

However, the defendant here argues that the point of citing Leonard is that one of the instructions in Leonard contained the following language, “If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty...” Thus, according to the defendant, this shows the prevailing practice at the time the state constitution was ratified. This argument fails for a variety of reasons.

First, all five jury instructions challenged in Leonard were general instructions dealing with the burden of proof and defenses, and every single instruction was found to misstate the law. It is abundantly clear from the opinion, that the instructions were crafted by the trial court (or trial counsel) and were not a type of standard jury instruction used in other cases such as WPIC instructions. If they were standard instructions, then every single case during this time period would have been reversed.

Second, there is nothing in the Leonard opinion, or anything else the defendant cites herein, that demonstrates the actual standard practice at the time in regards to the issue he raises here.

And third, the defendant does not address State v. Wilson,<sup>7</sup> discussed in Meggyesy. Wilson complained of an instruction that

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<sup>7</sup> 9 Wash. 16, 36 P. 967 (1894).

stated that if the jury found the elements of the crime, the jury “must” find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court stated that taking all the language in context, “it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law ***made it their duty*** to find him guilty.” Wilson, at 21 (emphasis added). The Court held that there was no instructional error. Id. The defendant’s argument that this Court erred in regards to the fourth factor is not persuasive.

As to the fifth factor, the differences in the structures of the federal and state constitutions, the State conceded in Meggyesy that this factor always supports an independent analysis. Meggyesy, at 703.

As to the sixth, and final Gunwall factor, matters of particular state or local concern, while criminal law is a matter of state and local concern, there is nothing about this concern that would suggest that there is any different standard in regards to the issue at hand than any other area of the country or the federal court system--a jurisdiction that as already noted has rejected the argument the defendant makes here.

This argument has been made multiple times, in Meggyesy, Brown, and Bonisisio, if not other cases. The Supreme Court has denied review of this issue at least two times (Meggyesy, and Bonisisio). Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, supra. The defendant has failed to make any new arguments sufficient to meet this burden.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 22 day of May, 2013.

Respectfully submitted,

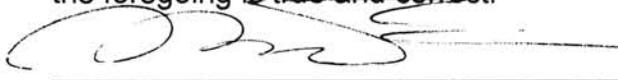
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HERNANDEZ, Cause No. 68764-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



\_\_\_\_\_  
Name  
Done in Seattle, Washington

05/21/13  
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Date