

NO. 69851-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY BRINKLEY,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

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REPLY BRIEF OF APPELLANT

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A. ISSUE IN REPLY

Did defense counsel's objection to the wrong prong and subsequent misreading of the charging document constitute invited error?

B. ARGUMENT IN REPLY

DEFENSE COUNSEL DID NOT INVITE THE ERROR.

The State argues Brinkley's conviction for robbery must stand because defense counsel invited the court to instruct the jury on an uncharged alternative means. Brief of Respondent at 11-13. The State is mistaken because counsel's actions did not constitute "invited error."

Under the invited error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). For the doctrine to apply, the defendant must have "materially contribute[d]" to the error "by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Hockaday, 144 Wn. App. 918, 924 n. 5, 184 P.3d 1273 (2008). Washington courts hold that proposing an erroneous jury instruction invites error, precluding relief on appeal. E.g., State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Here, however, defense counsel did not draft the charging document, nor did he propose the erroneous instruction. It is clear from the record that defense counsel was simply objecting – somewhat

inartfully – to instructing the jury on another means, based on an argument that the State had not pursued that theory in its presentation of the evidence. Brief of Appellant at 11 n. 4, citing 4RP 362-63 (transcript pages attached as an Appendix).

The State attributes ill intent to counsel's actions. BOR at 13. But surely such a plan could be more efficiently executed than by encouraging the court to compare the charging document and instruction, side-by-side. On balance, rather than contributing to error, counsel's actions offered the court an additional opportunity to correct the error. Despite counsel's inartful statements, counsel did not "materially contribute" to the error in this case. Hockaday, 144 Wn. App. at 924 n. 5.

In summary, the trial court erred in instructing the jury on an uncharged alternative means. Because the jury may have convicted Mr. Brinkley based on that uncharged means, the error was prejudicial. State v. Brewczynski, 173 Wn. App. 541, 549-50, 294 P.3d 825 (2013).

C. CONCLUSION

For the reasons set forth above and in the appellant's opening brief, Brinkley's robbery conviction should be reversed because the jury was instructed as to an uncharged means. Alternatively, for the reasons set forth in his opening brief, the assault conviction should be vacated.

DATED this 24<sup>TH</sup> day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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# **APPENDIX**

1 MS. WETMORE: None from the State.

2 MR. STEPHENS: None from the defense.

3 THE COURT: No. 7 is WPIC 37.02. It's been modified in  
4 accordance with State v. Teal, T-E-A-L, 152 Wn.2d 333, a  
5 2004 case. That is the to-convict instruction for robbery  
6 in the first degree. Any objection?

7 MS. WETMORE: None from the State.

8 MR. STEPHENS: Your Honor, my only concern is that (5)(c)  
9 may not reflect the Information as charged. I agree with  
10 (a) and (b) accurately reflect the Information. So I would  
11 note an exception to (c). I think it otherwise correctly  
12 states the law, but I believe the State has elected to go  
13 under the deadly weapon element of robbery in the first  
14 degree and that (c) is a separate and distinct mode of  
15 committing robbery in the first degree, that being bodily  
16 injury.

17 MS. WETMORE: Your Honor, I don't have a copy of the  
18 Information in front of me. I just don't recall how the  
19 wording is.

20 THE COURT: Hang on a second.

21 (Pause.)

22 THE COURT: I think the pertinent language from the  
23 Information is -- you might want to take a look at it  
24 yourself. So I could always hand my copy down. It says,  
25 "And in the commission of said crime and in immediate flight

1 therefrom, the defendant displayed what appeared to be a  
2 firearm or other deadly weapon and inflicted bodily injury  
3 upon KE." So I think that gets it in within (c).

4 MR. STEPHENS: Okay.

5 THE COURT: Okay? Mr. Stephens?

6 MR. STEPHENS: I'll just note my exception. Years ago, I  
7 believe on the advice of Mr. Fine, the State started  
8 charging elements of the crimes with the "and" as opposed to  
9 "or." The jury instruction says "or," giving the jury the  
10 option. So I'll just note my exception, which I generally  
11 do in that situation, anyway, because I don't understand why  
12 that's been done, but maybe greater minds than mine can  
13 understand why that might be.

14 MS. WETMORE: I believe that's proper and I would ask  
15 that you give the instruction as I have requested.

16 THE COURT: All right. The exception is noted.

17 MR. STEPHENS: Thank you.

18 THE COURT: So Jury Instruction No. 8 is the to convict  
19 for kidnapping in the second degree. This is WPIC 39.11 as  
20 modified in accordance with State v. Teal. Any objection?

21 MR. STEPHENS: No.

22 MS. WETMORE: Not from the State.

23 MR. STEPHENS: None from the defense.

24 THE COURT: All right. Thank you. Instruction No. 9 is  
25 the to convict for assault in the second degree. That's

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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STATE OF WASHINGTON  
SUPERIOR COURT  
CLERK  
DATE SERVED: 09/24/13 11:49:29

SIGNED IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2013.

X Patrick Mayovsky