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Division I  
State of Washington

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Plaintiff/Respondent,

vs.

BIJAN KHORRAMI, Defendant/Appellant

**APPELLANT'S REPLY TO RESPONDENT'S BRIEF**

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**A. Introduction**

Bijan Khorrami, by and through his counsel of record Diana Lundin, hereby submits the following argument and authority in reply to Respondent's Brief filed on or about June 14, 2016.

**B. Grounds For Relief**

Petitioner respectfully renews his request to reverse his conviction.

**C. Statement of the Case**

Mr. Khorrami incorporates the Statement of Facts contained in his opening brief, with the following additions/emphases: The State also proposed jury instructions containing the complained of error. CP 41.

**D. Argument in Reply**

Mr. Khorrami properly raises a claim of manifest constitutional error in his appellate challenge to the trial court's erroneous response to the jury's inquiry.

In State vs. Salas, 127 Wash.2d 173, 89 P.2d 1246 (1995), cited by the State, Mr. Salas did not object to the trial court's juror inquiry response directing the panel to refer to its instructions. The Supreme Court concluded that the jury instructions were in fact an accurate statement of the law attaching the appropriate burden of proof; thus, the court found no error with the instructions. Although the court mentioned CrR 6.15(c)'s mandate to lodge objections at the trial court level, the court also recognized the exception for manifest errors affecting a constitutional right. Because the court found no error in the instructions, it

consequently concluded Mr. Salas did not establish a manifest error of constitutional magnitude, and thus his failure to object at trial waived his appellate argument.

Presumably, had the court agreed with Mr. Salas that the instructions improperly relieved the State of an evidentiary burden, it would likewise have found reversal appropriate because “it is reversible error to instruct the jury in a manner that relieves State of burden to prove every element of the offense beyond a reasonable doubt.” State vs. Pirtle, 127 Wash.2d 628, 904 P.2d 245 (1995); State vs. Brown, 147 Wash.2d 330, 58 P.3d 889 (2002). Such inaccuracies do rise to the level of manifest error of constitutional magnitude. State vs. Ritchie, 365 P.3d 770 (2015); State vs. Peters, 163 Wash. App. 836, 847, 261 P.3d 199 (2011).

“‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” State vs. Kirkman, 159 Wash. 2d 918, 935, 155 P.3d 125, 134 (2007) (internal citations omitted). Here, Mr. Khorrami has shown that the erroneous jury instructions had identifiable consequences in his trial. The jury’s confusion, expressed in its question during deliberations, is the best evidence thereof; Mr. Kosterman’s subsequent email confirms this.

State vs. Hayward, 152 Wash. App. 632, 217 P.3d 354 (2009), is instructive. There, neither party objected to the jury instructions, including the definition of recklessness, in an alleged assault case. Nonetheless, Division Two reversed Mr. Hayward’s conviction because it did not adequately clarify the

State's burden to prove reckless infliction of substantial bodily harm in addition to the intentional act of assaulting the victim.

Thus, even though the issue was raised for the first time on appeal, relieving the State of its burden to prove each essential element qualified as a manifest error of constitutional magnitude. Mr. Khorrami stands in the same position. *See Also State vs. Fehr*, 185 Wash. App. 505, 341 P.3d 363 (2015) *citing State vs. Brown*, 147 Wash.2d 330, 58 P.3d 889 (2002) "automatic reversal is required when an omission or misstatement in a jury instruction "relieves the State of its burden to prove every element of a crime."

The State also cites to cases such as *State vs. Besabe*, 166 Wash. App. 872, 271 P.3d 387 (2012) *citing State vs. Allen*, 50 Wash. App. 412, 749 P.2d 702 (1988), to suggest that because the trial court directed jurors to rely on their instructions, any error in the instructions themselves is harmless. Yet, those cases addressed the question of whether the court erred in communicating with jurors without consulting with defense counsel present. As to *that* error, the courts concluded *in those cases* the State met its burden to show the error was harmless beyond a reasonable doubt.

Mr. Khorrami does not claim he had no notice of the jury's question; thus *Besabe* and *Allen* do not bear directly on the issues herein. The only way the court's response to the jury inquiry here can be harmless *beyond a reasonable doubt* is to conclude that the instructions themselves properly stated the law in a non-misleading or confusing manner, which they did not.

The State also contends that the jury question is meaningless because it reflects the jurors' thought processes, which inhere in the verdict. Just this month, however, Division Two of the Court of Appeals explained that juror statements *after* a verdict is reached are not treated equally with juror statements occurring *before* a verdict is rendered. In State vs. Gaines (46352-1-II, filed July 6, 2016), jurors were questioned about alleged misconduct pre-verdict, and based on their statements one juror was dismissed.

Ms. Gaines argued that the trial court should have employed an objective standard to determine whether she was prejudiced by any misconduct, however the appellate court disagreed and, distinguishing between pre and post-verdict comments, concluded that a subjective inquiry into the jury's deliberative process was proper pre-verdict. The court's analysis thereafter took into account the jurors' reactions (based on their comments) to the extraneous evidence alluded to by one venire member.

Although factually different, Gaines recognizes that a jury statement/inquiry made prior to rendering a verdict is a proper gauge of the impact of claimed errors. Applying that rule here, the jury's question can properly be considered as it reflects the confusion over the proper legal standard and essential elements, which were not properly defined in the jury instructions.

The trial court's failure to clarify this confusion was also an abuse of discretion because the statutory definition of assault<sup>1</sup> requires that the criminal negligence must be as to "a particular result" and not to a general risk of harm.<sup>2</sup> Once the jury's confusion on this specific issue was apparent, no reasonable judge in her position would have declined to follow the WPIC's direction to provide a "more particular description of [the] act." Even State vs. Johnson, 180 Wash.2d 295 (2014), recognized this necessity in some cases. "Error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." State vs. Schaler, 169 Wash. 2d 274, 288, 236 P.3d 858, 865 (2010).

State vs. Tyler, 47 Wash. App. 648, 736 P.2d 1090 (1987), *overruled on other grounds by* State vs. Delcambre, 116 Wash.2d 444, 805 P.2d 833 (1991), is akin to Mr. Khorrami's because there, as here, the jury inquired about an essential element that was not properly defined in the original jury instructions. This Court concluded it was error for the trial court not to have *sua sponte* clarified the jury's confusion when it requested a definition. Likewise here, the jury's question demanded clarification, which was possible without exceeding boundaries of what had already been instructed and argued by the parties. Just as in Tyler, "the jury's confusion required some action by the trial court other than that taken." State vs. Tyler at 653.

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<sup>1</sup> RCW 9A.36.031

<sup>2</sup> See WPIC 10.04

As to the State's claim that Mr. Khorrami invited the error by proposing instructions based on the relevant WPIC's, it is important to note that the State also proposed an identical instruction. Cases such as State vs. Mills, 154 Wash.2d 1, 109 P.3d 415 (2005) and State vs. Chino, 117 Wash. App. 531, 72 P.3d 256 (2003), contain examples where our appellate courts have addressed claimed errors in jury instructions given absent defense objection, without regard to which party originally proposed them. These are a far cry from situations where a party intentionally introduces an error into the trial court for the purpose of obtaining appellate review. *See E.g. State vs. Pam*, 101 Wash.2d 507, 680 P.2d 762 (1984).

Here, both parties vigorously litigated their respective cases without intentionally misleading the court as to the relevant issues. As the powerful concurrence by Justice Madsen articulated in State vs. Studd, 137 Wash.2d 533, 973 P.3d 1049 (1999), the invited error doctrine should not operate to punish parties when they propose WPIC instructions and where effective representation is their proposal has been endorsed. Studd at 554.

The policy underlying the invited error doctrine was articulated clearly in Pam:

Effective appellate review can be achieved only if both the defendant and the State maintain their adversary positions and vigorously litigate their respective claims. When counsel attempts to circumvent this system, the issues are not adequately presented for review and the system falters. State vs. Pam at 764.

Neither party here attempted to "circumvent the system," "mislead the court" or "set up an error." Nonetheless, manifest error occurred prejudicing Mr. Khorrami's constitutional right to a fair trial. Review is proper.

Finally, the evidence was insufficient to support the conviction because a reasonable person in Mr. Khorrami's position would have had no reason to believe that Calderon's arm was under his tire at the moment he engaged the engine.

No matter how hard it tries, the State cannot escape the fact that no one at the scene observed Officer Calderon as she knelt under Mr. Khorrami's vehicle. Mr. Khorrami didn't see her there; his son didn't see her there; most importantly, her own partner standing next to Mr. Khorrami, didn't see her there. Even utilizing his side view mirrors, Calderon was undetectable to Mr. Khorrami. Thus, a reasonable person in his position would not have been aware of a substantial risk of *bodily harm to her* by engaging the vehicle's engine.

The State's argument to the contrary<sup>3</sup> again confuses the offense elements. It contends that because Mr. Khorrami was told "we are going to boot your car" or "your car has been booted" he should have known more than one officer was involved. While "we" could easily refer to parking enforcement or the police department in general, even if we accept the State's interpretation, there is still no nexus between the knowledge that another officer was involved<sup>4</sup> and a reasonable means of knowing she was actually under the car at that moment.

The State's case boils down to its contention that a reasonable person in Mr. Khorrami's position would have looked over at his right front tire wheel well instead of looking at the parking enforcement officer standing by his driver's side

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<sup>3</sup> See Response Brief at 20.

<sup>4</sup> Sitting in the parking enforcement van, for example.

door as he quickly walked towards her. No reasonable jury could have concluded the State's evidence proved this beyond a reasonable doubt because, by all accounts, the only person Mr. Khorrami had any dealings with was Officer Nolan. She is the one who Mr. Khorrami's son confronted about the first vehicle, and the one who gave Mr. Khorrami the paperwork for that boot removal. She is also the one who was filling out the boot notice for Mr. Khorrami's car when he approached, the only one standing directly in front of his car door. Calderon was nowhere to be seen during these events.

While the State may be correct that a reasonable jury could have found Mr. Khorrami failed to be aware of a general risk of harm (to Officer Nolan perhaps since she was standing adjacent to the vehicle), no reasonable jury could have concluded that Mr. Khorrami failed to be aware of the risk of substantial bodily harm to Calderon.

**E. Request For Relief**

The Petitioner respectfully renews his request for relief from this Honorable Court by reversing his wrongful conviction.



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