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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 44403-8-II

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

BY C
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

GARY D. HAMMELL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT

Procedural Background.

The defendant was charged by Information on September 13, 2012, with Assault in the Third Degree, RCW 9A.36.031(1)(g). (CP 1). The matter was tried to a jury on January 7, 2013. The instructions were given without exception by either party. (RP 72). The jury returned a verdict of guilty. The court imposed a standard range sentence, based upon the defendant's criminal history, of 22 months in prison. (CP 14, 18-19). The defendant filed a Notice of Appeal. (CP 29).

Factual Background.

On September 13, 2012, Officer Lougheed of the Aberdeen Police Department was on patrol. She was in uniform operating a marked patrol vehicle with lights and sirens. (RP 10-11). She was dispatched to the report of an older blue pickup truck being driven recklessly in the area of Pacific and Oak Streets in the City of Aberdeen. Officer Lougheed located the defendant's vehicle which matched that description backed in toward a building and partially out into the street. (RP 11, 13). As she approached, she saw the defendant seated, alone, in the vehicle. Officer Lougheed got out of her vehicle and walked up to contact the defendant (RP 11-12).

Deputy Lougheed walked around the front of the defendant's vehicle and contacted the defendant at the driver's door. The vehicle was still running. (RP 14). When Officer Lougheed attempted to speak to the defendant, he turned away from her. She tried again to get his attention as

he was speaking on the phone. (RP 14-15). It appeared to Officer Lougheed that the defendant was upset and crying. (RP 15).

Officer Lougheed asked the defendant a number of times to hang up the phone and talk to her. The defendant responded by saying that he was not doing anything wrong. (RP 15). Eventually, she told the defendant that he needed to hang up the phone and identify himself to her. The defendant responded that he wasn't going to be giving her his identification as he had done nothing wrong. (RP 16). Officer Lougheed had seen the defendant long enough at this point to determine that she believed that he was under the influence of alcohol. (RP 16-17). Officer Lougheed told the defendant that he needed to turn off the vehicle or she was going to remove him from the vehicle. (RP 16). At this point, the defendant responded by challenging Officer Lougheed to remove him from the vehicle. (RP 16).

Officer Lougheed attempted to open the vehicle door. The defendant shoved the door at her striking her in the chest. (RP 17). He then closed and locked the door. Officer Lougheed reached in the open window, pulled the lock up and opened the door in an attempt to get him out of the vehicle. She took a hold of his arm and his hair. The defendant grabbed the steering wheel, moved his body out of the vehicle and shoved his shoulder straight into Officer Lougheed's sternum. (RP 17-18). This blow was hard enough to knock her to the ground where she struck her head on the pavement.

At this point, Officer Lougheed employed her taser. (RP 18-19). Eventually, the defendant knocked the taser out of her hand. After a struggle, Officer Lougheed was able to take the defendant to the ground. (RP 20). A short time later, a Hoquiam officer arrived to assist and the defendant was finally taken under control. (RP 20-21, 42-43).

RESPONSE TO ASSIGNMENTS OF ERROR

The trial court properly instructed the jury.

1. Appellate review is precluded by RAP 2.5(a).

The defendant has failed to preserve the jury of this issue for appellate review. Failure to object “deprives the trial court of its opportunity to prevent or cure the error.” State v. Kirkland, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An error such as this involving the instructions given at trial may be raised for the first time on appeal only if it is “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-687, 757 P.2d 492 (1988).

This court may not assume that an error is of constitutional magnitude. State v. O’Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). This court should look to the asserted claim and assess whether it implicates a constitutional interest rather than some other form of trial error.

The alleged error herein is not “manifest” as it did not result in actual prejudice. The defendant must make a “plausible showing” that the

asserted error had a practical and identifiable consequence in the trial of the case. Kirkland, 159 Wn.2d at p. 135.

No objection was made to the instructions given. His failure to object bars any review unless the defendant can prove that the error is a manifest constitutional error with identifiable consequences. State v. Lind, 67 Wn.App. 339, 342-44, 835 P.2d 251 (1992). The defendant herein could do nothing more than speculate that this alleged error had any identifiable consequences to him. The record is insufficient to allow for appellate review.

2. The “to convict” instruction given by the trial court was proper under Washington law.

To begin with, this court should understand the argument that the defendant is making. The defendant’s argument is that there is a right to jury nullification under the State Constitution. According to the defendant, even if the jury finds all of the elements of the charged crime beyond a reasonable doubt, the jury should reserve the right to find the defendant not guilty on some basis unsupported by the facts in the particular case. This is completely wrong. The Washington courts have so recognized. State v. Meggyesy, 90 Wn.App 693, 699, 958 P.2d 319 (1998).

The court in Meggyesy undertook a Gunwall¹ analysis. Applying the Gunwall factors, the court in Meggyesy specifically found that there

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State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

was nothing under that State Constitution regarding the right to a jury trial that should be interpreted in a broader fashion than under the United States Constitution. Meggyesy, 90 Wn.App at p. 701-704. Division II of the Court of Appeals has reached the same result. State v. Bonisisio, 92 Wn.App. 783, 794, 964 P.2d 1222 (1998):

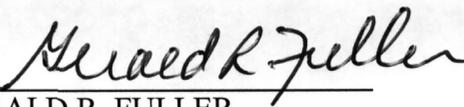
As here, the defendant in *Meggyesy* argued for an instruction telling the jury it “may” convict. 90 Wn.App at 697. We agree with the reasoning in *Meggyesy* that such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction. 90 Wn.App. at 700. We also agree with the *Meggyesy* court that *Pritchard v. State*, 248 Ind. 566, 230 N.E.2d 416 (1967), is inapposite because the Indiana Constitution, in contrast to the Washington Constitution, requires the jury to determine the law. *Meggyesy*, 90 Wn.App. at 704. Thus, the trial court did not err in instructing the jury as it did.

CONCLUSION

The assignment of error must be rejected. The defendant’s conviction must be affirmed.

DATED this 8 day of August, 2013.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/ws

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DECLARATION OF MAILING

DECLARATION

I, Sarah Wisdom, hereby declare as follows:

On the 8th day of August, 2013, I mailed a copy of the Brief of Respondent to Jennifer J. Sweigert, Nielsen, Broman & Koch, P.L.L.C., 1908 East Madison Street, Seattle, WA 98122, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 8th day of August, 2013, in Montesano, Washington.

Sarah Wisdom