

FILED
Dec 12, 2016
Court of Appeals
Division III
State of Washington

34498-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MANUEL ABRAHAMSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in granting the State's motion to continue, by order of March 17, 2016.
2. The trial court erred in entering judgment, on May 19, 2016, on a verdict that did not necessarily find every element of the crime.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it continued the trial setting to accommodate both attorneys' prescheduled vacations?
2. Was there any defect in the to-convict instruction, and was any potential error in that regard invited by the defendant?
3. Are defects in element instructions subject to harmless error analysis?

III. STATEMENT OF THE CASE

In his opening statement, the defendant informed the jury that he did not contest that he took the vehicle belonging to the victim, Ms. Purvis, but that he did not intend to deprive her of her vehicle because he was so impaired by the consumption of alcohol and methamphetamine that he could not form the requisite intent to commit the crime:

Defendant's attorney: Good afternoon. [The prosecutor] Mr. Kuhlman's correct. Mr. Abrahamson was in that car. No question about it. It's not in dispute. What is, though, is whether or not he intended to deprive Ms. Purvis of that car. He did not. You're going to hear evidence that he was

severely intoxicated, bloodshot eyes, swaying back and forth, slurred speech, sometimes speech that you can't tell what he was saying if anything at all. You'll hear that his blood alcohol content was .27, that he had meth in his system. You're going to hear all these things. You're also going to hear exactly what Mr. Kuhlman just said, he brought the car back ten minutes later. He's sitting in it out front in the street. Then they pull him out of the car. One of the witnesses gets in, takes the keys. That's all true. But the key fact here is that he did not intend to deprive her of the vehicle. That's what this case is about. Thank you.

RP 107-108.¹

The testimony at trial established that on January 18, 2016, Ms. Purvis was visiting her daughter-in-law, Santana Santiago, and daughter, Terise Santiago, in Spokane Washington. RP 117-120, 131. After visiting for a while, Ms. Purvis realized that she did not know where her car keys were, so all three women went out to the parking lot to look for them. RP 109-110, 118-119, 134-36, 139. While outside, two of the women interacted briefly with Mr. Abrahamson, who was standing nearby. He requested a cigarette. RP 110, 119, 135. The women did not know the defendant, and he appeared to be drunk. RP 115, 119, 127, 139.

¹ The transcripts of trial proceedings are in two volumes (Kerbs), consisting of 218 pages, that maintain the sequential enumeration from one to the next. Therefore, they these are referred to simply as "RP." There is also a seven page transcript (Wilkins) of the motion to continue hearing held March 17, 2016. This is referred to as "RP Motion."

The women went back into the house to obtain a flashlight because it was dark outside. RP 122. A short time later, one of the women saw the defendant driving Ms. Purvis' car away. RP 111. They called the police and attracted the attention of neighbors. RP 121-23. Within ten minutes, the car returned to a different place in the parking lot. RP 123, 140, 151-52. One of the women, then the neighbors, and finally the police detained the driver, who was Mr. Abrahamson. RP 112-13, 122-23, 145. The car was not damaged and nothing was missing, other than a pack of cigarettes. RP 116, 140. Abrahamson was injured, so he was taken to the hospital, where he was found to have methamphetamine in his system and a blood alcohol content of .27. RP 146, 149.

The trial court specifically asked the defendant whether he had any exception to the "to convict" instruction; the defendant stated he did not. RP 168. An instruction on voluntary intoxication was given to the jury at the defendant's request.² The defendant's entire closing argument addressed the issue of voluntary intoxication and whether the defendant could form the intent to take Ms. Purvis's car. RP 184-89. In his closing argument, the defendant once again admitted that he took Ms. Purvis's car,

² "Instruction No. 8: No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent." RP 178; CP 29.

reiterating that the evidence was overwhelming on that point. RP 184. The defendant argued that the only issue in the case, again, was intoxication - whether the defendant was too intoxicated to form the requisite intent for the theft:

Mr. Abrahamson did take the car. He was in the car. Well documented. Few minutes later, he returned. He was in the car. He was extremely intoxicated. You hear testimony from multiple witnesses about it. There's no damage to the car. Nothing was taken from the car.

RP 184.

The jury convicted the defendant of the theft of Ms. Purvis's vehicle. CP 31. The defendant, having an offender score of nine, received a standard range sentence of 45 months. CP 39-40.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONTINUED THE TRIAL SETTING TO ACCOMMODATE BOTH ATTORNEYS' PRESCHEDULED VACATIONS.

The trial court did not violate the defendant's court-rule right to a speedy trial as provided under CrR 3.3.

The defendant's first claim - that the expiration date for speedy trial was April 1, 2016 - is incorrect. Br. of Appellant at 9. The defendant was timely arraigned on February 2, 2016. *See* CP 69 (Jan. 20, 2016 Scheduling

Order Setting Arraignment).³ Defendant was in custody, and therefore his right to trial time under the sixty-day trial rule, CrR 3.3, would expire on April 4, 2016.⁴ At his arraignment, his case was scheduled for a pre-trial conference on March 11, 2016 with a trial date set as March 28, 2016. CP 70 (Feb. 2, 2016 Scheduling Order).

Defendant's claims that the prosecutor's "office assigned the case to [Attorney Reese Sterett] *knowing* that he would not be available on the trial date[]" and that the prosecutor's office engaged in "an outright assignment of a trial to a prosecutor who would surely be unavailable" are also incorrect. Br. of Appellant at 11-12 (emphasis added). The defendant's case

³ A Supplemental Designation of Clerk's Papers was filed on December 8, 2016, designating several orders and would start with page 66. References to these documents have been estimated to be the correct number which will be assigned. However, since the Index has not been filed yet, will reference the document and date filed for ease of reference.

⁴ CrR 3.3(b) requires an in-custody defendant to be tried within "60 days *after* the commencement date specified in this rule." Mr. Abrahamson's arraignment on February 2 was the commencement date. CrR 3.3(c)(1). February 3 is the first day *after* his commencement date, and is the first countable day for the 60 day calculation. "The first day counted against the sixty-day trial period is the day *after the oral order.*" *State v. Carson*, 128 Wn.2d 805, 813, 912 P.2d 1016 (1996); CrR 8.1; CR 6.1(a). Therefore, day sixty fell on April 2, 2016, a Saturday (including February 29, 2016 in the calculation). The last countable day for trial cannot fall on a Saturday or Sunday, so April 4, 2016 was the last day for trial under the rule at the time of his arraignment. CrR 8.1; CR 6.1(a). The defendant's claim that the expiration date was April 1, 2016, is incorrect.

was assigned to Attorney Sterett *before* the arraignment and *before* any trial date was assigned *by the Court*. See February 2, 2016 Scheduling Order signed by prosecuting attorney Sterett. CP 70.

Prior to requesting the first continuance in this matter, the prosecutor filed a Motion to Continue, on March 16, 2016. CP 5-8. Therein, prosecutor Sterett informed the trial court and Mr. Abrahamson that he was unavailable for trial on March 28, 2016. His unavailability was due to a prescheduled vacation set for March 28-31, 2016. Additionally, on behalf of the defendant's attorney, the State informed the court that the following week was not a workable setting for trial - the defendant's counsel, Mr. Charbonneau, was going to be out of the office from March 30 through April 6, 2016 on a pre-scheduled vacation. Additionally, Mr. Sterett had ten trials that were pre-assigned to Judge Moreno set to start that next week as well. Therefore, April 11, would be the earliest trial date available for *both* attorneys.

At the continuance motion, counsel for defendant joined in the request to the continuance, because of his prescheduled vacation:

MS. McPEEK: Your Honor, my understanding from Mr. Charbonneau is that he also has prescheduled time away starting on the 30th of March and will not -- and that's through the 6th of April is my understanding. So his -- he had concerns of the ability to start a trial on the 28th and actually complete it before he was scheduled to be gone.

...

THE COURT: I'm not going to hear from Mr. Abrahamson, Counsel. He's represented by counsel. Do you have anything further you want to add, Ms. McPeek?

MS. McPEEK: No, Your Honor. I just wanted the court for the record to know that the client is objecting, continuing to object. *He is aware of the circumstances and that his --his counsel is -- is in agreement, though, to the 11th of April.*

RP Motion 4-5 (emphasis added).

The trial court granted the parties' request for a trial setting on April 11, noting that the cases and speedy trial rule recognized:

that there are exceptions to the trial settings in the event of things that have been outlined here. For example prescheduled vacations or conferences, as the case may be, or other conflicting trial dates, which may have been prescheduled prior to this current matter. With all that in mind, the court does find good cause pursuant to the rule to continue the matter, not finding any prejudicial impact to Mr. Abrahamson within the context and definition of Criminal Rule 3.3. So I grant the motion and set the trial over to April 11th.

RP Motion 5-6.

The trial court then signed an order continuing the trial to April 11, 2016, listing "counsels unavailable - previously scheduled time off," as one reason for continuing the case. CP 72 (March 17, 2016 Scheduling Order).

The agreed continuance was signed by defendant's counsel and by the deputy prosecutor, with the defendant noting his own objection. *Id.*⁵

The trial court's findings are supported by the record and no abuse of discretion occurred in the continuance of the trial date.

Both attorneys joined in the motion to continue the case, both had prescheduled vacation conflicts that arose from the *first* trial setting of March 28, 2016. The prosecutor could try the case *if* it was tried that week in *one* day, April 1,⁶ the Defendant's attorney could try the case that week *only if* the trial would finish in *two* days, before Wednesday, March 30, 2016.⁷ The trial court properly considered these reasons and found that they justified the requested continuance. The law supports the granting of this continuance.

A defense attorney's prescheduled vacation is an adequate basis to justify a continuance under CrR 3.3. *State v. Jones*, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003), citing *State v. Selam*, 97 Wn. App. 140, 143,

⁵ The defendant suggests that the continuance "was not agreed in writing." Br. of Appellant at 10. This is without clarification. The continuance was not agreed to by the defendant. He noted his objection on the form. However, it *was* agreed to by defendant's counsel as indicated in the discussion with the trial court, and as indicated by defense counsel's signature without objection. CP 72 (March 17, 2016 Scheduling order).

⁶ RP Motion 3.

⁷ RP Motion 4.

982 P.2d 679 (1999). Defense attorneys are entitled to at least the same degree of dignity as deputy prosecutors. *Selam*, 97 Wn. App. at 143. Defendant never indicated he desired different counsel. *See Selam*, 97 Wn. App. at 143, citing, *State v. DeWeese*, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991) (noting that substitution of defense counsel is not controlled by the State, and involves considerations of counsel's adequacy that can be addressed only *after* the defendant properly moves the court for different counsel). Here, as in *Selam*, the defendant never indicated he desired different representation. The trial court did not abuse its discretion by granting the defense attorney's request for a brief continuance because of that attorney's prescheduled vacation.

Additionally, the agreement to the motion by defendant's counsel may be deemed a waiver of the defendant's objection to the requested delay. *See* CrR 3.3(f)(2) ("The bringing of such motion [to continue] by or on behalf of any party waives that party's objection to the requested delay").

The second reason sustaining the trial court's determination that the case be continued was the deputy prosecutor's prescheduled vacation. A prosecutor's responsibly scheduled vacation is a valid basis for granting a continuance. *State v. Heredia-Juarez*, 119 Wn. App. 150, 79 P.3d 987 (2003); *State v. Torres*, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005, 60 P.3d 1212 (2003). "To construe CrR 3.3

otherwise would be to deprive deputy prosecutors of the dignity they deserve, and would result eventually in less effective justice as well as in unfairness in the administration of justice.” *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992).

The defendant’s claim that he was prejudiced is, at best, speculative. He first claims the defendant “was place[d] at risk of losing his attorney.” Br. of Appellant at 13. That loss would only occur if his attorney left on vacation and never came back.

Second, he claims that the requested continuance was lengthy. The continuance requested and granted was a two week continuance. No case supports the claim that a two week continuance is lengthy. Counsel then discusses the reassignment of counsel, but fails to address how a newly appointed defense attorney would be able to timely prepare for trial, especially in less than two weeks. Appellant seems to argue that all attorneys, both deputy prosecutors and defense attorneys, are fungible commodities. The defendant fails to establish any prejudice in his ability to present a defense or in his preparation for trial that resulted from the continuance.

Because the trial court did not abuse its discretion in continuing the trial to April 11, 2016, the defendant was tried within the time limit set forth under CrR 3.3. The continuance of the trial setting of March 28 to April 11,

2016 results in an excluded period of time under CrR 3.3(e)(3) because it was a “delay granted by the court pursuant to section (f).” Therefore, the allowable time for trial after the excluded period was May 11, 2016. CrR 3.3(b)(5). Trial started April 26, 2016. There was no violation of the speedy trial rule.

B. ANY DEFECT IN THE TO-CONVICT INSTRUCTION WAS INVITED BY THE DEFENDANT AND HARMLESS.

The defendant claims the to-convict instruction omitted an element of the offense. Br. of Appellant at 16. He then claims the error is structural, and cannot be harmless. *Id.* at 18. Because there is no element missing, and because any error in the giving of the instruction was invited by the defendant, his claim is without merit. Additionally, such errors, if existing, are subject to the harmless error analysis.

The jury was given the following to-convict instruction:

INSTRUCTION NO. 6

To convict the defendant of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 18th, 2016 the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle;
- (2) That the defendant intended to deprive the other person of the motor vehicle; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2) and (3), 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 of the evidence, you have a reasonable doubt as to anyone of these elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 27.

The defendant was asked separately on each jury instruction whether he had an objection to that instruction. RP 167-69. The trial court directly asked defendant if he had any objection to the to-convict instruction and he answered he did not:

THE COURT: Do you have an objection to the “to convict” instruction? That would be 70.26.

MR. CHARBONNEAU: I do not.

RP 168.

1. Invited error and failure to raise issue in the trial court.

The defendant raised no objection to the use of the above instruction, which is of little wonder because his whole defense was one based on intoxication. Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a);⁸ *State v. Schaler*,

⁸ RAP 2.5(a) states an appellate court may refuse to review any claim of error which was not raised in the trial court. An error of constitutional magnitude can be raised for the first time on appeal. RAP 2.5(3); *Seattle v.*

169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Smith*, 174 Wn. App. 359, 364, 298 P.3d 785 (2013). Appellate courts review a challenged jury instruction de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

As this court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012): “[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),⁹ requiring that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” *Accord*, *State v. Sublett*, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012) (any objections

Harclan, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

⁹ CrR 6.15(c) states:

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

to the instructions, as well as the grounds for the objections, must be put in the record to preserve review).

Here, the appellant waived his claim of error because he did not object at the time the court took exceptions and objections to the jury instructions. An objection to the to-convict instruction would have permitted the trial court the opportunity to correct any error before verbally instructing the jury. RP 929. Defendant cannot, at this time, cry foul because he had the opportunity to have the trial court correct the instruction. He has waived his claim of error.

Moreover, because any error was invited, it is not reviewable. Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. Appellate courts may deem an error waived if, as here, the party asserting such error materially contributed to the error. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds in State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). The invited error doctrine prevents parties from benefiting from any error they caused at trial regardless of whether it was done intentionally or unintentionally. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the to-convict instruction. *See State v. Recuenco*, 154 Wn.2d 156, 163,

110 P.3d 188 (2005) (citing *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002)), *rev'd on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). The invited error doctrine is a “‘strict rule’ to be applied in every situation where the defendant’s actions at least in part cause[d] the error.” *State v. Summers*, 107 Wn. App. 373, 381-82, 28 P.3d 780, 43 P.3d 526 (2001) (quoting *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

The failure to object to the instruction waived the raising of instructional error on appeal. The defendant contributed to any instructional error, by affirmatively agreeing to the proposed to-convict instruction, and, therefore, his affirmative agreement invited the error. Any review of this alleged error is waived and forfeited.

2. The to-convict instruction requires the State to prove, and the jury to find, that the defendant exercised the wrongful control over a motor vehicle of another, with the intent to deprive the other of that motor vehicle.

The defendant claims the to-convict instruction omits the element that the property belonged to someone other than the defendant. However, the language from the instruction (in bold) requires the State to prove that “**the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle,**” and, additionally, requires that the State prove “the

defendant **intended to deprive the other person of the motor vehicle.**”

(Emphasis added).

“Jury instructions are ‘sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.’” *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). When read as a whole, the State was required to prove the vehicle was an “other” person’s vehicle, and that the defendant was unauthorized to possess the vehicle. The instructions demanded that. Simply, “an other” person is “another” person, both forms refer to someone other than the defendant.

In some cases, such as those involving jointly owned community property, or joint ventures, or embezzlement, a more direct statement that the property must belong to another would be warranted, because you cannot steal your own property. However, here, the State was required to prove that the defendant *exercised unauthorized control* over a vehicle with intent to deprive the *other person of that* vehicle.

In support of his claim of instructional error, the defendant cites *State v. Ralph*, 85 Wn. App. 82, 930 P.2d 1235 (1997). That case is inapt. It is a standard of review case on the legal sufficiency of a charging document. *Ralph* stands for the proposition that when an information is *challenged*

before conviction, the information is strictly construed on appeal as to whether the information contains all of the requisite elements of the offense. Here, defendant does not challenge the information, but raises an unpreserved error relating to jury instructions. Similarly, *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), adds little to the present analysis. In *Smith*, the instruction was constitutionally defective because it stated the wrong crime as the underlying crime which the conspirators agreed to carry out. The jury simply found, according to the instructions in that case, that the defendant and others agreed to conspire to commit murder, not that they agreed to commit murder.

Even less compelling is *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). Br. of Appellant at 16. There our Supreme Court held unconstitutional an act which denied to an accused in a criminal action the right to have the question of his sanity tried to a jury.

The instruction given in this case satisfies all of the elements of the offense of theft of a motor vehicle.

3. Any error contained in the to-convict instruction was harmless.

Defendant asserts that any instructional error relating to a missing element of an offense is structural error, and, thus requires reversal. Br. of Appellant at 18. This is incorrect. An erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. U.S.*,

527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). Unlike structural trial defects such as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder*, 527 U.S. 1 at 9. Therefore, a jury instruction that misstates an element of the crime is subject to harmless error analysis to determine whether the error has relieved the State of its burden to prove each element of the charged offense. *Brown*, 147 Wn.2d at 339.

In order for an appellate court to hold that an erroneous jury instruction was harmless, the court must be convinced “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Brown*, 147 Wn.2d at 341 (quoting *Neder*, 527 U.S. at 19). “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” *Brown*, 147 Wn.2d at 341.

Here, any error concerning the allegation that the instruction failed to properly set out the element of “property of another” was harmless. First, the defendant conceded in his opening and in his closing that the State’s evidence was correct, the *only* issue in the case was whether the intoxicated defendant could form the requisite intent to steal. Second, the defendant

requested and received a jury instruction on intoxication as follows: “No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.” CP 29.

The evidence in this case establishing Ms. Purvis’s ownership of the motor vehicle and the non-ownership the defendant in the same vehicle was overwhelming. After visiting with her daughter and daughter-in-law for a while, Ms. Purvis realized that she did not know where her car keys were, so all three went out to the parking lot to look for them. Two of the women interacted briefly with Abrahamson, who was standing nearby, requesting a cigarette. Mr. Abrahamson was a stranger and he appeared to be drunk. He was observed driving away in Ms. Purvis’s car, he was observed driving back. The women called the police and attracted the attention of neighbors. RP 121-23. Mr. Abrahamson was found in the driver’s seat. Yet, Mr. Abrahamson did not remember anything, including he did not remember taking any car. RP 165.

It was established that Mr. Abrahamson took the car without permission. Ms. Purvis testified he did not have permission to take her car. The evidence was clear that the vehicle belonged to Ms. Purvis. Mr. Abrahamson did not remember anything, including he did not

remember taking any car. RP 165. It was clear beyond peradventure that the vehicle did not belong to Mr. Abrahamson. Therefore, the vehicle had to be the property of another. That the vehicle belonged to “another” was not an issue in the case. If there was error, there is no doubt that the jury verdict would have been the same absent the error.

C. THE IMPOSITION OF APPELLATE COSTS IS DISCRETIONARY WITH THE COURT

The defendant should file a report of continued indigency in compliance with this court’s June 10, 2016 directive. The discretionary determination of whether appellate costs should be imposed is within the sound province of this court.

V. CONCLUSION

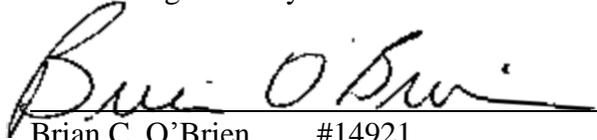
Because the trial court did not abuse its discretion in continuing the trial date to April 11, 2016, the defendant was tried within the time limit set forth under CrR 3.3.

The defendant’s failure to object at trial when specifically asked whether he had any concerns with the to-convict instruction waived any issue of instructional error on appeal. The defendant contributed to the error, by affirmatively agreeing to the proposed instruction, and his affirmative agreement invited the error. Any review of this alleged error is waived and

forfeited. If there was instructional error, it was harmless. There is no doubt that the jury verdict would have been the same absent the error.

Dated this 12 day of December, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL ABRAHAMSON,

Appellant.

NO. 34498-3-III

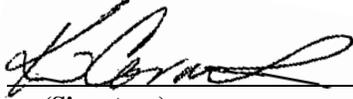
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 12, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kelly Vomacka
kelly@vomackalaw.com

12/12/2016
(Date)

Spokane, WA
(Place)


(Signature)