

NO. 348547

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

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STATE OF WASHINGTON  
PLAINTIFF/RESPONDENT,

V.

DONNY JAMES ST. PETER  
DEFENDANT/APPELLANT

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Appellant was charged under two separate cause numbers, 16-1-00093-1 and 16-1-00100-7, with a total of four counts of burglary in the second degree, three counts of theft in the third degree, and one count of attempted theft in the third degree. [CP 215-217; SCP 31-33]. The cases were consolidated for trial. [RP 6:9] A jury trial was held on October 13, 2016 to October 14, 2016. The jury found Appellant guilty on all counts. [RP 138:3-17]. Appellant appealed his convictions.

## ARGUMENT

### A. Appellant's claimed error is invited error.

Appellant asserts that the instructions given to the jury were constitutionally defective in that they did not adequately advise the jury regarding the process of deliberation, and that, in effect, undermined the requirement of jury unanimity. However, the relevant instructions given to the jury were also proposed by Appellant and no objections were made to any instructions or lack of instructions. Therefore, any claimed error by Appellant is invited error and cannot be raised on appeal.

This direct issue was decided in *State v. Henderson*, 114 Wn.2d 867 (1990). In *Henderson*, the issue was framed by the Washington Supreme Court as follows: "Can the defendant in a criminal trial [ ] request that instructions be given to the jury [ ] and then, after the

requested instructions have been given to the jury by the trial court [ ], complain on appeal that the instructions given were constitutionally infirm [ ]?” *Id.* at 868

The Court stated that “the law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant’s request.” *Id.* The Supreme Court’s position on this was clearly laid out in *State v. Boyer*: “A party may not request an instruction and later complain on appeal that the requested instruction was given.” *Id.* at 870 citing *State v. Boyer*, 91 Wn.2d 342, 344-45 (1979). *Boyer* is the established law of Washington. *Id.* See also *State v. Kincaid*, 103 Wn.2d 304, 314 (1985); *State v. Pam*, 101 Wn.2d 507, 511 (1984); *State v. Mak*, 105 Wn.2d 692, 748, *cert. denied*, 479 U.S. 995 (1986); *State v. Tyson*, 33 Wn.App. 859, 864, *review denied*, 99 Wn.2d 1023 (1983); *State v. Alger*, 31 Wn.App. 244, 249, *review denied*, 97 Wn.2d 1018 (1982). This invited error doctrine applies even if the claimed error is of a constitutional basis. *Henderson*, 114 Wn.2d at 870; *State v. Tyson*, 33 Wn.App. at 864; *Alger*, 31 Wn.App. at 249.

The standard Washington Pattern Jury Instructions (WPIC) that deal with jury deliberation and unanimity are WPIC 1.04 pertaining to the

jury's duty to deliberate and reach a unanimous verdict, and the closing instruction WPIC 151.00, which discusses the process for deliberation. The court gave WPIC 1.04 and WPIC 151.00 in their entirety as part of the court's instructions to the jury. [CP 46, 72-73; RP 102:24-103:10, 111:14-113:3] Appellant's trial counsel proposed both WPIC 1.04 and WPIC 151.00; the same instructions, with the same language, that were given by the trial court. [CP 110, 131-132] No objections were made by Appellant's trial counsel as to the inclusion of these instructions or the lack of any additional instructions regarding issues of jury deliberation or jury unanimity. [RP 96:13-19] Therefore, even if there were error, such error was invited error by Appellant and cannot now be raised on appeal. *Henderson*, 114 Wn.2d at 868-70.

B. Appellant has failed to establish "manifest error affecting a constitutional right" to allow this appeal of an unpreserved claim of error.

As conceded by Appellant, Appellant's counsel did not object to the instructions as given to the jury and made no objection to the now asserted issue at the trial court level. [Appellant's Brief 1, 7] As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332 (1995). In order to raise an issue for first time on appeal, Appellant must show "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v.*

*O'Hara*, 167 Wn.2d 91, 98 (2009); *McFarland*, 127 Wn.2d at 333; *State v. Scott*, 110 Wn.2d 682, 686-87 (1988); *State v. Lynn*, 67 Wn.App. 339, 342 (1992).

Permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts. *McFarland*, 127 Wn.2d at 333 citing *Lynn*, 67 Wn.App at 344. RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *McFarland*, 127 Wn.2d at 333.

The asserted error must be “manifest”- i.e., it must be “truly of constitutional magnitude, and the defendant must show how, in the context of the trial, the alleged error actually affected the defendant’s right. *Id.* It is the showing of actual prejudice that makes the error “manifest.” *Id.*; *O'Hara*, 167 Wn.2d at 99 (“Manifest” under RAP 2.5(a)(3) requires a showing of actual prejudice.); *Scott*, 110 Wn.2d at 688.

“[T]he appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *O'Hara*, 167 Wn.2d at 98. To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical

and identifiable consequences in the trial of the case.” *Id.* at 99; *State v. Kirkman*, 159 Wn.2d 918, 935 (2007). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O’Hara*, 167 Wn.2d at 99; *McFarland*, 127 Wn.2d at 333. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333; *State v. Riley*, 121 Wn.2d 22, 31 (1993).<sup>1</sup>

Appellant merely speculates that it is “conceivable” that a juror could have left the room at some point and then returned as others continued to deliberate. [Appellant’s Brief 7] However, there is no evidence in the trial court record that a juror ever left the deliberation room or that all jurors did not take part in deliberations. Appellant frames this differently, saying “it is difficult to assess the effect of the error because there is no way of knowing whether all twelve jurors were present at all times during deliberations.” [Appellant’s Brief 9] This statement both undermines Appellant’s ability to show actual prejudice, thereby defeating this appeal, and also emphasizes the underlying purpose of RAP 2.5(a). RAP 2.5(a) was not intended to allow criminal defendants to raise

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<sup>1</sup> The only case on point with Appellant’s issue is an unpublished Division Two case, *State v. Tucker*, 196 Wn.App. 1041 (Div.2, 2016). The appellant in *Tucker* raised the exact issue presented by Appellant in this case. The Division Two court held that the appellant’s arguments were pure speculation about juror conduct and nothing in the trial record supported his allegations. The court declined to address the merits, having found that appellant did not show “manifest error.”

unpreserved issues on appeal based on an unsupported and speculative claim that something *may* have happened during deliberations when no such suggestion appears in the record. Hence, the requirement of “manifest” error and the showing of actual prejudice. *McFarland*, 127 Wn.2d at 333; *O’Hara*, 167 Wn.2d at 99.

Appellant’s argument is based on pure speculation about juror conduct or what might have occurred during deliberations. No facts in the record support his claim that the jurors did not deliberate appropriately or properly, that deliberations ever lacked a jury member, or that the verdicts were not unanimous. Thus, Appellant shows no manifest error affecting a constitutional right and this Court should decline to address the merits of such an unpreserved claim of error. RAP 2.5(a).

C. The jury was properly instructed as to jury unanimity.

Appellant cites multiple cases that emphasize the fundamental requirement of jury unanimity in criminal cases. Respondent fully agrees in the importance of this fundamental constitutional right. However, the cases cited by Appellant merely emphasize the requirement of jury unanimity. Appellant has provided no legal authority to suggest that the instructions given in this particular case were actually constitutionally deficient.

The jury was given WPIC 1.04 in its entirety. This standard instruction instructed the jury as follows:

As jurors, you have a duty to discuss the case with one another and deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

[CP 46; RP 102:24-103:10 (Instruction No. 2)]

The jury was also given WPIC 151.00. This standard instruction instructed the jury in relevant part:

The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you... Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision.

[CP 71-72; RP 111:14-113:3 (Instruction No. 28)]

WPIC 1.04 was cited with approval in *State v. Watkins*, 99 Wn.2d 166, 175 (1983) and *State v. Faucett*, 22 Wn.App. 869, 874 (Div.2, 1979). In 1968, The ABA Task Force on Criminal Justice proposed an instruction

that was to be given to assist a jury in reaching a verdict. *Id.* at 174. ABA

Standard 5.4 provided as follows:

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

*Id.* at 174-175 citing *ABA Standards Relating to the Administration of Criminal Justice*, Std. 5.4 at 332 (Comp.1974).

*Watkins* recognized that WPIC 1.04 is Washington State's adoption of the ABA proposed instruction. *Watkins*, 99 Wn.2d at 175. The jury was given standard WPIC instructions in this case which included statements that the jury has a "duty to discuss the case with one another," to reach a "unanimous verdict," and to "consider the evidence impartially with [their] fellow jurors." [CP 46; RP 102:24-103:10 (Instruction No. 2)]. The jury was also advised that the presiding juror was required to see that "each [juror] has a chance to be heard on every question before [them]." [CP 71-72; RP 111:14-113:3 (Instruction No. 28)]. They were further advised that "each [of them] must agree for [them] to return a verdict." [CP 71-72; RP 111:14-113:3 (Instruction No. 28)].

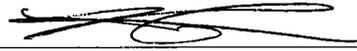
Appellant has provided no legal authority for the proposition that either WPIC 1.04, WPIC 151.00, or the combination of the two are constitutionally insufficient on the issue of jury unanimity. Furthermore, the jury returned verdicts of guilty on all counts. [RP 138:3-17] Having been instructed appropriately, the presumption is that the jury followed the instructions and rendered unanimous verdicts on all counts.

## CONCLUSION

Respondent requests this Court decline to address this appeal on the merits pursuant to RAP 2.5(a) as Appellant has failed to establish “manifest error affecting a constitutional right.” Furthermore, the jury was properly instructed on jury unanimity with the combination of WPIC 1.04 and WPIC 151.00.

Dated this 5 day of July, 2017

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 5th day of July, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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A handwritten signature in black ink that reads "Shauna Field". The signature is written in a cursive style with a large initial "S".

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**July 05, 2017 - 11:41 AM**

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