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(consolidated with 35746-5-III)

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ERICKA MCCANDLESS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Any attempt to raise an issue relating to the definition of “accident” would lack merit because the facts of this case supported a finding that the contact with the officer’s car by the defendant was accidental, the settled law addressing the application of the word “accident” in a “hit and run” case also applies to cases where the collision is intentionally caused, and because any potential issue regarding the definition of the term “accident” was not preserved by any timely objection or discussion.

## **II. ISSUES PRESENTED**

This Court, by letter dated October 29, 2018, requested briefing regarding the following issues:

1. Did the vehicle contact in this case constitute an “accident”?
2. Whether this is an issue that can be raised for the first time on appeal?

## **III. STATEMENT OF THE FACTS RELEVANT TO NEW QUESTIONS POSED BY THE COURT.**

Deputy Spencer Rassier testified that during the eluding chase, as Ms. McCandless turned northbound on Herald Road, the stolen truck she was driving slid into a curb.

And once it did that, I tried to conduct a post-PIT maneuver. And once I did, the vehicle accelerated forward, hitting my vehicle, causing damage.

RP 117-18.

As the truck sped away, the front left side of the patrol car was damaged from patrol car's impact with the truck. RP 129-30. Deputy Rassier was violently jolted by the collision. RP 130. Exhibits P8 and P9 were introduced showing the damage to the patrol car. RP 129-30.

On cross-examination of Deputy Rassier, the defendant established that in a post-PIT maneuver, the officer often places the patrol car all the way up against a car to prevent it from getting away. RP 135. Deputy Rassier also described how the vehicle moved away and in the process struck his patrol vehicle:

[Defense Attorney]: Okay. Now, you testified that, as you approached the vehicle and were starting to attempt the maneuver, the driver accelerated, striking your vehicle and then sped away?

[Deputy Rassier]: Correct.

CP 136.

[Defense Attorney]: So your plan was to move your -- I'm trying to stay out of everyone's way -- move your vehicle like this (indicating) and make contact with that vehicle there and maybe push it a little bit or whatever it took to get it to stop?

[Deputy Rassier]: Yes.

CP 138.

Defense counsel then established that Deputy Rassier could not remember exactly how the contact with the stolen truck would have caused

damage to the front-left side of the patrol vehicle and that the deputy did not know if the truck or his vehicle caused the damage made by the contact between the two vehicles. RP 138-41.

In closing, the defendant emphasized that these statements were important, not for an issue of the driver of the vehicle being responsible or guilty of the crime of failure to leave information, but because the answers could be used to determine the officer's other testimony regarding who was driving the vehicle:

There's another thing that's somewhat interesting about his testimony, and that's the description of the hit and run. I know I spent some time on it. I asked the gentleman to please diagram for us how things happened, because he very clearly testified that the vehicle struck his patrol car when it was moving forward. Again, you'll recall the diagram. And you may find it interesting that the description is the truck's moving forward while the patrol car's up -- you know, up against it and that somehow this truck collides with the front left quarter panel of the vehicle. *It's not being argued to say that the driver of the vehicle's not guilty of hit and run. It doesn't matter. The State's absolutely correct who was at fault. But when you're evaluating testimony from witnesses, you can consider these things.*

RP 305-06 (defendant's closing argument).

#### IV. ARGUMENT

**THE DEFENDANT MAY HAVE RAISED THE ISSUE OF WHETHER THE TERM “ACCIDENT” INCLUDES THE INTENTIONAL COLLISION OF VEHICLES, IF IT WERE NOT FOR THE FACTS OF THIS CASE, THE SETTLED LAW REGARDING THE ISSUE, QUESTIONS OF ISSUE PRESERVATION UNDER RAP 2.5, AND THE DOCTRINE OF INVITED ERROR.**

As our Supreme Court reiterated only two months ago, appellate practice involves the process of winnowing out weaker arguments:

As we have explained, “[f]ailure to raise all possible nonfrivolous issues on appeal is not ineffective assistance.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). “The ‘process of winnowing out weaker arguments ... and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.’” *Id.* at 302, 868 P.2d 835 (alteration in original) (internal quotation marks omitted) (quoting *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed. 2d 434 (1986)).

*Matter of Meredith*, 191 Wn.2d 300, 312-13, 422 P.3d 458 (2018).

Appellate attorneys are cautioned against raising frivolous issues in an appeal. In one “hit and run” case, the appellate court imposed sanctions when it found defendant’s appeal regarding the sufficiency of the evidence lacked merit and was apparently brought for the purposes of delay:

We have examined the record and find no debatable issues upon which reasonable minds might differ. Applying the considerations set out in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980), we conclude the appeal is

frivolous and, pursuant to RAP 18.9(a), impose \$150 as a sanction to be paid by appellant to respondent.

*City of Seattle v. Snog*, 28 Wn. App. 613, 614, 625 P.2d 179 (1981).

1. The facts of the case did not involve a clear situation which would raise the issue of an “intentional” accident.

As above, the deputy did not know how his vehicle came into contact with the other vehicle, or how the damage occurred to the left-hand driver’s front side of the vehicle. Moreover, the deputy did not opine that he or the fleeing driver intentionally caused the accident that resulted in the minimal damage to his patrol vehicle - a cracked headlight and a slightly bent push bar. Nor did the defendant offer that the contact with the deputy’s vehicle was intentional. The deputy stated that the F-350 truck struck his vehicle while it accelerated away from, not towards his vehicle, and that resulting contact occurred before he was able to conduct his post-PIT maneuver. RP 118. This was his failed attempt to contact the F-350’s rear driver’s side tire. RP 138. It failed because, “while [he] [was] trying to do that, the vehicle accelerated and ended up colliding with [his] vehicle.” RP 138-39.

Moreover, the real point of contention raised on appeal regarding the failure to remain at the scene of the accident charge was the defendant’s argument that the evidence failed to establish that she had knowledge of the

collision.<sup>1</sup> This factual position finds more support in the record than would the contention that either vehicle intentionally caused the damage. The officer denied that the contact was intentionally caused by him, as he testified he failed at his attempt to contact the vehicle, and testified that the F-350 struck his vehicle while driving away. There was no testimony that the damage or the collision was intentionally caused. Therefore, the facts of this case do not support a finding that the collision was other than accidentally caused.

2. The settled law of this state and other states is that the word “accident” encompasses situations involving intentional conduct.

Directly on all fours regarding the issue of whether the term “accident” includes the intentional acts of one or both drivers is

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<sup>1</sup> See Br. of Appellant at 24-25:

However, there is no evidence whatsoever, direct or circumstantial, that Ms. McCandless or the truck’s driver were aware of Dep. Rassier’s attempted Post PIT maneuver or any collision caused thereby. This was a high-speed chase and the F-350’s driver was earnestly attempting to elude pursuing deputies. The truck attempted to slow down and turn right from Sprague to Herald, lost control, hit the curb, and stopped for an instant. Dep. Rassier attempted to hit the right rear tire of the truck to prevent it from moving, but the truck sped off and the chase continued in the same manner as before. There was simply no evidence admitted at trial that would sustain any rational inference that Ms. McCandless, or any of the occupants of the truck, knew an accident or collision with Dep. Rassier’s vehicle had occurred.

*State v. Silva*, 106 Wn. App. 586, 595, 24 P.3d 477 (2001). That case expressly “hold[s] that the word ‘accident’, within the meaning of our hit-and-run statute, includes incidents arising from intentional conduct on the part of the driver and/or the victim.” *Id.* at 595. The court in *Silva* engaged in statutory construction analysis that included an examination of dictionary definitions of the word “accident” - concluding that “[s]uch definitions do not exclude events in which intentional conduct plays a part.”<sup>2</sup> *Id.* at 592.

*Silva* has survived for 17 years and its well-reasoned decision, concluding that the word “accident” as used in the “hit and run” statutes encompasses situations involving intentional conduct, has remained good law. The legislature has not acted contrary to *Silva*’s holding. *Silva* continues to stand for the direct principle it clearly enunciated. The principle of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). This respect for precedent “promotes the evenhanded, predictable, and consistent

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<sup>2</sup> In *Silva*, the court noted, as other jurisdictions had noted, that it makes no sense to read the statute as imposing duties on persons who negligently injure others or damage their property, but as absolving persons who do so intentionally from any such duties, and that the clear weight of authority supports the position that the word “accident” encompasses situations involving intentional conduct. *Silva*, 106 Wn. App. at 594-95.

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). There is no reason to revisit the issue in this case.

3. RAP 2.5 prevents an examination of the issue of whether the vehicle contact in this case would constitute an “accident.”

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed by our State’s highest court in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict”

by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

*Id.* at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically, regarding RAP 2.5(a)(3), our State Supreme Court has indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

As this Court has noted:

Washington courts and even decisions internally have announced differing formulations for “manifest error.” First, a manifest error is one “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d at 688, 757 P.2d 492. Second, perhaps perverting the term “manifest,” some decisions

emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *Scott*, 110 Wn.2d at 688, 757 P.2d 492; *Lynn*, 67 Wn. App. at 346, 835 P.2d 251. A third and important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

*State v. Stoddard*, 192 Wn. App. 222, 228, 366 P.3d 474 (2016).

Here, there were no objections to the instructions given, or the law surrounding the definition of "accident" as it pertained to the facts of this case, or the elements of the offense. Therefore, the issue is not preserved for appeal. RAP 2.5.

The issue was not manifest in the context of being an error that would be *obvious* to the trial court. The facts did not *obviously* establish that the collision was intentional, such that a trial court would determine there was an issue raised in the case regarding a definition of "accident." Nor would a judge, knowing of the *Silva* case, deem the issue as being unanswered by the court. Moreover, it is questionable as to whether this "issue" of statutory construction, already answered by the courts, would rise to the level of implicating a constitutional issue.

Finally, the facts necessary to examine the issue are not presented in this case. No one argued the “accident” was intentional, and the facts as outlined above do not support this Court having to reach a factually undeveloped issue. Courts must ensure they are “rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). If the court does not do so, it may step “into the prohibited area of advisory opinions.” *Id.* at 416 (quoting *Diversified Indus. Devereaux. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). The issue is not reviewable under RAP 2.5.

4. Any error regarding this issue was invited and, therefore, not reviewable.

The defendant acknowledged that whoever was driving the F-350 was *guilty* of “hit and run,” but that Deputy Rassier’s memory of the contact was disputed and could be used to impeach his ultimate conclusions of who was driving the F-350. RP 305-06 (defendant’s closing argument). This was a strategic choice<sup>3</sup> by the defendant.

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<sup>3</sup> This strategic choice would also bar consideration of an ineffective assistance of counsel claim, if one were raised, regarding the failure to seek further definitions for the term “accident.” *See State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To establish ineffective assistance, a defendant must show both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel’s performance will not be considered deficient if it can be

In making this argument any error regarding the definition of “accident” 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,

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characterized as legitimate trial strategy. *Kyllo*, 166 Wn.2d at 863. With respect to prejudice, a defendant must show “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Id.* at 862.

28 P.3d 780, 43 P.3d 526 (2001) (quoting *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)), *review granted, cause remanded*, 145 Wn.2d 1015, 37 P.3d 289 (2002), *and opinion modified on reconsideration*, 43 P.3d 526 (Wash. Ct. App. 2002).

The defendant did not ask for any additional definition for the term “accident” and agreed to all of the instructions.

We actually are in the same position. I had a chance to carefully review the instructions before Your Honor took the bench. I had a chance to look at them and discuss them with the State. I agree; *they all seem proper*. We don’t have any objections or exceptions at this time.

RP 263.

The failure to object to the instruction waived any claim of instructional error on appeal. The defendant contributed to any purported 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.

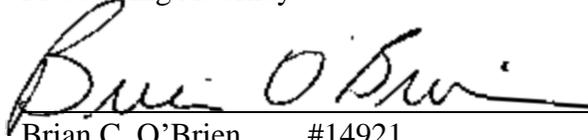
## V. CONCLUSION

The facts of this case, the settled law regarding the issue, questions of issue preservation under RAP 2.5, and the doctrine of invited error all preclude review of whether an intentional collision constitutes an

“accident.” *State v. Silva* has settled the issue regarding whether the term “accident” as used in the “hit and run” statutes includes intentional acts.

Dated this 8 day of November, 2018.

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

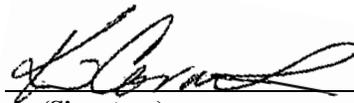
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In re: Personal Restraint Petition of  ERICKA HELLER, a/k/a ERICKA McCANDLESS,  Petitioner.	

I certify under penalty of perjury under the laws of the State of Washington, that on November 8, 2018, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Robert M. Seines  
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Spokane, WA  
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# SPOKANE COUNTY PROSECUTOR

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