

No. 35457-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

SHAUN PAUL DAVIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Timothy B. Fennessy

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APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

Appellant Shaun Paul Davis accepts this opportunity to reply to the State's brief. Mr. Davis requests that the Court refer to his opening brief for issues not addressed in this reply.

## B. ARGUMENT IN REPLY

**1. The jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.**

This argument pertains to Issue 2 raised in Mr. Davis' opening brief. Mr. Davis argues the jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt. *See* Appellant's Opening Brief pgs. 17-21; *see also* CP 171, 175.

In response, the State argues that Mr. Davis is precluded from raising this issue under the doctrine of invited error. *See* Respondent's Brief pgs. 16-18. The State argues "[b]ecause Mr. Davis specifically agreed to the instructions prepared by the trial court, any error was invited." *See* Respondent's Brief pg. 16. To support this argument, the State points to Mr. Davis' failure to object to any of the jury instructions given by the trial court, including the special verdict form for the attempt to elude sentencing enhancement. *See* Respondent's Brief pg. 17-18; *see also* RP 167.

The doctrine of invited error prevents a defendant from proposing a jury instruction and then challenging it on appeal. *See State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). "In determining whether the invited error doctrine applies, our courts consider 'whether the defendant affirmatively assented to the error, materially

contributed to it, or benefited from it.” *State v. Hood*, 196 Wn. App. 127, 135, 382 P.3d 710 (2016) (quoting *In re Personal Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014)). ““The doctrine appears to require affirmative actions by the defendant.”” *Id.* (quoting *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000)). In *Hood*, the Court of Appeals held that the doctrine of invited error did not bar review of a reasonable doubt jury instruction that the defendant did not affirmatively request, or object to. *Hood*, 196 Wn. App. at 131-36.

Here, Mr. Davis did not propose the special verdict form for the attempt to elude sentencing enhancement. (CP 119, 136-138, 171, 175; RP 49-52). He also did not object to this instruction. (RP 167). Nonetheless, he took no affirmative actions with respect to this instruction, such as formally stipulating to the correctness of the instruction. *See Hood*, 196 Wn. App. at 134-35. At trial, the State asked Mr. Davis to “formally adopt” the State’s proposed jury instructions, which included the special verdict form for the attempt to elude sentencing enhancement as given, and the trial court declined this request:

[The State:] Just if the defense is not going to submit their own jury instructions, we would ask that defense formally adopt the state’s jury instructions as their own.

....

[Trial court:] All right. Talk to me a little bit why you would ask them to adopt the state’s instructions as their own.

[The State:] Otherwise, they - - it’s invited error if they - - if they submit instructions and - - do not say that they are relying upon the State’s instructions. Otherwise, they should have to submit their own packet. Oftentimes what happens is that the state will submit jury instructions, defense will not submit any, or they’ll submit one or two. If it goes up on appeal, the - - the Court of Appeals, if they find the defense has adopted the state’s version versus submitting their own instructions, then it’s invited error for any abnormalities or any instructions that were not submitted. And so, they either can adopt the state’s version, or they can submit a packet on their own. My experience is that they often don’t

submit their own packet or at least their own complete packet. And so, we have been asked by our appellate unit to make sure that on the record it's clear that if they are not submitting a complete packet of their own, they are adopting the state's packet.

[Trial court:] Well, I would have to see the law on that. *I'm not inclined to require that they adopt the state's on the record.* I am inclined, and I try to make a record every - - in every case with regard to an opportunity to object or except to the instructions that the court has provided as the court's packet that they are intending to give. That packet in this case, at this stage, involves the State's instructions. [Defense counsel] has indicated he has a couple of his own. But he's been fully advised this morning with regard to the court's intentions. We will have an opportunity on the record before we instruct the jury for the state to take any exceptions and/or make any objections to those that the court is going to give. As will [defense counsel]. So, I think that we're talking six of one, half a dozen of the other, *but I'm not intending to require [defense counsel] to adopt the state's packet in that form.*

[The State:] If the court is at least going to require that defense accept the court's instructions, versus submitting their own packet, I think that that would be sufficient. I do agree that it's more of semantics.

[Trial court:] Okay. All right. . . .

(RP 50-52) (emphasis added).

By merely failing to object, Mr. Davis did not agree to the wording of the jury instruction for the attempt to elude sentencing enhancement. *Cf. State v. Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (holding that the invited error doctrine precludes review of a jury instruction, where the defendant agreed to use the wording of the jury instruction). The invited error doctrine does not prohibit Mr. Davis from challenging the jury instruction for the attempt to elude sentencing enhancement.

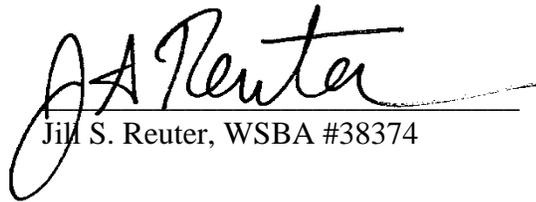
The State also argues that Mr. Davis' challenge to the special verdict form for the attempt to elude sentencing enhancement is subject to harmless error review, rather than structural error. *See* Respondent's Brief pgs. 24-29. However, this Court has acknowledged that giving a defective reasonable doubt instruction is structural error, not subject to harmless error analysis. *See State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d

785 (2013). Harmless error does not apply to this issue. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

### C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Davis' opening brief, the case should be reversed and remanded for resentencing without the attempt to elude sentencing enhancement, or on the alternative, for a new trial on the attempt to elude sentencing enhancement.

Respectfully submitted this 17th day of April, 2018.

  
Jim S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

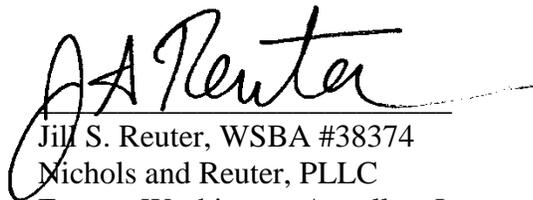
STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 35457-1-III  
vs. ) Spokane Co. No. 15-1-03367-1  
)  
SHAUN PAUL DAVIS ) PROOF OF SERVICE  
)  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 17, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Shaun Paul Davis  
c/o Spokane County Detention Services  
1100 West Mallon Avenue  
Spokane, WA 99260-0320

Having obtained prior permission, I also served a copy on the Spokane County Prosecutor's Office at [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org) using the Washington State Appellate Courts' Portal.

Dated this 17th day of April, 2018.

  
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