

70409-5

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NO. 70409-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STACEY ANNIE JAMISON
AKA STACEY ANNIE IVES,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. The invited error doctrine prohibits review of a claim of error if the party seeking review materially contributed to the error at trial. The defendant in this case explicitly endorsed the jury instruction which she now asserts was erroneous. Does invited error preclude review of the defendant's claim?

2. An unconstitutional judicial comment on the evidence does not require reversal of the conviction when the record affirmatively shows that no prejudice could have resulted. In this case, the allegedly unconstitutional comment consisted of referring to the victim as "Officer Clark Dickson"; it occurred after the defendant had admitted that Dickson was an officer and had referred to him as an officer dozens of times. Even if an unconstitutional comment on the evidence did occur, should the defendant's conviction be affirmed on the grounds that no prejudice could have resulted?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Stacey Annie Ives, also known as Stacey Annie Jamison, was charged by amended Information with one

count of assault in the third degree. CP 11. The State alleged that Ives had assaulted Seattle Police Officer Clark Dickson. CP 3, 11. Following a jury trial, Ives was found guilty as charged. CP 14. Ives subsequently received a standard range sentence. CP 27-29. She timely appealed. CP 33.

2. SUBSTANTIVE FACTS.

a. Facts Of The Crime.

Seattle Police Officers Clark Dickson, Owen Rodmaker, and Chris Gregorio were dispatched to respond to a disturbance at a residence shortly before midnight. 2RP 84, 104, 108.¹ Upon arriving at the scene, the officers rang the doorbell on the locked outer gate. 2RP 109-10. Ives came out to greet them, and asked for the officers' names, which they gave. 2RP 110. Ives asked the officers to get "him" out of her apartment, and let them into her apartment. 2RP 110. At Ives' request, Dickson stayed with Ives while the other officers searched Ives' apartment for an unknown male. 2RP 110-11. Ives would not tell the officers who was in her

¹ There are four volumes of the Verbatim Transcription of Audio CD of Proceedings in this case. The volume for April 1, 2013, is referred to as 1RP; April 2, 2013, is referred to as 2RP; April 3, 2013, is referred to as 3RP; and April 19, 2013, is referred to as 4RP.

apartment or where he was, but repeated "just get him out of here."
2RP 111.

After a thorough search of the apartment, the officers determined that there was no one in Ives' apartment other than her three children. 2RP 88. The officers concluded their investigation, and informed Ives that there was no one there, but Ives did not believe them. 2RP 112-13. As the officers began to leave the apartment, Ives became enraged and started yelling, following them outside. 2RP 113. Ives said "Hell no. I'm going to go get my beat stick," and ran back inside. She returned within moments holding a long stick that appeared to be a broom or mop handle. 2RP 113-14. Ives held the stick over her head with both hands, and swung it as if trying to scare the officers off. 2RP 115. Ives then turned toward Dickson and struck him in the arm with the stick, causing pain. 2RP 216-17. After a brief struggle, the officers disarmed Ives and arrested her. 2RP 117.

At trial, the officers testified that they were indeed police officers, and were in uniform at the time of their contact with Ives. 2RP 79-83, 104-07; 3RP 23. Ives took the stand, and denied assaulting Officer Dickson. 2RP 141. She testified that she had made a gesture toward the officers with the stick because she

wanted to induce them to write a report about her complaint of an intruder. 2RP 141. She admitted that she knew that Dickson, Rodmaker, and Gregorio were police officers at the beginning of her contact with them, at the end of it, and that day as she testified in court. 2RP 157-63. However, Ives stated that in the middle of her contact with the officers she didn't believe that Dickson "was behaving in a professional and officially officer kind of manner and following protocol." 2RP 162.

Throughout her testimony, Ives referred to Dickson, Rodmaker, and/or Gregorio as "officers" seven times, and specifically referred to Dickson as "Officer Dickson" an additional ten times. 2RP 136-60. Defense counsel referred to Dickson, Rodmaker, and/or Gregorio as "officers" 22 times, and specifically referred to Dickson as "Officer Dickson" an additional three times. 2RP 100-01, 125, 137, 140, 144; 3RP 33, 63-69.

b. Crafting Of Jury Instructions.

Prior to trial, the State brought a motion to require the defendant to submit a full set of proposed jury instructions. CP 67-69; 1RP 12. The trial court told defense counsel, Mark Flora, that "with regard to the request that the defense present a full

set, I would just ask, Mr. Flora, during our jury instruction conference on the record if you haven't submitted the standard WPICs, I'll be asking you to adopt, object, or take exception to as you choose to do so on the record." 1RP 12. Flora agreed to do so. 1RP 12.

Ives filed only one proposed jury instruction, addressing the definition of reasonable doubt. CP 12-13. The State proposed a full set of instructions, including a to-convict instruction modeled on WPIC 35.23.02. CP 40-58. That instruction stated that the elements the State had to prove beyond a reasonable doubt in order for the jury to convict Ives were:

- (1) That on or about November 20, 2012, the defendant assaulted Officer Clark Dickson;
- (2) That at the time of the assault Officer Clark Dickson was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
- (3) That any of these acts occurred in the State of Washington.

CP 55.

Prior to closing arguments, the court went through each of the proposed jury instructions, and asked defense counsel to state whether the defendant endorsed the instruction or had any objection to it. 2RP 165-70. Through her counsel, Ives explicitly

endorsed most of the State's proposed instructions. 2RP 165-69. When the trial court asked for input on the to-convict instruction proposed by the State, defense counsel stated, "I endorse that also." 2RP 168-69. The trial court adopted the instruction endorsed by Ives and gave it to the jury. CP 19.

C. ARGUMENT

1. IVES' CONVICTION SHOULD BE AFFIRMED BECAUSE THE CLAIMED ERROR WAS INVITED BY IVES, AND BECAUSE NO PREJUDICE COULD HAVE RESULTED FROM IT.

Ives claims that her conviction must be reversed because the trial court impermissibly commented on the evidence by referring to the victim as "Officer Clark Dickson" in the to-convict jury instruction when the victim's status as a law enforcement officer was an element of the charged crime. This claim should be rejected. The invited error doctrine precludes review of Ives' assertion of error, because at trial Ives affirmatively endorsed the instruction she now challenges. Even if this Court were to reach the merits of her claim, her conviction should be affirmed because the record affirmatively shows that no prejudice could have resulted from the claimed error.

a. The Invited Error Doctrine Prohibits Review Of Ives' Claim.

Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). This doctrine applies even to errors of constitutional magnitude that would otherwise be reviewable for the first time on appeal under RAP 2.5, such as judicial comments on the evidence. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). Courts apply the invited error doctrine strictly, sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding doctrine prohibited review of legally erroneous jury instruction even though it was standard WPIC when defendant proposed it); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (noting that defendant who participates in drafting of jury instruction may not challenge the instruction on appeal).

Here, the invited error doctrine prohibits review of Ives' claim because she affirmatively endorsed the challenged instruction. When the State made a pre-trial motion to require Ives to submit a complete set of proposed jury instructions, the trial court informed

Ives that if she did not submit her own proposed instructions, the court would require her “to adopt, object, or take exception” on the record to the State’s proposed instructions. 1RP 12; CP 67-69. Defense counsel acquiesced. 1RP 12. Prior to closing arguments, the court went through each of the proposed jury instructions, and asked defense counsel to state whether the defendant endorsed the instruction or had any objection to it. 2RP 165-70. Through her counsel, Ives explicitly endorsed most of the proposed instructions. 2RP 165-69. When the trial court asked for input on the to-convict instruction Ives now challenges, defense counsel stated, “I endorse that also.” 2RP 168-69; CP 55.

By endorsing the to-convict instruction, Ives joined the State in asking the trial court to give that instruction, and invited the error of which she now complains. This Court should therefore decline to review Ives’ claim.

- b. The Record Affirmatively Shows That No Prejudice Could Have Resulted From The Claimed Error.

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Article IV, section 16 of the

Washington State Constitution prohibits a judge from making comments that convey to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A remark or instruction improperly suggesting to the jury that an element of an offense has been established as a matter of law is a judicial comment on the evidence. Levy, 156 Wn.2d at 721. An improper judicial comment requires reversal of a conviction if the defendant was prejudiced by the comment. Id. at 723. Washington courts presume a judicial comment on the evidence to be prejudicial, with the burden on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Id.

Here, even if one assumes that the trial court's reference to the alleged victim as "Officer Clark Dickson" in the to-convict instruction constituted an improper judicial comment on the evidence, the record affirmatively shows that no prejudice could have resulted. It is true that Dickson's status as a law enforcement officer is one of the things the State had the burden of proving at trial. RCW 9A.36.031(1)(g); WPIC 35.23.02. However, Ives not only chose not to challenge Dickson's testimony that he was a

police officer, but she affirmatively admitted that Dickson was an officer dozens of times. Defense counsel referred to Dickson, Rodmaker, and/or Gregorio as “officers” 22 times, and specifically referred to Dickson as “Officer Dickson” an additional three times. 2RP 100-01, 125, 137, 140, 144; 3RP 33, 63-69. Ives herself referred to Dickson, Rodmaker, and/or Gregorio as “officers” seven times during her testimony, and specifically referred to Dickson as “Officer Dickson” an additional ten times. 2RP 136-60. Ives also explicitly conceded that Dickson, Rodmaker, and Gregorio were in fact law enforcement officers. 2RP 163.

Given Ives’ numerous admissions that Dickson was an officer, it is clear that no prejudice could have resulted from the trial court’s reference to Dickson as “Officer Clark Dickson.” See State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006) (citing fact that defendant did not admit or stipulate to fact referenced in judicial comment in holding that record did not affirmatively show that no prejudice could have resulted). Indeed, the numerous references by Ives and defense counsel to “Officer Dickson” were tantamount to a stipulation that Dickson was in fact an officer. No rational juror would have concluded that Dickson was *not* an officer,

and therefore no prejudice could have resulted from the alleged error. See Levy, 156 Wn.2d at 727.

Ives contends that “it is conceivable the jury could have determined Dickson was not a police officer engaged in his professional duties at the time of the assault.” Appellant’s Brief at 7. However, the challenged jury instruction suggested only that Dickson was an officer. CP 19. The trial court never commented on the issue of whether Dickson was engaged in his professional duties at the time of the assault; that determination remained for the jury to make. Because Ives’ admissions had already eliminated any issue as to Dickson’s status as a police officer, no prejudice could have resulted from the trial court’s reference to him as “Officer.” See Levy, 156 Wn.2d at 727.

Ives is prohibited from challenging the to-convict instruction that she affirmatively endorsed by the doctrine of invited error. Even if this Court were to address the merits of her claim, her conviction should be affirmed because no prejudice could have resulted from the trial court’s reference to the alleged victim as “Officer Clark Dickson” when Ives had already admitted dozens of times that Dickson was an officer.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ives' conviction.

DATED this 19th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. STACEY ANNIE JAMISON, AKA STACEY ANNIE IVES, Cause No. 70409-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of February, 2014

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Name
Done in Seattle, Washington