695604-9

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NO. 69564-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

SUDESHKUMAR KOTHARI,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ARGUMENT IN REPLY

1. KOTHARI MAY CHALLENGE THE "TO- CONVICT" INSTRUCTIONS FOR THE FIRST TIME ON APPEAL.

The State asserts Kothari waived a challenge to the "to-convict" instructions because he failed to object to the challenged language at trial. Brief of Respondent at 4-8. But under RAP 2.5(a)(3), certain instructional errors that are of constitutional magnitude may be challenged for the first time on appeal.[1] "Constitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The appellant must demonstrate the error is both manifest and truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is manifest if it results in actual prejudice or had practical and identifiable consequences in the trial. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999).

Errors affecting a defendant's constitutional right to jury trial can be raised for the first time on appeal. State v. Camarillo, 115 Wn.2d 60, 62-64, 794 P.2d 850 (1990); State v. Hansen, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) ("Failure to give Petrich instructions affects the defendant's

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[1] In pertinent part, RAP 2.5(a) provides, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors in the appellate court: . . . (3) manifest error affecting a constitutional right." By its terms, RAP 2.5(a) is a discretionary, not mandatory, rule. Ford Motor Co. v. Seattle Exec. Services Dept., 160 Wn.2d 32, 49 n.4, 156 P.3d 185 (2007).

constitutional right to jury trial . . . and thus may be raised for the first time on appeal.") (citations omitted).

The trial court infringed Kothari's right to trial by a jury in full possession of the power to acquit when it instructed jurors they had a "duty to return a verdict of guilty" if they found from the evidence that each element had been proved beyond a reasonable doubt. See State v. Primrose, 32 Wn. App. 1, 2, 4, 645 P.2d 714 (1982) (reversal of bail jumping conviction required where trial court instructed jurors that, "[a]s a matter of law the defendant has not introduced evidence concerning a lawful excuse for his failure to appear[;]" court ignored "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power."); United States v. Leach, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980) ("Jury nullification – the right of a jury to acquit for whatever reasons even though the evidence supports a conviction – is an important part of the jury trial system guaranteed by the Constitution."). This Court should reject the State's assertion that Kothari may not raise his challenge to the "to-convict" language for the first time on appeal.

2. INSTRUCTING THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY" IMPROPERLY INFRINGED KOTHARI'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The State argues Kothari fails to establish this Court's decision in State v. Meggyesy[2] was incorrect. Brief of Respondent at 8-14. Among other claims, the State assails Kothari's failure to address State v. Wilson, 9 Wash. 16, 36 P. 967 (1894). The State maintains that Wilson held the trial court did not err by instructing jurors that "the law made it their duty" to find the accused guilty if they found from the evidence that the accused committed every act necessary to constitute the crime. Brief of Respondent at 12-13.

What the State fails to note, however, is that the Court also concluded "it would have been better that the word 'may' should have been substituted" for the word "must" in the phrase, "if they [jurors] found that the game was carried on for gain, they must find defendant guilty." Wilson, 9 Wash. at 21. Contrary to the State's position, this portion of Wilson supports Kothari's contention that, at the time the Constitution was adopted,[3] courts instructed juries using the permissive 'may' as opposed to the current

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[2] State v. Meggyesy 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

[3] See Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978) (referring to "original version of the constitution adopted in 1889").

practice of requiring the jury to make a finding of guilt. See also State v. Wentworth, 118 N.H. 832, 839, 395 A.2d 858, 863 (N.H. 1978) (in New Hampshire, jurors are instructed in part that "[I] f you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty.") (emphasis added).

For this reason and those contained in the Brief of Appellant, Kothari requests this Court reject the State's argument that Meggyesy and its progeny must continue to be followed.

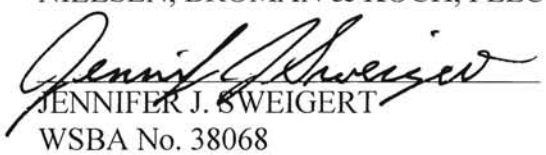
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Kothari requests this Court reverse his convictions and remand for a new trial.

DATED this 26th day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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SUDESHKUMAR KOTHARI,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] SUDESHKUMAR KOTHAR
DOC NO. 362420
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JULY 2013.

X Patrick Mayovsky