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NO. 69564-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

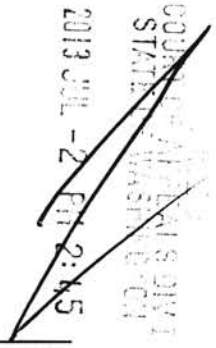
STATE OF WASHINGTON,

Respondent,

v.

SUDESHKUMAR S. KOTHARI,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

The defendant was convicted of First-Degree Burglary, Second-Degree Assault -- both with aggravating factor findings, and Misdemeanor Violation of a No-Contact Order. The defendant's sole claim on appeal is his assertion that it is improper for a "to convict" jury instruction to state that the jury has a duty to return a guilty verdict if it finds that each element of a crime has been proven beyond a reasonable doubt.

Should this Court reject the defendant's argument because this case is governed by State v. Meggyesy,[1] a case decided 15 years ago, and the defendant has failed to prove that the holding of Meggyesy is "incorrect and harmful" as required by In re Stranger Creek,[2] the required standard to overturn precedent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with Burglary in the First Degree, Assault in the Second Degree -- both with aggravating factor exceptional sentence allegations, and Misdemeanor Violation

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[1] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

[2] 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

of a No-Contact Order. CP 10-13. A jury found the defendant guilty as charged. CP 102-07.[3] The defendant received an exceptional sentence of 196 months. CP 234-44.

2. THE JURY INSTRUCTIONS

The challenged "to convict" jury instruction read as follows:

> To convict the defendant of the crime of Burglary in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 14, 2011, the defendant unlawfully entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with the intent to commit a crime against a person or property therein;
>
> (3) That while in the building or in immediate flight from the building the defendant assaulted a person; and
>
> (4) That any of these acts occurred in the state of Washington.
>
> **If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.**
>
> On the other hand if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

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[3] The verbatim report of proceedings consists of three paginated volumes for the following dates: 1/6/12, 3/5/12, 3/6/12, 3/7/12, 3/8/12, 3/12/12 and 10/26/12.

CP 23 (emphasis added). The highlighted language is the language the defendant challenges on appeal.[4]

3. SUBSTANTIVE FACTS

The trial facts are not relevant to the issue raised on appeal, therefore, the trial facts will not be summarized here.

C. ARGUMENT

THE DEFENDANT HAS FAILED TO SHOW THAT EVERY WPIC "TO CONVICT" JURY INSTRUCTION IS UNCONSTITUTIONAL

The defendant contends that language in the "to convict" jury instructions provided in his case rendered the instructions unconstitutional. Specifically, he contends that the following language is a misstatement of the law:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty***...
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty...

The language he complains is included in every "to convict" WPIC

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[4] The "to convict" instructions for count II and count III, as well as the aggravating factor "to convict" instruction, contain the elements of that crime/aggravating factor, the date of offense, and the exact same language as highlighted above. CP 29-30, 36, 40-41.

jury instruction. See e.g., WPIC 26.02, 26.04, 26.06. This same argument has been rejected in State v. Brown,[5] State v. Bonisisio,[6] and State v. Meggyesy, supra. The Supreme Court has repeatedly denied review. Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, 77 Wn.2d at 653. The defendant has failed to make any new arguments sufficient to meet this burden. In addition, the defendant's claim is not properly before this Court.

1. The Alleged Error Is Not Manifest Allowing For Appellate Review Absent An Objection.

The defendant did not raise this issue below. In fact, when given the specific opportunity to object to the giving of any of the now contested instructions, the defendant told the court that the packet of instructions "accurately reflects the law and I have no objections or exceptions." RP 442 (3/12/12). On appeal, in a footnote, other than to assert that his claim raises a constitutional issue, the defendant does not assert how the issue amounts to

[5] 130 Wn. App. 767, 124 P.3d 663 (2005).

[6] State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

"manifest constitutional error" that can be raised for the first time on appeal. See Def. br. at 6 n.2.

An appellate court will not review an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (failure to instruct on "knowledge" not manifest error). "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." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An appellant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected his rights. 127 Wn.2d at 333. "[I]t is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." 127 Wn.2d at 333.

Thus, to obtain review, the defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). A reviewing court will not assume that an error is of constitutional magnitude. Id. The court will look to the asserted claim and assess whether it implicates a constitutional interest as

compared to another form of trial error. Id. If the claimed error is of constitutional magnitude, the court will determine whether the error is manifest. Manifest requires a showing of "actual prejudice." Id. 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.

In State v. Naillieux, a case that involved the trial court's failure to give a certain unanimity instruction, the Court aptly described the problem with the increasing number of claimed manifest error situations:

> Mr. Naillieux argues that we should review his assignments of error in the first instance because these errors are manifest constitutional errors. He, thus, essentially invites us to review his case de novo. The problems this argument presents are spelled out clearly by Judge Marshall Forrest in his thoughtful opinion in State v. Lynn, 67 Wn. App. 339, 342-46, 835 P.2d 251 (1992). And given the increasing frequency with which these assignments of error show up in this court, the problems bear repeating.
>
> We sit as a court of review which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources. And it encourages skilled counsel to save claims of constitutional error for

> appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor. Most errors in a criminal case can be characterized as constitutional.
>
> Mr. Naillieux is entitled to a new trial only if his claimed errors are manifest constitutional errors. Even if the claimed error is constitutional in nature, we will not review it unless it is also manifest. An error is manifest when the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." "'[M]anifest' means ***unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed***. 'Affecting' means ***having an impact or impinging on, in short, to make a difference***. A purely formalistic error is insufficient." We conclude that, while Mr. Naillieux's claims of manifest constitutional error might well implicate constitutional due process rights, they are not manifest.

State v. Naillieux, 158 Wn. App. 630, 638-39, 241 P.3d 1280 (2010) (internal citations omitted) (emphasis added).

Here, there can be nothing more than pure speculation that the alleged error--the inclusion of the disputed language in the jury instructions--had identifiable consequences. Further, it is difficult to see how the defendant can claim the alleged error is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed," when there are multiple published cases holding in contrast to his position, and by his own admission, he is merely

trying to preserve the issue. This is insufficient to allow for appellate review.

2. The Defendant's Claim That Prior Case Law Is Incorrect Is Not Persuasive.

In Meggyesy, the defendant made the same argument as made here--that the language that the jury had a duty to convict if they found beyond a reasonable doubt each element of the crime had been proven, violated the defendant's "right to trial" under the state and federal constitutions. This Court rejected this argument. In short, the defendant claims that this Court got it wrong. Specifically, he argues, like Meggyesy did, that under the state constitution, a different result is required.

In Meggyesy, this Court first noted that the challenged language appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the offenses beyond a reasonable doubt. Meggyesy, 90 Wn. App. at 699. The Court acknowledged that with general verdicts, juries do have the power to acquit against the evidence. Meggyesy, at 700 (citing United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972)). But the Court noted that under the federal constitution, the circuit courts have clearly held that while jury nullification is always

possible, no case has held that an accused is entitled to a jury nullification instruction. Meggyesy, at 700. The defendant does not cite contrary authority here.

Meggyesy then argued that under the state constitution, the result must be different. This Court, followed by Brown, supra; and Bonisisio, supra; all rejected this argument.

In determining whether the state constitution provides broader protection in a certain area, the court considers the Gunwall factors.[7] Under Gunwall, the court is guided in deciding whether to conduct an independent analysis under the state constitution based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Meggyesy, at 701.

As to the first Gunwall factor, there is nothing in the language of article I, section 21 that addresses the particular concern herein. See Meggyesy, at 701. In pertinent part, article I, section 21 simply provides that "[t]he right to trial by jury shall remain inviolate."

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[7] Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

As to the second Gunwall factor, the defendant seems to agree that while the language of article I, section 21 and the sixth amendment is different, nothing in the language of either provision--or the difference in language--addresses the particular concern herein. See Meggyesy, at 701-02. In pertinent part, the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." In State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), the Supreme Court held that the language of the sixth amendment and article I, § 22 is substantially similar.

The third Gunwall factor, state constitutional history, also does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right. Meggyesy, at 702. The Supreme Court has previously held that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." Brown, 132 Wn.2d at 596.

In Meggyesy, this Court found that the fourth factor, preexisting state law, "does not aid the appellants." Meggyesy, at 702. This Court noted that the Supreme Court has held that

article I, section 21 preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted. Id. This Court found that Meggyesy had provided no pre-constitutional case establishing a rule prohibiting the challenged language used herein. The defendant here claims this is incorrect and cites to Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885). This claim is of no moment.

Meggyesy cited to Leonard as well, and the Court properly considered the case for its limited value. Leonard was convicted of murder and sentenced to death. He challenged a great number of the jury instructions provided in his case on a number of grounds--none of which, the Meggyesy court noted, involved the legal challenge made by Meggyesy (or herein by the defendant).

However, the defendant here argues that the point of citing Leonard is that one of the instructions in Leonard contained the following language, "If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you ***may*** find him guilty..." Thus, according to the defendant, this shows the prevailing practice at the time the state constitution was ratified. This argument fails for a variety of reasons.

First, all five jury instructions challenged in Leonard were general instructions dealing with the burden of proof and defenses, and every single instruction was found to misstate the law. It is abundantly clear from the opinion that the instructions were crafted by the trial court (or trial counsel) and were not a type of standard jury instruction used in other cases at that time, such as WPIC instructions are used now. If the instructions in Leonard were standard instructions, then every single criminal case in the State of Washington would have been reversed based on Leonard. This, obviously, did not occur.

Second, there is nothing in the Leonard opinion, or anything else the defendant cites herein, that demonstrates the actual standard practice at the time in regards to the issue he raises here.

And third, the defendant does not address State v. Wilson,[8] discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, the jury "must" find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court stated that taking all the language in context, "it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the

[8] 9 Wash. 16, 36 P. 967 (1894).

crime had been committed by the defendant, the law ***made it their duty*** to find him guilty." Wilson, at 21 (emphasis added). The Court held that there was no instructional error. Id. The defendant's argument that this Court erred in regards to the fourth factor is not persuasive.

As to the fifth factor, the differences in the structures of the federal and state constitutions, the State conceded in Meggyesy that this factor always supports an independent analysis. Meggyesy, at 703.

As to the sixth, and final Gunwall factor, matters of particular state or local concern, while criminal law is a matter of state and local concern, there is nothing about this concern that would suggest that there is any different standard in regards to the issue at hand than any other area of the country or the federal court system--a jurisdiction that as already noted has rejected the argument the defendant makes here.

This argument has been made multiple times, in Meggyesy, Brown, and Bonisisio, if not other cases. The Supreme Court has denied review of this issue at least two times (Meggyesy, and Bonisisio). Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it

is incorrect or harmful. See In re Stranger Creek, supra. The defendant has failed to make any new arguments sufficient to meet this burden.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 2 day of July, 2013.

Respectfully submitted,

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By: _____
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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 Jennifer Sweigert, 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. KOTHARI, Cause No. 69564-9 -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 2 day of July, 2013

Name
Done in Seattle, Washington