69812-5

69812-5

NO. 69812-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN CLARDY, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior 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. When raising a prosecutorial misconduct claim, a defendant must demonstrate both misconduct and prejudice to prevail. Here, the prosecutor made a confusing statement in closing argument that could be read as a misstatement of the law. The statement was not repeated; instead, the prosecutor correctly stated the law moments later. The jury instructions also correctly and repeatedly advised the jury of the applicable law. Has Clardy failed to meet his burden of proving prejudicial misconduct?

2. Jury instructions are sufficient if they permit the defendant to argue his theory of the case, are not misleading, and properly inform the jury of the applicable law. Here, the jury was correctly informed that it could only convict if it unanimously found beyond a reasonable doubt that Clardy recklessly discharged a firearm, and that that discharge created a substantial risk of death or serious physical injury to another person. Recklessness was defined, following the words of the statute, as a knowing disregard of a substantial risk that a wrongful act or result will occur. Was the jury instructed correctly regarding the definition of recklessness? If not, has Clardy failed to preserve the issue for review by proposing the instruction below and by not objecting to the court's giving of the recklessness instruction? Is any error harmless in light of the fact

that recklessness was not at issue in the case, because the shooter fired at the victim eight times and Clardy's defense was that he was not the shooter?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 11, 2011, the State of Washington charged the defendant, Kevin Stewart Clardy, Jr., with one count of Robbery in the First Degree, one count of Burglary in the First Degree while armed with a firearm, and one count of Assault in the First Degree. CP 1-3. Co-defendants Tia Lyn Eaton, Amani Catrice Sorrell, Josiah M. Rashid, and Doresida C. Castro were charged in the same Information. CP 1-3. The Information was later amended to charge Clardy with Robbery in the First Degree, Burglary in the First Degree, Assault in the First Degree, Unlawful Possession of a Firearm in the First Degree, and Drive-By Shooting. CP 113-16. The first three counts were all alleged to have been committed while armed with a firearm. CP 113-15.

The matter proceeded to trial on October 16, 2012, before the Honorable Hollis R. Hill. 2RP 1.[1] To comply with CrR 6.15, Clardy explicitly adopted the jury instructions proposed by the State and submitted additional proposed instructions of his own. CP 75-102;

[1] This brief follows Clardy's convention for referring to the Verbatim Report of Proceedings. See Brief of Appellant at 2 n.2.

159-98. The trial court instructed the jury with respect to Drive-By Shooting consistently with the jointly proposed instructions. Compare CP 380-81 with CP 221, 244.

The jury convicted Clardy as charged on all counts, including the firearm enhancements. CP 263-72. The court sentenced Clardy to a standard range sentence. CP 296-308. This appeal timely followed. CP 294-95.

2. SUBSTANTIVE FACTS

For purposes of background information only, the State accepts Clardy's recitation of the substantive facts, except as discussed in greater detail below.

C. ARGUMENT

1. CLARDY WAS NOT PREJUDICED BY ANY PROSECUTORIAL MISCONDUCT.

Clardy argues that all of his convictions should be reversed because of prosecutorial misconduct during closing argument. But the prosecutor's argument, while inartful, was not misconduct when read in context of the argument as a whole. Nor can Clardy demonstrate that he was prejudiced. Clardy's convictions should be affirmed.

Where a defendant claims the prosecutor made an improper closing argument, the conviction should be affirmed unless the defendant

demonstrates both prosecutorial misconduct and resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To determine whether a prosecutor's argument was improper, a reviewing court must examine the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Id. at 85-86.

A defendant is prejudiced if a substantial likelihood exists that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The defendant bears the burden of demonstrating both that the argument was improper and that he was prejudiced. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

Here, Clardy predicates his claim of prosecutorial misconduct on a single statement by the prosecutor. In his initial remarks during closing argument, the prosecutor discussed some general principles about jury decisionmaking. Explaining the purpose of the to-convict instructions and the requirement of a unanimous verdict, the prosecutor said:

> To put it in less legal terms, it gives you a set, a list, a checklist of things you need to consider and make a decision on. If you decide all of them one way, the Defendant's guilty; if you decide all of them another way, he's not guilty; if you can't decide or you reach different conclusions on different elements, then you can't render a verdict.

2RP 1200.

This statement is confusing, and it is not clear exactly what the prosecutor was trying to convey. However, to the extent that the prosecutor could be understood as saying that, in order to acquit, a juror had to have reasonable doubt on all of the elements of the crime, as opposed to any element, the statement was admittedly inaccurate. A failure of proof on a single element requires the jury to acquit on that offense. E.g., State v. Scott, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). But that principle of law was clearly conveyed to the jury. Looking at the argument as a whole, the issues in the case, and the court's instructions to the jury, the prosecutor's statement was not improper.

First, all of the jury instructions provided by the trial court reflect the correct legal standard. Each to-convict instruction states that, if the jury has a reasonable doubt as to any single element, it must acquit on that count. CP 212-13, 215, 217, 219, 221. For instance, with respect to Burglary in the First Degree, the jury was instructed:

> 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 II.
>
> 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 as to Count II.

CP 215 (emphasis added). In addition, the jury was instructed that, where counsel's argument is not supported by the law as given the jury by the court, it must disregard that argument. Specifically, the jury was told:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 202 (emphasis added). Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

Second, it is clear from the record that the prosecutor was not intending to tell the jury that it had to find a failure of proof on every element in order to acquit, because the prosecutor correctly stated the law on this issue only a moment later. Specifically, immediately after the incorrect statement, the prosecutor turned to the charge of Burglary in the First Degree and discussed all of the elements of that crime, noting that the only element truly in dispute was identity. 2RP 1201-04. He repeatedly pointed out that the State bore the burden of proving every element beyond a reasonable doubt. E.g., 2RP 1202 ("You still have to make a decision as to Element Number 4, but all of the evidence in this case is that all of these acts occurred in the state of Washington"); 2RP 1203

("You still have to make a decision, but that doesn't mean there's a reasonable doubt or even a need to take much time to make that decision."). He argued that the case was about who did it, not about what happened—an argument that Clardy himself echoed. Compare 2RP 1201-10 (prosecutor's argument that only the issues of identity and specific intent on Assault 1 were at issue) with 2RP 1231-37 (defense counsel's argument that only the issues of identity and specific intent on Assault 1 were at issue). The prosecutor concluded the discussion of Burglary in the First Degree by stating, "What's left is this question: Was it the Defendant or an accomplice, or was it someone else? If it was the Defendant or an accomplice, then Mr. Clardy's clearly guilty; if it wasn't, then he's not." 2RP 1204.

Similarly, in narrowing the areas of dispute with regard to Drive-By Shooting, the prosecutor said, "So, for Drive-by Shooting, again, the real question comes down to, was it the Defendant? . . . It's either the Defendant who did it or he's not guilty." 2RP 1209. These statements clarified for the jury that if it found that the State's proof failed even on a single element—most likely, identity—it had to acquit.

These later statements cured any earlier misstatement of the law, and shed light on what the prosecutor was likely trying to explain in the inartful sentences to which Clardy objects. In context, it appears that the

prosecutor was attempting to discuss the interaction between the to-convict instructions and the concept of juror unanimity. While the trial court provided the jury with the elements of each crime in five separate to-convict instructions, the fact that the jury could only reach a decision on each count if it was unanimous was not fully addressed until a later instruction.[2] Compare CP 212-13, 215, 217, 219, 221 (the five to-convict instructions) with CP 248-52 (instructions regarding unanimous verdicts and lesser-included offenses). Further, the requirement of juror unanimity was less straightforward in this case than the typical case, as there were alternative means of conviction in the robbery count, as well as lesser-included offenses that could be considered even in the absence of juror unanimity on the greater offenses. See CP 213, 248-52. Taking into account the law provided by the court in its instructions and the prosecutor's correct statements of law regarding the State's burden of proof and juror unanimity with respect to each element only moments

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[2] Although juror unanimity was mentioned in the to-convict instruction for Robbery in the First Degree, the discussion there may have contributed to the prosecutor's garbled explanation. Specifically, that instruction read:

> If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a) or (5)(b) or (5)(c) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (5)(a) or (5)(b) or (5)(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 213.

later, it appears that the prosecutor was merely attempting to explain that the jury must be unanimous to render any verdict. In context, the prosecutor's statement—while misleading in isolation—was not misconduct.

Even if the argument was improper, however, Clardy has failed to show how he was prejudiced. The misstatement by the prosecutor was made a single time and promptly rectified. Compare State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191, 199 (2011) (finding misconduct was prejudicial where the improper comments were made frequently).[3] The inaccuracy was not inflammatory; the prosecutor did not ask the jurors to decide the case on an improper basis or appeal to their passions or prejudices. Compare Belgarde, 110 Wn.2d at 508-10 (holding misconduct was prejudicial where the prosecutor described the American Indian Movement, with which the defendant was associated, as "a deadly group of madmen" and compared it to Sinn Fein and Kadafi). Nor did the incorrect statement constitute an improper shifting of the burden of proof to Clardy. Compare State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) (concluding that prosecutorial misconduct warranted a new trial

[3] The Washington Supreme Court granted Walker's petition for review and remanded for reconsideration in light of State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012). State v. Walker, 164 Wn.2d 724 (2012). The Court of Appeals adhered to its original decision in an unreported opinion. State v. Walker, 173 Wn. App. 1027 (2013).

where the prosecutor argued that the jury had to find the State's witnesses were either lying or mistaken in order to acquit the defendant).

Further, even if the prosecutor's statement was taken literally, and even if the jury disregarded the prosecutor's later and correct arguments as well as the accurate and clear jury instructions, it is hard to imagine how Clardy was prejudiced. After all, the prosecutor was still contending that, in order to convict, the jury had to unanimously agree that the State met its burden on all of the elements. 2RP 1200. This is a correct statement of law.

In short, the prosecutor made a confusing statement of law that he promptly corrected. The jury was clearly and properly instructed by the trial court. The misstatement was not prejudicial. All of Clardy's convictions should be affirmed.

2. THE JURY INSTRUCTIONS PROPERLY REQUIRED THE STATE TO PROVE CLARDY RECKLESSLY DISCHARGED A FIREARM.

Clardy claims that the first sentence of Instruction 40 (CP 244), defining "recklessly," relieved the State of its burden of proving an element of Drive-By Shooting, because the term "wrongful act" was not replaced with the term "death or serious physical injury to another person." But Clardy's argument is without merit; the jury was correctly instructed as to the elements of the crime. Further, he affirmatively

requested the instruction below, inviting the error of which he now complains. To the extent this Court concludes the error was not invited, Clardy failed to object to the court's instruction, and this claim is not a manifest constitutional error, so any error has not been preserved for review. Finally, even if the term "wrongful act" should have been more specific, that error was harmless beyond a reasonable doubt because the required recklessness was not disputed.

a. The Jury Instruction Defining Recklessness Was Correct.

Clardy argues that the jury instruction misstated the law by requiring the jury to find only that he recklessly committed a wrongful act, instead of recklessly creating a risk of death or physical injury to another person. He is incorrect. Because the to-convict instruction in this case clearly stated every element, including that Clardy recklessly discharged a firearm, the statutory definition of recklessness provided by the court was not erroneous.

Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct the jury in a manner that would relieve the State of the burden of proof. State v. Pirtle,

127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are sufficient if they permit the defendant to argue his theory of the case, are not misleading, and properly inform the jury of the applicable law. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011). Challenged instructions are reviewed de novo. Id. Each instruction must be evaluated in the context of the instructions as a whole. State v. Sublett, 176 Wn.2d 58, 81, 292 P.3d 715 (2012).

Here, Clardy was charged with Drive-By Shooting, which required the State to prove that he recklessly discharged a firearm in a manner that created a substantial risk of death or serious physical injury to another, and that the discharge was from a motor vehicle or its immediate vicinity. RCW 9A.36.045(1); CP 115, 220. The jury was instructed that, to convict Clardy of that offense, the State had to prove beyond a reasonable doubt:

> (1) That during the period of time intervening between March 8, 2011, through March 9, 2011, the defendant recklessly discharged a firearm;
>
> (2) That the discharge created a substantial risk of death or serious physical injury to another person;
>
> (3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and
>
> (4) That the acts occurred in the State of Washington.

CP 221. Clardy does not assign error to this instruction. The instructions then defined recklessness:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 244. This definition mirrors the statutory definition of reckless. RCW 9A.08.010(1)(c).

Clardy contends that the latter instruction misstated the law because the definition of recklessness referred to a "wrongful act" rather than the specific result of risking "death or serious physical injury to another person." This argument fails, because he considers the instruction that defines recklessness out of context. The to-convict instruction clearly instructed the jury that it must find that Clardy "recklessly discharged a firearm." CP 221. While recklessness is defined in general terms, the to-convict instruction for Drive-By Shooting specifically required that Clardy's recklessness be applied to the particular act of discharging a firearm, not any possible wrongful act. Read as a whole, these instructions clearly communicated that the jury must conclude that Clardy knowingly disregarded a substantial risk that he would discharge a firearm.

Despite this, Clardy relies on State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), and Harris, supra, to argue that the definition of recklessness must include a specific reference to the substantial risk that he would cause death or serious physical injury. However, Gamble does not address the issue of jury instructions, and the Supreme Court has never held that the definition of recklessness must specify the wrongful act at issue as to the particular crime charged in every case. Moreover, the State respectfully contends that Harris, and this Court's similar decision in State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), rev. granted, __ Wn.2d __ (No. 88683-1 Sept. 3, 2013), were wrongly decided.

In Gamble, the Supreme Court considered the question of whether Manslaughter in the First Degree is a lesser-included offense of felony murder (Murder in the Second Degree) predicated on assault (specifically, Assault in the Second Degree). In concluding that manslaughter is not a lesser-included offense, the court observed that for assault, the risk to be disregarded is substantial bodily harm, whereas for manslaughter, the risk disregarded is death. 154 Wn.2d at 467-69. The Gamble court did not consider what jury instructions were required. Thus, although Gamble does establish that for purposes of manslaughter, the State must prove that the defendant disregarded a substantial risk of death, it does not stand for

the proposition that this information must be included in the definition of recklessness, as opposed to the to-convict instruction.

This Court applied the reasoning of Gamble to analyze jury instructions defining recklessness in State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011). In that case, the defendant was charged with Manslaughter in the First Degree. Id. at 837. The jury was instructed that the elements of that crime were (1) that the defendant engaged in reckless conduct, and (2) that the victim died as a result of the defendant's reckless acts. Id. at 845. Recklessness, in turn, was defined for the jury much as it was in the case at bar: a person acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur, and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. Id.

The relevant statutory definition of the crime is more specific than that provided in the Peters to-convict instruction. A person is guilty of Manslaughter in the First Degree not if he "engages in reckless conduct," but if he "recklessly causes the death of another person." Id. at 847 (citing RCW 9A.32.060(1)(a)) (emphasis in original). Because the jury was instructed that recklessness was established by disregard of a substantial risk that a wrongful act would occur, the Peters court concluded that the State was relieved of its burden of proving that the defendant disregarded

a substantial risk that a death would occur. Id. at 849-50. In short, the jury was not informed anywhere of the actual element that the State had to prove: that the defendant recklessly caused a death.[4]

In State v. Harris, relying in part on Peters, Division Two reached a result much like Clardy urges here. Specifically, the Harris court held that the same recklessness instruction used in the present case misstated the law:

> [T]he definitional instruction that told the jury it need only find that Harris disregarded the risk of a "wrongful act," even read with the "to convict" instruction, did not properly state the law and these instructions relieved the State of its burden to show that Harris knew and recklessly disregarded that great bodily harm could result from his picking [the victim] up and shaking him.

Harris, 164 Wn. App. at 388.

The State respectfully disagrees with this holding in Harris. There are several clear flaws in the decision. First, the court failed to read the instructions as a whole. While the Harris court correctly concluded that Gamble established that the relevant wrongful act for purposes of the

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[4] The State contends that the Peters court rightly held that the jury was not properly instructed, but that it was mistaken as to the source of the error. Peters held that the recklessness definition, rather than the to-convict instruction, was flawed. But the to-convict jury instruction must contain all the elements of the crime because it "serves as a yardstick by which the jury measures the evidence to determine guilt or innocence." State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). Had the to-convict instruction actually tracked the statute, it would have informed the jury that Peters needed to have recklessly caused the death of the victim, and the State would not have been relieved of its burden of proving an element of the crime. Thus, the Peters court erred by focusing on the definition of recklessness rather than the to-convict instruction.

recklessness instruction depends on the specific crime charged, it applied Peters for the proposition that a recklessness instruction must always specify the wrongful act that relates to the crime charged. Id. at 386-87. This reading fails to take into account the fact that none of the instructions in Peters specified the relevant wrongful act that the State was required to prove. By contrast, the instructions in this case clearly required the State to prove that the defendant "recklessly discharged a firearm."

Second, critical to the court's holding that the instructions in Harris were deficient were the facts that Harris requested that "great bodily harm" be specified in the recklessness definition, but the court refused, and that when Harris tried to argue in closing that he was not aware of the risk of harm posed by shaking a baby, the State's objection was sustained. Id. at 385, 387. Thus, Harris was expressly precluded from arguing his theory of the case by the failure to define the wrongful act as great bodily harm.[5] Id. at 387. In contrast, the failure to specify the wrongful act in the recklessness instruction had no effect in this case, because the wrongful act was specified in the to-convict instruction and Clardy was not precluded from arguing his theory of the case by that manner of instruction.

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[5] The to-convict instruction in Harris did specify that the State must prove that the defendant recklessly inflicted great bodily harm, and it is not clear upon what basis the trial court refused the defense proposed instruction and sustained the State's objection to the defense argument. Id. at 384-85.

This Court adopted the reasoning of Harris in State v. Johnson, supra. As with Harris, the State respectfully disagrees with the holding of Johnson, and the Supreme Court has accepted review.[6] The Johnson court relied on Peters for the proposition that a recklessness instruction must specify the wrongful act that relates to the crime charged, at least as to manslaughter, and dismissed as irrelevant the failure of any of the instructions in Peters to specify the particular wrongful act that the State was required to prove. Id. at 133-34. Johnson also stated that it agreed with the principle, articulated in Harris, that a trial court should instruct in the language of the governing statute. Id. at 132. Yet it did not explain why the use of the statutory language defining the elements in the to-convict instruction would be inadequate. While the court indicated that it was extending the principle of Gamble, the principle being referred to is not clear, as the wording of jury instructions was not at issue in that case. Id.; Gamble, 154 Wn.2d at 462-69.

In short, the definition of recklessness in this case adequately conveyed the applicable law. The to-convict instruction made clear the wrongful act at issue by specifying that the State must prove that the

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[6] The Supreme Court granted the State's petition for review on the defective information issue, and granted Johnson's petition for review regarding his ineffective assistance of counsel claim. __ Wn.2d __ (No. 88683-1 Sept. 3, 2013). The latter issue subsumes the question of whether it was deficient for trial counsel to propose the same definition of recklessness challenged here. The question of deficiency necessarily raises the question of whether the instruction was erroneous.

defendant recklessly discharged a firearm. CP 34. The State was not relieved of the burden of proving an element of the crime; to the contrary, the element was plainly stated in the to-convict instruction.

b. Clardy Has Failed To Preserve Any Error For Appellate Review.

Even if the trial court's definition of recklessness was incorrect, Clardy himself proposed it, and cannot now complain that it was given. Moreover, he failed to object to the instruction, and it is not a manifest error affecting a constitutional right. This Court should decline to review Clardy's claim of error.

It is well established that a defendant may not set up an error in the trial court and then complain of it on appeal. State v. Henderson, 114 Wn.2d 867, 869-71, 792 P.2d 514 (1990). This doctrine applies to proposed jury instructions, even where the to-convict instruction omitted an essential element of the crime and the error was of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Here, Clardy attempts to object to an instruction he proposed.

At trial, the State filed proposed jury instructions, including a definition of recklessness drawn from Washington's criminal pattern jury instructions. CP 381; WPIC 10.03. The State also filed a pretrial motion

to compel Clardy to file "a complete set of proposed instructions." CP 401-02. The trial court granted the motion. CP 314. Clardy then sought to agree with the State's instructions, obviating the need to file the same proposed WPIC instructions the State had already filed. CP 74. The trial court granted this motion as well. CP 315; 2RP 251. The first page of Clardy's proposed instructions reads: "The Defense agrees and stipulates to the WPIC standard instructions proposed by the State of Washington except for the additional instructions that are being requested by the Defense." CP 76. Clardy did not request any different instruction on the definition of recklessness or regarding Drive-By Shooting. When Clardy revised his proposed instructions during the course of the trial, he again explicitly adopted the State's proposed WPICs. CP 160.

The trial court instructed the jury regarding recklessness in the same language proposed by the State and stipulated to by Clardy. Compare CP 244 with CP 381. Because Clardy effectively proposed the same language he now complains misstates the law, any error from using the "wrongful act" language in the instructions was invited and cannot be appealed.

Even if this Court concludes that Clardy did not invite the error of which he now complains, review should still be declined. Clardy made no objection whatsoever in the trial court to that court's instruction regarding

the definition of recklessness, thereby failing to preserve the issue for review.

Under RAP 2.5(a), an appellate court may refuse to hear any claim of error not raised in the trial court. The policy behind the rule is to conserve judicial resources, and a "[f]ailure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 935, 155 P.3d 125 (2007); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). An appellate court will consider a constitutional claim for the first time on appeal, but only if the error is manifest and truly of constitutional dimension. RAP 2.5(a)(3); O'Hara, 167 Wn.2d at 98. This Court should not assume that an alleged error is of constitutional magnitude. Id.; Scott, 110 Wn.2d at 687. To show that a constitutional error is "manifest," the defendant must demonstrate that the alleged error actually prejudiced him, and had practical and identifiable consequences in the trial of his case. O'Hara, 167 Wn.2d at 99.

Here, Clardy makes a cursory argument, in a footnote, that his claim involves manifest constitutional error. Brief of Appellant at 15 n.5. But he fails to even identify what constitutional provision has been violated, let alone explain how or why any violation prejudiced him.

In fact, any error in this case was not of constitutional magnitude. As discussed above, the instructions given accurately set out the elements

of the crime, satisfying the demands of due process. To satisfy due process, "jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." Id. at 105. The jury must be instructed as to each element of the crime charged; the failure to further define one of the elements is not a constitutional error. Id. At most, the error identified here is a failure to define a term with as much specificity as possible in light of the crime charged, which is not an error of constitutional dimension. Id. at 105-07.

Even if the error was constitutional, review is not appropriate because it had no practical or identifiable consequences in this case. Under the instructions given, if the jury had concluded that Clardy did not recklessly discharge a firearm, it would have acquitted him, as it was directed to do by the to-convict instruction. CP 221; O'Hara, 167 Wn.2d at 108 (no practical consequence if the jury could make all the necessary findings under the instructions given). When the elements instruction is clear and correct, an alleged error in a definitional instruction does not have "practical and identifiable consequences," and thus, is not manifest constitutional error. Compare State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Most significantly, the question of whether the discharge of the firearm was reckless was not contested at trial. Rather, the defense theory at trial was that Clardy was never identified as a participant in any of the charged crimes. The prosecutor noted in closing argument that recklessness was uncontested. 2RP 1208-09. Clardy agreed. In closing, his counsel argued that the facts were not in dispute, and that it was not a case of what happened, but who did it. 2RP 1231, 1236. He never discussed recklessness, or even the crime of Drive-By Shooting. 2RP 1230-55. Clardy cannot show prejudice.

The definition of recklessness was jointly proposed by Clardy and the State. To the extent it was erroneous, Clardy invited the error. Further, his failure to object below precludes this Court's review, as the error neither affected a constitutional right nor prejudiced Clardy. Review on this basis should be denied.

c. Any Error In Failing To Further Define Recklessness Was Harmless Because The Element Was Not In Dispute.

Even if this Court concludes that the failure to specify the wrongful act at issue in the recklessness instruction was error—and that

the error is reviewable[7]—it was harmless in this case because the element of reckless discharge of a firearm was undisputed.

"An erroneous jury instruction that misstates the law is subject to harmless error analysis." Peters, 163 Wn. App. at 850. Even omission of an element from a jury instruction can be harmless, if the missing element is supported by uncontested evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The State bears the burden of proving beyond a reasonable doubt that the jury verdict would have been the same absent the error. Peters, 163 Wn. App. at 850.

Here, it was uncontested that the discharge of the firearm was committed recklessly. The uncontroverted evidence was that the shooter fired at the victim, Anthony Dao, as many as eight times: once as he was fleeing the house, three to four times as Clardy and his co-defendants drove through a residential neighborhood with Dao chasing them, and another two to three times when the cars stopped and Clardy got out and approached Dao on foot. 2RP 321-22, 328-331, 333-36. Dao described being fired at, hearing the shots, and hearing the shotgun pellets hit the front of his car. 2RP 328-30, 335-36. While Clardy was out of his car shooting at Dao, he was within 20 to 30 feet of him. 2RP 333.

[7] Even if this Court determines, pursuant to RAP 2.5(a)(3), that a manifest constitutional error occurred, that error may still be harmless. O'Hara, 167 Wn.2d at 98.

Investigating officers recovered several spent shotgun shells from the car in which Clardy and his codefendants fled, corroborating Dao's testimony that a number of shots were fired. 2RP 1141. On these facts, no reasonable defense attorney would have argued that the shooter's conduct was not reckless.[8]

Nor did Clardy. Instead, his defense strategy was to contest proof of identity. 2RP 1230-55. As discussed above, Clardy did not contest what happened, only that he was a participant. 2RP 1231. In fact, during closing argument, his lawyer never mentioned the term "reckless" or even Drive-By Shooting. 11/20/12RP 1230-55. Thus, recklessness was never an issue in this case.

The uncontroverted evidence proved beyond a reasonable doubt that the shooter acted intentionally, not merely recklessly. Clardy did not contest recklessness, only proof of whether he was the shooter. Any lack of specificity as to the wrongful act referred to in the challenged instruction was harmless beyond a reasonable doubt. Clardy's conviction for Drive-By Shooting should be affirmed.

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[8] Indeed, as the jury convicted Clardy of Assault in the First Degree based on the same facts, it necessarily concluded that he acted with even greater culpability: intent. CP 217, 269.

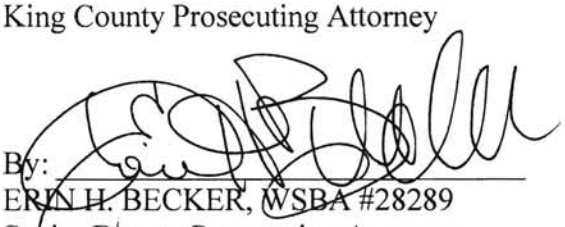
D. CONCLUSION

For all of the foregoing reasons, all of Clardy's convictions should be affirmed.

DATED this 2nd day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate by 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 Christopher H. Gibson, 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. KEVIN CLARDY, JR., Cause No. 69812-5-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 2 day of October, 2013

Name
Done in Seattle, Washington