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SUPREME COURT NO. 90831-1
COURT OF APPEALS NO. 70214-9-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANG THANH NGUYEN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF RESPONDENT</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>ISSUES PRESENTED FOR REVIEW</u>	1
D. <u>STATEMENT OF THE CASE</u>	2
E. <u>ARGUMENT</u>	2
1. APPELLATE REVIEW IS PRECLUDED BY RAP 2.5(a) AND/OR THE DOCTRINE OF INVITED ERROR.....	3
2. ANY INSTRUCTIONAL ERROR IS HARMLESS BEYOND A REASONABLE DOUBT	6
F. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 7

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007)..... 5

State v. LeFaber, 128 Wn.2d 896,
913 P.2d 369 (1996)..... 4

State v. Lynn, 67 Wn. App. 339,
835 P.2d 251 (1992)..... 5

State v. Nguyen, No. 70214-9-I
(Wash. Ct. App. Sept. 15, 2014)..... 1, 2, 3, 6

State v. Olson, 126 Wn.2d 315,
893 P.2d 629 (1995)..... 3

State v. Pam, 101 Wn.2d 507,
680 P.2d 762 (1984)..... 3

State v. Scott, 110 Wn.2d 682,
757 P.2d 492 (1988)..... 5

State v. Studd, 137 Wn.2d 533,
973 P.2d 1049 (1999)..... 4

Rules and Regulations

Washington State:

RAP 1.2..... 3

RAP 2.5..... 1, 3, 5

RAP 13.4..... 2

RAP 13.7..... 3

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Sang Thanh Nguyen, No. 70214-9-1, filed September 15, 2014 (unpublished).

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were either not reached by the Court or were decided adversely to the State:

1. The Court of Appeals concluded that the jury instructions as a whole properly informed the jury of the applicable law concerning accomplice liability and the State's burden of proof. As an alternative ground to affirm, the State renews its argument that both the invited error doctrine and RAP 2.5(a) preclude review.

2. The Court of Appeals concluded that there was no error in the jury instructions in this case. As an alternative ground

to affirm, the State renews its argument that any error was harmless beyond a reasonable doubt.

D. STATEMENT OF THE CASE

The defendant, Sang T. Nguyen, was convicted of possession of cocaine, a controlled substance, with intent to deliver. CP 21, 50-51. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 2-5.

The Court of Appeals affirmed the conviction in a unanimous unpublished opinion. State v. Nguyen, No. 70214-9-1 (Wash. Ct. App. Sept. 15, 2014).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Nguyen in his petition for review, which comprise all of the issues raised in the Court of Appeals. If review is accepted, the State seeks cross-review of corresponding issues it raised in the Court of Appeals but that the Court's decision rejected or did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review,

and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals, which it believes are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. APPELLATE REVIEW IS PRECLUDED BY RAP 2.5(a) AND/OR THE DOCTRINE OF INVITED ERROR.

The Court of Appeals properly concluded that the jury instructions given in this case properly informed the jury of the applicable law. Nguyen, No. 70214-9, slip op. at 4-8. If this Court grants review on this issue, the State cross-petitions to preserve its argument that Nguyen invited any instructional error and that RAP 2.5(a) precludes review in any event.

The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). With respect to jury instructions, “[a] party may not request an

instruction and later claim on appeal that the requested instruction was given." State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Although the failure to object alone does not trigger the invited error doctrine, the doctrine applies when the defendant affirmatively assents to the instruction. See State v. LeFaber, 128 Wn.2d 896, 904 n.1, 913 P.2d 369 (1996).

Here, the State proposed a complete set of jury instructions, including pattern "to convict" and accomplice instructions. CP 106-26. Nguyen's counsel confirmed that the State's proposed instructions "appear to be the WPICs ... essentially, so I don't have any issues with those." RP 435. After the trial court refused Nguyen's proposed instruction on a lesser offense, the court asked, "[D]o we have agreement on every other instruction?" RP 441. Nguyen's counsel responded, "Yes." RP 441. At the end of trial, the court asked for objections or exceptions to the proposed instructions. Nguyen's counsel had "[n]o exceptions." RP 483. Nguyen's affirmative agreement to the instructions proposed by the State is tantamount to proposing the instructions that he now claims were inadequate. Because Nguyen invited any error, he may not complain of it on appeal.

Even if Nguyen did not invite error, he failed to preserve the jury instruction issue for appellate review. "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An instructional error not objected to below may be raised for the first time on appeal only if it is "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is manifest if it resulted in actual prejudice. 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." Kirkman, 159 Wn.2d at 135 (alteration in original).

Nguyen never objected to the instructions given here. Rather, as shown above, he affirmatively assented to the instructions proposed by the State. This bars review unless Nguyen can show that the error is manifest constitutional error with identifiable consequences. See State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Nguyen does not argue that the instructions given here caused manifest error, and because any error was harmless beyond a reasonable doubt (as argued supra), he can make no such showing.

2. ANY INSTRUCTIONAL ERROR IS HARMLESS
BEYOND A REASONABLE DOUBT.

The Court of Appeals rejected Nguyen's claim that "the State cannot establish that failure to instruct the jury of its burden of proof regarding accomplice liability was harmless beyond a reasonable doubt." Nguyen, No. 70214-9-1, slip op. at 7. Because the court found no error, however, it did not expressly rule whether the error was harmless. If this Court grants review in this case, the State cross-petitions to preserve its contention that any instructional error was harmless beyond a reasonable doubt.

At the Court of Appeals, Nguyen argued that the alleged instructional error was not harmless because the State "relied on accomplice liability to demonstrate his dominion and control" of the cocaine. Brief of Appellant at 7. But, as the Court of Appeals recognized, the State did not rely on accomplice liability alone to support a guilty verdict. Rather, the prosecutor argued that the jury could convict Nguyen as either a principal, because of his constructive possession of the cocaine, or as an accomplice, because of his companion's actual possession and Nguyen's assistance in setting up the transaction:

He had dominion and control. Yes, he did. And we know that, one, because he's the one who had the ability to sell these drugs. He's the one who set up the deal. If you had something to sell, for example, if you have a car or something like that, and you have the ability to transfer that car from one person to another person, then you had dominion and control over that car. And, that's what Mr. Nguyen had over those drugs. He had the ability to sell them. That's a level of control.

He also had the ability to tell those drugs to go from one place to another place, 'cause he told Van that he was going to meet him at the Red Hill Market. And, when that plan didn't work out, he told Van that he was going to meet him at his house. So, he was telling that substance to go from Point A to ... Point B. That is a level of dominion and control. But, the Defendant himself also tells you that – in his own words, in his statements, that he had a level of control; ... that he set up the deal; that he had a role to play as far as carrying the drugs. And, he even tells us in his statement that he – when asked how much crack did you bring with you, he says a half-ounce. That question is very crucial. How much drugs did you bring with you? So, there is a level of constructive possession in this case. And, more importantly, there is actual possession because he was working in concert with Ms. Alojasin.

4RP 495-96. Because the evidence established that Nguyen had constructive possession of the cocaine and intent to deliver, any error in the accomplice instructions was harmless beyond a reasonable doubt. See State v. Brown, 147 Wn.2d 330, 341-43, 58 P.3d 889 (2002) (erroneous accomplice liability instruction

harmless beyond a reasonable doubt where the evidence established that defendant acted as a principal).


F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 22nd day of October, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Sarah Hrobsky
(sally@washapp.org), the attorney for the petitioner, Sang T. Nguyen,
containing a copy of the ANSWER TO PETITION FOR REVIEW, in State v.
Nguyen, Cause No. 90831-1, in the Supreme Court of the State of
Washington, 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.

U Brame

Name

Done in Seattle, Washington

10/22/19

Date

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Please accept for filing the attached documents (Answer to Petition for Review) in State of Washington v. Sang Thanh Nguyen, No. 90831-1.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jennifer Joseph's direction.

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