71519-4

71519-4

NO. 71519-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOREEN STARRISH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The defendant contends that her murder conviction must be reversed because, she claims, that while testifying, Detective Mike Mellis opined that she was guilty. Should this claim be rejected because the testimony the defendant complains was elicited by the defendant during cross-examination and thus the invited error doctrine bars review, and because Detective Mellis neither expressed his opinion as to the defendant's guilt or to the credibility of the testimony of any particular witness?

2. The defendant challenges certain language in the WPIC "to convict" jury instructions given in her case. Over the last 15 plus years, at least a half dozen times, this Court and other appellate courts have rejected this exact same argument. Should this Court find that the defendant has failed to show that all these prior cases were wrongly decided?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged in count I with second degree murder with a deadly weapon sentencing enhancement, and in count II with possession of heroin. CP 88-89. A jury found the

defendant guilty as charged. CP 120-22. The defendant received a standard range sentence of 168 months. CP 154-64.

2. SUBSTANTIVE FACTS

On the morning of March 3, 2011, Aaron Smith was stabbed to death in the living room of his home by Doreen Starrish, the defendant and mother of his two young children. 7RP[1] 25. At trial, Starrish admitted to having stabbed Smith, but she claimed it was a tragic accident that occurred after she grabbed a knife in self-defense. 13RP 93-97. By everyone's account, Starrish and Smith's 10-year relationship was volatile and contentious, with constant arguments and fighting that went both ways. 8RP 12, 44-46; 10RP 15-19. The two lived in the house together, but they slept in separate bedrooms. 9RP 29; 13RP 72.

Along with Starrish and Smith, at the time of the stabbing there were six other people present in the home, Starrish and Smith's two young children (who did not testify), Jonathon Jones (Starrish's lover and fellow heroin user), Reginald Tramble and Diane Berniard (a couple who were friends of both Starrish and

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[1] The verbatim report of proceedings is cited as 1RP—8/12/13, 2RP—9/20/13, 3RP—11/7/13, 4RP—11/12/13, 5RP—11/13/13, 6RP—11/14/13, 7RP—11/18/13, 8RP—11/19/13 (listed as morning session), 9RP—11/19/13 (2nd session), 10RP—11/20/13, 11RP—11/21/13, 12RP—11/25/13, 13RP—11/26/13, 14RP—12/3/13, 15RP—12/4/13, 16RP—12/5/13, 17RP—12/6/13, 18RP—1/31/14.

Smith and who were temporarily staying at the residence), and Dan Boerm (a roommate). 9RP 6-8; 10RP 21. However, when officers arrived at the scene, they found Tramble and Berniard standing in front of the house calling out for help, Smith lying just inside the front door, and the rest of the house was empty. 7RP 29-32.

Smith was still alive when the officers arrived and while he told the officers that he had been stabbed, he refused to say by whom. 7RP 34-35, 60. An Amber Alert was put out for the two missing children. 7RP 86.

Smith suffered a single stab wound to the heart. 7RP 34; 10RP 152-53. The wound penetrated approximately four inches deep into Smith's chest and in a slightly downward direction. 10RP 152-53. Before hitting the heart, the knife travelled through the cartilage of one of Smith's ribs. 10RP 177-78. The medical examiner testified that the injury was consistent with someone stabbing Smith with an overhand motion and that it would take a moderate amount of force to have caused the injury. 10RP 158, 167-68.

After stabbing Smith, Starrish fled the scene with Jones in her SUV. 14RP 71-73. Shortly thereafter, Starrish called the house and spoke to Boerm, who had been asleep in the back room.

11RP 46. Starrish instructed Boerm to secret the children out of the back of the house and to meet up with her. 11RP 46-47, 49. As instructed, Boerm took the two children out the back of the house where he met up with Starrish, who was waiting in her SUV on a nearby street. 11RP 50-51, 54. Starrish then drove off with the children. 11RP 54.

While on the lam, Starrish called Albert Smith, Aaron's brother, and told him that she had not stabbed Smith. 8RP 65. Starrish also called Detective Christina Bartlett and proclaimed that she had not stabbed Smith. 12RP 18. She contacted her brother and said the same thing to him. 13RP 207. Later, after arranging to have the children dropped off with Kathryn Gates, Smith's grandmother, and after talking with an attorney, Starrish turned herself in -- four days after she stabbed Smith. 8RP 9-10, 19-23; 11RP 60-61; 12RP 18; 13RP 207.

Diane Berniard and Reginald Tramble were friends with both Starrish and Smith. 9RP 6-8, 10RP 12-13. Both described Starrish and Smith's relationship as "on-again, off-again," volatile, with lots of arguing and yelling going back and forth, as well as minor assaultive behavior going both ways. 9RP 8, 18-21; 10RP 15-17. Berniard and Tramble had been staying with Starrish and Smith

and sleeping on the couches in the front room of the house for three or four days prior to the murder. 9RP 15-17.

a. Diane Berniard's Statements To The Police And Her Trial Testimony

According to Berniard's trial testimony, the night before the murder, Starrish, Smith, Tramble, herself and the children had dinner together at the house before Starrish, Tramble and herself went out drinking. 9RP 29-31. During the evening, Tramble and Berniard also smoked some marijuana, while Starrish smoked some heroin. 9RP 31-32. The three did not return home until 7:30 or 8:00 the next morning. 9RP 33.

Berniard testified that upon returning home, she and Tramble went to sleep on the couches in the living room while Starrish left to go pick up Jonathan Jones, who was getting out of jail for the day on work release. 9RP 33-34. Berniard testified that a while later she heard Starrish and Jones arrive home and go into Starrish's bedroom. 9RP 34. About 15 minutes later, Smith got up to get the girls ready for school. 9RP 35. When Smith heard Starrish and Jones in the bedroom, he opened the bedroom door, called Starrish a "trifling bitch," then closed the door and walked into the girl's room. 9RP 35-36.

After putting one of the girls into the shower, Smith again opened Starrish's bedroom door and said something to the effect of "really, you are going to do this while the children are here and they are right in the room next to you." 9RP 37. Starrish responded back by yelling "fuck you," and telling Smith to get out of her room. 9RP 38. Smith then closed the door and walked away, only to return moments later, open the door, and grab Starrish's heroin off the bed. 9RP 37-39.

Berniard testified that shortly thereafter Starrish came out of the bedroom yelling at Smith to the effect of "give me my shit and I'm not playing with you." 9RP 38-39. Jones came out right behind Starrish and stood between Starrish and Smith. 9RP 41. When Smith told Starrish that he had flushed her stuff, Starrish went into the kitchen and came back with a knife in her hand saying she was going to stab Smith. 9RP 42, 50. Smith took the knife out of Starrish's hand and threw it aside, as Jones stepped in front of Smith. 9RP 42. Jones told Smith, "don't hit her, it's not even worth it, I'm just going to get her to leave." 9RP 43. However, when Jones stepped aside, Starrish, who had grabbed another knife from the kitchen, stabbed Smith in the chest. 9RP 43, 45.

According to Berniard, as Smith proclaimed "did you really just stab me," Starrish grabbed her keys and her phone, and along with Jones, she fled the scene in her SUV. 9RP 46-47. Berniard testified that other than taking the first knife away from Starrish, Smith never did anything physical to Starrish before he was stabbed. 9RP 54-55. Berniard also testified that she did not believe Starrish intended to kill Smith, that she did not use much force, and that it appeared to be a minor wound. 9RP 109.

Berniard testified that Smith did not want anyone to call 911. 9RP 61. She testified and admitted that when 911 was called, she told the operator that Smith had been stabbed but she did not tell them who did it. 9RP 64. She admitted she did the same thing when the responding officers asked her what had happened. 9RP 64, 67. She claimed she did this because Smith did not want the police to know that Starrish had stabbed him. 9RP 64, 67. It was not until she was taken to the station and interviewed by detectives that she told them it was Starrish who stabbed Smith. 9RP 67-68.

On cross, Berniard admitted that she had repeatedly lied to the police. 9RP 78-82. She admitted that she told the police that she had been asleep on the couch and that she only awoke after hearing Smith proclaim "I can't believe you fucking stabbed me."

9RP 81. She admitted that she gave a signed statement saying the same thing. 9RP 131.

b. Reginald Tramble's Statements To The Police And His Trial Testimony

Tramble testified that he had been best friends with Starrish for eight years and that he later became friends with Smith. 10RP 12-14. He testified that on the evening before the stabbing, he, Berniard, Starrish and others had been out barhopping and doing drugs – he and Berniard were smoking marijuana, Starrish was smoking heroin. 10RP 23-25. When they arrived home the next morning, he and Berniard laid down on the couches in the living room, while Starrish went to pick up Jones from jail. 10RP 26-27.

When Starrish returned with Jones, the two of them went into Starrish's bedroom and closed the door. 10RP 29-30. About 45 minutes later, Smith got up and put one of his daughters in the shower. 10RP 31. Smith then walked over and opened Starrish's bedroom door and said, "are you serious, are you for real, with the children in the house." 10RP 32. According to Tramble, Smith then reached into the room and grabbed Starrish's "stash." 10RP 32-33.

A minute later, Starrish came out of the room yelling "give me my stuff." 10RP 34-35. She then grabbed a knife and lunged

at Smith saying she was going to stab him. 10RP 35. Smith took the knife away from Starrish and started to walk away. 10RP 35, 37. Starrish then grabbed another knife, although Tramble testified that he did not know where she got it from. 10RP 37. Starrish then lunged at Smith again, stabbing him. 10RP 35. Tramble testified he did not actually see the knife enter Smith's chest because Smith was facing away from him when he got stabbed. 10RP 39. After stabbing Smith, Starrish left the residence with Jones. 10RP 41.

Tramble testified that during the stabbing, Jones never came out of the bedroom. 10RP 41. He asserted that Smith only went into Starrish's room once. 10RP 90. Tramble also testified that he never saw Smith physically assault Starrish before he was stabbed. 10RP 42.

On cross, Tramble admitted that he told responding officers that he had not seen the stabbing. 10RP 66. He admitted that he gave a statement to a responding patrol officer at the scene, and another statement to a homicide detective (Detective Mike Mellis), saying the same thing. 7RP 37-38. Tramble ultimately gave a third statement, a statement he gave during a defense interview, in which he claimed he witnessed the stabbing. 12RP 40-42.

c. Jonathan Jones' Statements To The Police And His Trial Testimony

Jones was called to testify by the defense. Jones testified that he and Starrish were fooling around a little bit when Smith busted into the bedroom. 14RP 61. Jones said that while Smith was not really that upset, he was calling Starrish names, calling her a junkie, and saying that she should not be fooling around. 14RP 67. Jones testified that after Smith came into the bedroom a second time, Starrish noticed that her $1500 in rent money that had been sitting on the bed was missing. 14RP 68. Jones said that while he looked around the bedroom for the money, Starrish exited the bedroom to confront Smith. 14RP 69. When Jones exited the bedroom a short time later, he saw Smith rushing Starrish and Starrish pushing Smith away. 14RP 69-70. According to Jones, he never saw a knife and did not even know Smith had been stabbed until he was later questioned by the police. 14RP 70. He also testified that he never saw or heard Smith throw Starrish against the wall and never saw Smith assault Starrish that morning. 14RP 90, 88.

Jones admitted that when he was questioned by detectives, he had lied and initially told them that he had not even been over at

Starrish's house that morning. 14RP 74, 77-78. Upon being confronted further by detectives, Jones admitted to them that he had been at the house, but he claimed he had not seen anything. 14RP 81. Jones testified that it was not until he was interviewed by defense counsel that he first began to disclose what he saw the morning of the stabbing. 14RP 86.

d. The Defendant's Trial Testimony

Starrish testified that after a night of partying with Tramble, Berniard and others, they arrived back at the house early in the morning. 13RP 79-84, 180. She then left to pick up Jones who had received a day pass from jail. 13RP 85. When she arrived back home, her and Jones went into her bedroom. 13RP 85. Starrish claimed that she locked the bedroom door behind her. 13RP 85. A while later, Starrish proclaimed that Smith unlocked the bedroom door with a knife, came into her bedroom, slapped her, and said "you fucking serious?" 13RP 88. Starrish testified Smith was angry because she was using heroin and having sex with Jones. 13RP 149, 158, 181. Starrish claimed that she just ignored Smith. 13RP 88.

Smith then left the room, shutting the door behind him. 13RP 89. Starrish testified she could still hear Smith calling her a

bunch of names. 13RP 89-90. Smith then came into her room again, "talking shit." 13RP 90. After he left the room, and as she was making the bed, Starrish noticed that her cell phone, rent money and car keys were gone – not her drugs. 13RP 90, 102. Remaining "calm," Starrish walked out of her bedroom whereupon, she claimed, Smith grabbed her and slammed her against the wall. 13RP 93. She screamed for someone to call 911, but nobody did. 13RP 94. Starrish testified that Tramble and Berniard were pretending to be asleep. 13RP 94.

Starrish said that she then dropped to the ground and that Smith wrestled with her and choked her. 13RP 95, 196. As she got a "little bit of leeway," she jumped up and grabbed something off the counter, the something turned out to be a knife. 13RP 95. However, Starrish testified, Smith snatched the knife away from her and threw it aside. 13RP 95.

Starrish testified that she then ran into the kitchen and grabbed a second knife. 13RP 96. Starrish testified that as she turned, Smith was "right there," and that he just walked right into the knife. 13RP 96, 200. She professed that it was an accident. 13RP 97. She then fled the scene with Jones, after Smith asked

her to take the children out of the house and after he gave her back her car keys and cell phone. 13RP 99-100, 102.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT HAS FAILED TO SHOW THAT DETECTIVE MIKE MELLIS EXPRESSED HIS PERSONAL OPINION THAT SHE WAS GUILTY OF MURDER

The defendant contends that her conviction must be reversed because, while testifying, Detective Mike Mellis expressed his personal opinion that she was guilty of murder. The defendant's claim fails for multiple reasons. First, whatever opinion Detective Mellis did express was elicited by the defendant during cross-examination, and thus, under the invited error doctrine, the defendant is precluded from raising this issue on appeal. Second, Detective Mellis neither expressed his personal opinion as to the defendant's guilt or as to the credibility of the testimony of any particular witness. In fact, there is nothing in the record to suggest that Detective Mellis was even aware of the substance of any witness' testimony. And third, any error was clearly harmless.

a. The Testimony Of Detective Mellis

During direct examination of Detective Mike Mellis, the prosecutor questioned the detective about the different tactics or themes he used in trying to obtain information from Reginald Tramble regarding the whereabouts of the missing children and the facts surrounding the stabbing of Smith. 10RP 215. Detective Mellis' questioning of Tramble occurred the morning of the stabbing when time was of the essence because there was an Amber Alert out for the two children, and at a time when it was unknown who had stabbed Smith. 10RP 214.

> In this case, I wanted him [Tramble] to know we did have a time crunch with the children, so I was pressuring him to give what he knew quickly because of that element. At that time, nobody knew whether the victim, or the person who was stabbed, was going to survive or not, so I certainly used that as a theme, or a way of trying to bring out a truthful statement from him, letting him know there is different scenarios that could happen. If the person survived, heck, maybe that guy wouldn't even want to press charges against whoever stabbed him. If he died, though, clearly, there was going to be a full force, full-on investigation going forward and he had to cooperate. I told him, in the end, you know, "I have been around the block." He mentioned that he had kind of been on the street for a while, in a way, and that he knew – or I encouraged him to recall that, in the end, you know, in court, everybody ends up telling the truth, was the theme with him. So

there was several themes going forward in talking to him.

10RP 216.

Counsel on appeal does not allege that when Detective Mellis was discussing the interviewing tactics he used in questioning Tramble, the detective was expressing his opinion about the guilt of the defendant or the truthfulness of Tramble's trial testimony. What the defendant complains about on appeal happened during cross-examination by defense counsel.[2]

> Defense Counsel: When you first spoke to Reggie Tramble...did you know that he had a conviction for lying to the police?
>
> Detective Mellis: No.
>
> Defense Counsel: Okay. And I think you testified you don't know if they [Tramble and Berniard] were separated at all times?
>
> Detective Mellis: No, I'm unaware of how they were handled specifically before I got to the scene.

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[2] Tramble never did tell Detective Mellis that the defendant stabbed Smith or that he saw what happened. Detective Mellis testified that for about half the interview, Tramble professed that he had not seen anything, that he had been asleep on the couch. 10RP 218. Detective Mellis said Tramble later changed his story, saying that he assumed the defendant must have stabbed Smith because he heard them arguing. 10RP 218. Detective Mellis testified that he finally gave up trying to interview Tramble and moved on to interviewing Berniard. 10RP 219.

Defense Counsel: So for all you know, the two of them may have had the opportunity to talk before they met with you?

Detective Mellis: Clearly they had the opportunities to talk.

Defense Counsel: Right. Okay. You made a statement during your direct testimony that in the end everyone who comes in court tells the truth. That's not true, is it?

Detective Mellis: No, not always, no.

Defense Counsel: Well, many people come to court and perjure themselves. It happens, right?

Detective Mellis: Is that a question?

Defense Counsel: Yes.

Detective Mellis: Your definition of "many" might be different than mine. People have perjured themselves in court, yes.

Defense Counsel: Right. So I guess that was one of your tactics to get them to talk to you, and you had an emergency, right? You had these kids, this Amber Alert, you had to get answers really quickly, right?

Detective Mellis: I had to get answers accurately out of Mr. Tramble, yes.

Defense Counsel: All right. And there was a sense of urgency?

Detective Mellis: There was.

Defense Counsel: Okay. And so, you know, I'm not criticizing you, it was just a tactic to use to tell him that, in the end, everyone is going to tell the truth in court?

Detective Mellis: Yes.

Defense Counsel: But you know that that's not true?

Detective Mellis: Well, in my experience, sir, when a witness -- I'm not talking about suspects here, but a witness, ultimately, the significant event that they witness, it is my experience that, you know, if you are not involved in the crime, whether you are a hard-core gangster -- this is the message I was giving him, whether you are a hard-core gangster or a witness on the street, in the end, everyone tells the truth in court.

Defense Counsel: That's your experience, in the end, everyone tells the truth?

Detective Mellis: The significant witnesses, sir, that's my experience.

Defense Counsel: Everybody? And that's been your, how long have you been a detective?

Detective Mellis: A long time, sir.

Defense Counsel: When was the last time you had a witness who lied in court that you are aware of?

Detective Mellis: I'm not sure, sir.

. . . . .

Defense Counsel: [H]e said that it was a verbal argument that happened outside; right?

Detective Mellis: I'm sorry, he said --

> Defense Counsel: I'm asking you, don't you remember if he said there was a verbal argument that happened outside; right?
>
> Detective Mellis: Yes.
>
> Defense Counsel: Okay. And that wasn't true, or was it? You don't know?
>
> Detective Mellis: I was left with the impression that I was not getting all of the truth out of Mr. Tramble, that's certainly true.

10RP 222-24, 226.

The next day, defense counsel brought a motion for a mistrial based on the answers Detective Mellis gave during his cross-examination. 11RP 2-3. However, before the prosecutor could even respond, the judge asked defense counsel, "let me ask you: Do you not think that you play a role in eliciting the testimony and how you pose the questions to that detective in terms of asking him about truthfulness, and the whole scope of his interrogation of this individual?" 11RP 3. In response, defense counsel claimed that he would be ineffective if he had to worry about the detective's responses to his questions, and, in any event, "there's nothing in my questions that suggested or invited this kind of response."

11RP 4, 7. The judge responded, "[w]ell, I have the benefit of the full transcript." 11RP 7.[3]

The judge denied the defendant's motion for a mistrial, stating, among other things, that she could find no prejudice from what occurred. 11RP 7-8. She also noted that the jurors would be properly instructed that they were the sole judges of the credibility of the witnesses. 11RP 7-9. Later, the judge specifically instructed the jury that "[y]ou are the sole judges of the credibility of each

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[3] Defense counsel had already employed a similar cross-examination technique with one of the responding police officers:

> Defense Counsel: Now as a police officer, you take many witness statements?
>
> Deputy Mark Souza: Yes.
>
> Defense Counsel: Part of your traditional duties?
>
> Deputy Souza: Yes.
>
> Defense Counsel: Sometimes witnesses lie to you in these statements?
>
> Deputy Souza: Sometimes.
>
> Defense Counsel: Sometimes they tell you the truth?
>
> Deputy Souza: Sometimes.
>
> Defense Counsel: Sometimes they exaggerate the truth?
>
> Deputy Souza: Had that happen too.
>
> Defense Counsel: At the scene, Reggie [Tramble] was consistent that he had not seen what happened?
>
> Deputy Souza: That's what he told me.
>
> Defense Counsel: You had no reason to doubt his statement at that time?
>
> Prosecutor: Your Honor, I'm going to object to commenting on credibility.
>
> The Court: I'm going to go ahead and sustain the objection.

7RP 53-54.

witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP 92.

b. The General Legal Principles

Testimony in the form of an opinion or inference is admissible under certain circumstances. See, e.g., ER 701;[4] ER 702.[5] This is true even where the opinion "embraces an ultimate issue to be decided by the trier of fact." State v. Quaale, ___ Wn.2d ___, 340 P.3d 213, 216 (2014) (citing ER 704). The opinion evidence must be "otherwise admissible" and is therefore subject to the requirements of ER 401,[6] ER 403,[7] ER 701, and ER 702. State v. Jones, 59 Wn. App. 744, 750 n.2, 801 P.2d 263 (1990), rev. denied, 116 Wn.2d 1021 (1991). At the same time, as

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[4] ER 701 permits a lay witness to testify in the form of opinions or inferences that are "rationally based on the perception of the witness," are "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," and are not based on scientific, technical, or other specialized knowledge. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

[5] ER 702 permits an expert witness to provide opinion testimony where the opinion is based on scientific theory that is generally accepted in the scientific community and the testimony would be helpful to the trier of fact. State v. Rafay, 168 Wn. App. 734, 784, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023 (2013).

[6] Under ER 401, "[e]vidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence." State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004).

[7] Under ER 403, relevant evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

a general rule, no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Because opinion testimony is allowed even if it pertains to an ultimate issue of fact, it is not always easy to determine whether the opinion crosses the line into an improper opinion of guilt. For example, in a DUI case, an officer was permitted to opine that the suspect was "obviously intoxicated," and could not drive safely because the officer's opinion was based on his observations and field sobriety testing and because it was opinion as to an ultimate fact rather than an opinion that the defendant was guilty. City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994). In contrast, in State v. Garrison, the trial court properly refused to allow the proprietor of a burglarized tavern to give his opinion as to whether Garrison was one of the parties who participated in the burglary of his tavern. The Court stated that:

> The question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was

> solely for the jury and was not the proper subject of either lay or expert opinion.

71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

Finally, the granting or denial of a motion for a mistrial is left to the sound discretion of the trial court and will be overturned only upon a showing of an abuse of discretion. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

c. The Doctrine Of Invited Error

A party may not set up an error at trial and then complain about the error on appeal. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). Known as the invited error doctrine, the doctrine is "a 'strict rule' to be applied in every situation where the defendant's actions at least in part cause the error." State v. Summers, 107 Wn. App. 373, 381-82, 28 P.3d 780 (2001) (quoting State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). This doctrine applies even where the alleged error raises constitutional

issues. State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979).

One example of the application of the invited error doctrine is where the error results from questioning of a witness by the defense. See State v. Vandiver, 21 Wn. App. 269, 273, 584 P.2d 978 (1978) (appellate review denied because the complained of testimony came from two officers who were responding to questions asked by defense counsel).

Here, all of the complained of testimony came during cross-examination of Detective Mellis by defense counsel. Even though Detective Mellis clearly testified that he told Tramble that "in the end...in court, everybody ends up telling the truth," as a tactic to try to get him to provide information during his interview, defense counsel questioned Detective Mellis on the validity of such a proposition. 10RP 216, 222-24. Defense counsel asked Detective Mellis if the statement that "in the end everyone who comes into court tells the truth...[t]hat's not true, is it?" to which the detective responded "no." 10RP 222. This likely would have been a good place to end, but counsel did not. Instead, defense counsel continued to question Detective Mellis as to his opinion about whether and how many people perjure themselves in court.

10RP 223-24. It is the answers to these questions that the defendant objects. Under the invited error doctrine, the defendant is barred from raising this issue on appeal.

d. Detective Mellis Did Not Opine That The Defendant Was Guilty

At worst, when Detective Mellis testified, he opined generally about witnesses testifying at trial, and that in his experience, they told the truth the majority of the time. This did not mean that the detective believed Tramble, Berniard, Jones, or any other witness had told the truth when they testified in this case. In fact, witnesses were excluded from the courtroom during trial. 3RP 15-16. Thus, Detective Mellis had not been present to hear the testimony of any witness and could not have opined as to whether they had told the truth or not when he did not even know what they had said.

Detective Mellis also never opined that Starrish was guilty of murder. He was never asked, nor did he opine, that the stabbing could not have been an act of self-defense or an accident.

Detective Mellis' statement that most witnesses tell the truth was testimony that was not relevant under ER 401. If one were to ignore the fact that, if error, it was invited, the error would be a simple evidentiary error, testimony that should have been excluded

under ER 401, because it lacked relevance, or ER 403, because whatever limited probative value it had did not outweigh whatever limited prejudicial value the testimony had. But there was no objection at the time and motion to strike the testimony.

e. Any Error Was Harmless

Evidentiary error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The trial court sits in the best position to determine the prejudicial effect of evidence. State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Here, the trial court found none. This is not surprising considering the general nature of Detective Mellis' statements about witnesses testifying. Further, as the trial court noted, the jurors were instructed that they were the sole judges of the credibility of the witnesses. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). The trial court did not abuse its discretion in denying the defendant's motion for a mistrial because the "opinion" of Detective Mellis, if it was an opinion and improper, was not prejudicial.

2. THE DEFENDANT HAS FAILED TO SHOW THAT ALL OF THE WPIC "TO CONVICT" JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

The defendant contends that language in the "to convict" jury instructions provided in her case rendered the instructions unconstitutional. Specifically, the defendant contends that the following language is a misstatement of the law because it tells the jury it has a duty to convict:

> 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 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.

CP 100 (emphasis added).[8] This language is included in every "to convict" WPIC jury instruction. See, e.g., WPIC 26.02, 26.04, 26.06. This same argument was rejected over 15 years ago in State v. Meggyesy[9]. It was rejected again in State v. Bonisisio,[10]

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[8] The same language was used in the "to convict" instruction for count II. See CP 114.

[9] 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).

[10] 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

State v. Wilson,[11] State v. Brown,[12] State v. Moore,[13] and most recently in State v. Nicholas.[14] The Supreme Court has repeatedly denied review. As this Court recently stated:

> We thought that this issue was resolved. Each division of this court has addressed similar challenges to the same instruction Moore contests here. And, in each case, the court upheld the instruction.

Moore, 318 P.3d at 297.

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 649, 653, 466 P.2d 508 (1970). The defendant has failed to make any new arguments sufficient to meet this burden. All the defendant has done is reframe the same old issue while hoping for a different result. But this is the same thing the defendants did in Moore, Brown, Wilson, and Nicholas, cases the defendant does not cite or address.

In Meggyesy, the defendant argued that the language that the jury had a duty to convict if it found beyond a reasonable doubt each element of the crime had been proven, violated the

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[11] 176 Wn. App. 147, 307 P.3d 823 (2013), rev. denied, 179 Wn.2d 1012 (2014).

[12] 130 Wn. App. 767, 124 P.3d 663 (2005).

[13] 179 Wn. App. 464, 318 P.3d 296, rev. denied, 180 Wn.2d 1019 (2014).

[14] ___ P.3d ___, 2014 WL 7403576 (Dec. 30, 2014).

defendant's "right to trial" under the state and federal constitutions. This Court rejected the defendant's argument. 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, 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 rejected this argument.

In an attempt to get around the Meggyesy case, the defendant claims that "The error is not that the jury should have been told of its power of jury nullification, as the Meggyesy Court characterized it. Rather, the error is that the jury should not have been affirmatively misled into believing that it lacked the power to

acquit despite the weight of the evidence." Def. br. at 20. This argument has been repeatedly rejected.

> Scott Nicholas seeks to distance himself from appellants in previous decisions by arguing that appellants in Meggyesy and Bonisisio also asked the court to approve a jury instruction that tells the jury it may acquit. Nicholas only asks this court to disapprove an instruction that tells the jury it has a duty to convict when the State proves all elements of the crime beyond a reasonable doubt. Nevertheless, Nicholas' distinction lacks importance. Meggyesy and Bonisisio addressed the respective appellant's objection to the duty to convict instruction as a discrete issue and did not conflate the issue with the appellant's desire for a jury nullification instruction. Nicholas also fails to observe that the courts in State v. Moore, State v. Brown, and State v. Wilson addressed only Nicholas' assignment of error. The appellant in Brown sought to distinguish his appeal on the same ground as Nicholas does here, but to no avail.

State v. Nicholas, 2014 WL 7403576, 2. The Court in Nicholas then discussed more directly the defendant's failed attempt to merely reframe the same issue.

> Scott Nicholas claims he reframes the standard defense argument to avoid the precedents of Meggyesy and Bonisisio by focusing on the word "duty." Nicholas defines "duty" as "[a]n act or a course of action that is required of one by ... law." Nicholas argues the use of the word "duty" misstates the law because it requires a jury to convict if it finds that the State proved all of the elements of the charged crimes. We disagree. Division Two, in State v. Brown, also disagreed. None of Nicholas' arguments are new under the sun.

Nicholas, at 3-4 (citations omitted). And as the Court aptly noted, "a juror who engages in jury nullification may be excused" by the court. Id. at 4-5 (citing State v. Morfin, 171 Wn. App. 1, 7-8, 287 P.3d 600 (2012), rev. denied, 176 Wn.2d 1025 (2013)).

This argument has been made multiple times in Meggyesy, Brown, Bonisisio, Wilson, Moore, and Nicholas, if not other cases. The defendant has failed to make any new arguments sufficient to show that these cases were decided incorrectly.

D. CONCLUSION

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

DATED this 25 day of February, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Thomas Kummerow, containing a copy of the Brief of Respondent, in STATE V.STARRISH, Cause No. 71519-4-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.

Name

02-25-15

Date

Done in Seattle, Washington