73443-1

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Court of Appeals
Division I
State of Washington

NO. 73443-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD R. MYERS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant was charged with hit and run injury accident. He did not propose a to-convict instruction and did not object to the WPIC to-convict instruction given. Did the defendant preserve the issue for appeal when he failed to object in the trial court?

2. The WPIC to-convict instruction paralleled Hit and Run statute and contained a knowledge requirement. Did manifest constitutional error occur when the instruction required the State to prove every element of the crime?

3. Despite their questions, the jury was able to return with a unanimous verdict. Can juror questions regarding matters that inhere in the verdict be used to attack the verdict?

4. The evidence was uncontroverted that the defendant crawled out the window of his overturned truck, yelled, "Let's go," and ran from the scene. If error occurred, was the error harmless based on the overwhelming evidence?

II. STATEMENT OF THE CASE

On August 12, 2012, David Cross and his girlfriend Mollie Clark decided to spend the day at a local swimming hole. 1 RP 34, 79. They noticed another couple there, the defendant and his

girlfriend, who were both intoxicated, slurring their words, having trouble walking and standing, and arguing loudly. 1 RP 37, 41, 82. When that other couple looked as if they were about to drive away, Clark became concerned about their safety. She offered to drive the girlfriend home in her own car while Cross took the defendant in the defendant's truck. 1 RP 42-45. Cross and Clark planned to drive the couple home and then return in Clark's car so they left their belongings at the swimming hole. 1 RP 84.

Things did not go according to plan. Cross was concerned not only about the defendant's intoxication but also about his own suspended license. 1 RP 45-46. He asked the defendant to drive and told him that his life was in the defendant's hands. 1 RP 46. Clark recalled that it was the defendant who insisted on driving because he did not want anyone else driving his truck. 1 RP 85.

The defendant took Cross in his truck and Clark followed with the girlfriend in her car. 1 RP 86-87. At first, the defendant was driving the speed limit but then sped up to over 50 mph. 2 RP 49, 87. The defendant lost control while negotiating a corner, flipped his truck onto its roof, and came to rest on the wrong side of the highway. 1 RP 50; 87.

Clark stopped as soon as she saw the accident and ran to help Cross as he crawled out of the passenger window while the defendant crawled out of the driver's window. The defendant yelled to Clark, "Let's go, let's go, let's get out of here." 1 RP 52-54, 88. When she refused to help him leave, the defendant took off running. Cross yelled, "You could have killed me," and chased the defendant but could not catch him. 1 RP 49-50, 89.

Medics arrived and treated Cross for cuts and scrapes, eventually taking him to the hospital on a stretcher. 1 RP 57, 2 RP 7. Investigating officers found the defendant's wallet and realized he lived less than a mile from the crash. 2 RP 9.

Police stopped at the defendant's house that day but no one answered the door. 2 RP 9. One officer thought he saw a shadow inside and left his card asking the defendant to call him. 2 RP 31.

Five days later on August 17, the officer returned to the defendant's home and spoke to him for the first time. 2 RP 10-11. The defendant said he remembered that on August 12 he had not been intoxicated, had been driving, and had hit his head. He said the injury he suffered caused him not to remember the accident. 2 RP 11, 29.

The State charged the defendant with hit and run injury accident. CP 166-67. Cross, Clark, and a Marysville officer testified at the two-day trial. There was no medical testimony regarding any injury the defendant may have suffered. The defendant's August 17 statements were admitted.

The State proposed a set of instructions including a to-convict instruction based on WPIC 97.02. CP 171-184. At the end of the first day of trial, defense said he planned to submit one instruction, an alternate version of the reasonable doubt instruction. 1 RP 106. At the end of the trial, he said he would also propose an instruction regarding the defendant not testifying. 2 RP 32.

The defendant did not object to any specific instruction including the State's to-convict instruction which became the court's Instruction 6. CP 144. Instead, "for purposes of the record" and "for maximum protection, potential appellate issues" he objected to all of the State's proposed instructions. Asked by the court if he had if he had any specific objections, he said no. 2 RP 36-37.

The State argued that the defendant acted logically, but wrongly, on August 12 when he fled the accident scene to avoid prosecution for DUI. 2 RP 42, 56. There was no evidence the defendant had suffered a concussion or was dazed. The evidence

showed that the defendant hopped out of the truck, said, "Let's go," and ran which ignored his responsibility to his injured passenger. 2 RP 57.

The defense argued that the State had not proved the defendant knowingly left the leaving the scene of the accident. 2 RP 51. He argued that the evidence showed instead that he had sustained a head injury and simply gone home. 2 RP 46, 54.

During deliberations, the jury sent out two questions regarding language in Instruction 6. The first asked if the knowledge element was "for the day of the accident or for the full week after?" CP 51-52. Although defense opined about an answer, it asked the court to refer the jury back to its original instructions which is what the court did. Id.; 2 RP 65-66.

The second question asked for definition of "about". CP 153. Defense asked the court to instruct the jury that Instruction 6 related to the date of the incident. 2 RP 68-69. The court declined to comment on the evidence or further define "about" and referred the jury back to the original instructions. Id. The jury returned its verdict the next day and found the defendant guilty of a hit and run injury accident on August 12, 2012. CP 135.

III. ARGUMENT

A. THE DEFENDANT WAIVED ANY ISSUE WITH THE TO-CONVICT INSTRUCTION BECAUSE HE DID NOT OBJECT AT TRIAL.

An appellate court may refuse to review a claim of error when the issue was not raised in the trial court. State v. O'Hara, 167 Wn.2d 91, 97-8, 217 P.3d 756 (2009). "'The appellate courts will not sanction a party's failure to point out at trial an error which the trial court... might have been able to correct to avoid an appeal and a consequent new trial.'" Id., quoting State v. Scott, 110 Wn.2d 682, 685, P.2d 492 (1988).

CrR 6.15 outlines in detail the proper procedures for proposing and objecting to jury instructions. A party "shall" serve and file proposed instructions. CrR 6.15(a). Then, if the court does not give the instruction, the party "shall" state the reason for the objection, "specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(b). Any objection to instructions and the grounds for the objections must be put on the record to preserve the issue for review. State v. Sublett, 176 Wn.2d 68, 76, 292 P.3d 715 (2012); Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986) (discussing CR 51(f)).

In the present case, the defendant did not propose a to-convict instruction. He told the court he intended to propose only two instructions, one on reasonable doubt and the other on the defendant's failure to testify. Only the State proposed a to-convict instruction, based on WPIC 97.02, which read:

> To convict the defendant of hit and run injury accident, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 12th day of August, 2012, the defendant was the driver of a vehicle;
>
> (2) That the defendant's vehicle was involved in an accident resulting in injury to any person;
>
> (3) That the defendant knew that he had been involved in an accident;
>
> (4) That the defendant failed to satisfy his obligation to fulfill all of the following duties:
>
> a. Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
>
> b. Immediately return to and remain at the scene of the accident until all duties are fulfilled;
>
> c. Give his name, address, insurance company, insurance policy number and vehicle license number, and exhibit his driver's license, to any person injured in the accident;
>
> d. Render any person injured in the accident reasonable assistance; and

> (5) 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.
>
> 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.

CP 179. It became the court's Instruction 6. CP 144.

The defendant did not object to Instruction 6. 2 RP 37. Instead, he said he objected to the "State's instructions as given" for "maximum protection, potential appellate issue." Asked if he had a specific objection, he said no. Id.

The defendant's "objection" was no objection at all. It did not draw the court's attention to any specific instruction or legal issue. The defendant acknowledged that he was not objecting to any specific instruction. In fact, the defendant did not object even when the jury asked its first question about Instruction 6. Instead, it asked the court to simply refer the court back to the original instruction. Any claimed instructional error was not preserved for appellate review.

B. THE TO-CONVICT INSTRUCTION PROPERLY INSTRUCTED THE JURY ON ALL OF THE ELEMENTS AND WAS NOT MISLEADING.

An appellate court may review an error that was not preserved in the trial court when the error is both constitutional and manifest. RAP 2.5(a). Reviewing courts do not assume that errors are of constitutional magnitude. O'Hara, 167 Wn.2d at 98-99. Rather, the defendant must show that the claimed error is both constitutional and manifest, that is, actually affected his rights at trial. Id. Even then, the error may be subject to harmless error analysis. Id.; State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

1. No Constitutional Error Occurred Because The To-Convict Instruction Contained All Elements Of The Crime.

A "to convict" instruction must contain all of the elements of the crime. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Whether a to-convict instruction sets out the elements of the crime charged is a question of law and review is *de novo*. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Failure to instruct on all the elements is a constitutional error. State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001). A mistake in a to-convict instruction that does not relieves the State of its burden to

prove every element is subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); State v. Moran, 119 Wn. App. 197, 210-11, 81 P.3d 122 (2003), review denied, 161 Wn.2d 1032 (2004).

In the present case, the defense has not shown a constitutional error because Instruction 6 contained each and every element of the crime. The hit and run injury accident statute reads, in pertinent part:

> (1) A driver of any vehicle involved in an accident resulting in the injury... of any person... shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section...
>
> (3) Unless otherwise provided in subsection (7) of this section the driver of any vehicle involved in an accident resulting in injury to... any person... or resulting in damage to any vehicle... shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance...

RCW 46.52.020(1) and (3). Instruction 6 contained each of those elements, (1) the defendant was the driver (2) of a vehicle involved

in an accident (4) and failed to immediately stop at or return to the scene until all duties were fulfilled. CP 144.

Knowledge of the accident is an additional element that the State must prove in a hit and run case. State v. Vela, 100 Wn.2d 636, 641-42, 573 P.2d 185 (1983). That element, too, was included in Instruction 6 (3). CP 144.

Instruction 6 tracked the WPIC and the hit and run statute and contained the knowledge element required by case law. No constitutional error occurred, no error occurred, because the instruction listed every element of the crime.

Nor did Instruction 6 relieve the State of its burden to prove each element by using the "on or about" language. There are cases in which hat wording can cause prejudice. See State v. Danley, 9 Wn. App. 354, 513 P.2d 96 (1973). This is not one of them.

In Danley, the defendant was charged with indecent liberties that took place "on or about April 16, 1969. 9 Wn. App. 365. Most of the evidence pointed to that day and the State argued that the crime occurred that day. The defendant presented an alibi and complained on appeal that the "on or about language" caused the jury to disregard his defense. The court disagreed because the on

or about language pointed to no other date than April 16 and so did not confuse jury into rejecting the alibi defense. Id. at 367.

If the same reasoning applied in this non-alibi case, the same result is required. This defendant's argument was that the State had not proved that he knew of the accident on August 12. All of the evidence pointed to that day and the State argued that the crime occurred that day. Even defense argued that the State had failed to prove the defendant's knowledge on that day. But no other date was introduced in the trial and the "on or about" language could not have changed that. The jury did not reject the defendant's defense because it was confused. It simply rejected the defense.

Nor does State v. Morden support the defendant's position. 87 Wn. 465, 151 P. 832 (1915). There, the defense was based on evidence that the victim was not at the crime scene on the date of the offense. The trial court instructed the jury that the exact date of the crime was unimportant. Id. at 474. That was reversible error. Id. The Supreme Court said that it would be difficult to imagine an alibi-defense case where the time of the crime was unimportant. Id.

The present case is not an alibi case and the jury was not instructed that the date was unimportant. Nor did the evidence or

argument pointed to any date other than August 12, 2012, as the defendant acknowledges. BOR at p. 12.

2. No Constitutional Error Occurred Because Read In A Common Sense Manner The Instruction Was Not Misleading About The Date Of The Knowledge Requirement.

A reviewing court will assume that the jury read the instructions in a normal, common sense manner. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, review denied, 164 Wn.2d 1034, 197 P.3d 1185 (2008). The issue is not whether it is possible to misinterpret an instruction but whether the ordinary jury would do so. Id. at 393. "'[E]ven the simplest sentence [is] open to myriad interpretations." Id., quoting State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988).

In the present case, no ordinary juror would have misunderstood the State's burden of proving the defendant knew of the accident when he fled the scene. To make its argument, the defendant relies on two questions from the jury. However, questions from the jury do not mean that the entire jury was confused or that the confusion was not clarified before the verdict. State v. Ng, 111 Wn.2d 32, 42-43, 750 P.2d 632 (1988).

It is impossible to determine what the jury questions meant. The defendant suggests that the jury was questioning whether it

could convict if it was not convinced the defendant knew of the accident before he ran away on August 12. While that explanation is possible, it is also possible that the jury asked the first question because one juror wondered if it would be fair to convict someone who could no longer remember his crime and thus could not contradict the evidence of the two other eyewitnesses. The second question could have meant the same. It is impossible to know.

Washington courts have already determined what to do because of the uncertainty that occurs when one tries to decipher the jury's thought processes. Those questions are disregarded. Questions from a deliberating jury are not final, and the jury's decision is contained exclusively in its verdict. Ng, 111 Wn.2d at 42-43.

In Ng, the trial court, instead of answering a question, referred the deliberating jury back to the instructions already given. 111 Wn.2d 32. The trial court said it believed that the instructions given already contained the answer to the question. Id. at 42-43. The Supreme Court affirmed because the court had not abused its discretion. Id. at 43. The question did not create an inference that all jurors were confused or that the confusion was not clarified before the verdict was reached. Id. Questions from the jury and

even juror's post-verdict statements could be used to attack the verdict. Id.

That reasoning applies in the present case. The defendant claims that the court abused its discretion when it referred the jury back to the instructions already given, instructions that were complete, correct, and allowed him to argue his theory of the case.

"It is inconceivable that the legislature intended that punishment would be imposed for failure to follow the course of conduct outlined, if the operator of the vehicle was ignorant of the happening of an accident. If he knowingly has an accident... and does not stop, he has violated the statute." Vela, 100 Wn.2d at 639. It is likewise inconceivable that Instruction 6 would be read as requiring conviction even when the defendant leaves an accident of which he has no knowledge.

Unless the date of the accident, August 12, applied to each paragraph of Instruction 6, the instruction made no sense. Paragraph 1 was the only paragraph that contained the date, August 12 and it required the State to prove that the defendant drove his vehicle on August 12. Paragraph 2, however, required the jury to find that the defendant's vehicle was involved in an accident resulting in injury. It is nonsensical to suggest that the jury

was being instructed that it could find the defendant guilty if it found he had been driving on August 12 but his vehicle happened to be involved in an accident on another day. Paragraph 4 outlined the defendant's obligations which began with "immediately" stopping as close as possible to the scene or returning "immediately" to fulfill certain obligations. CP 144. It is nonsensical to suggest that the date of August 12 did not apply to that requirement. It is just as nonsensical to read Paragraph 3 as requiring knowledge on any day other than August 12. Without knowledge, how could the defendant "immediately" stop or return to the scene? It would be an impossibility. If the date applied to paragraphs 1, 2, 4, and 5, it also applied to paragraph 3.

Instruction 6 was clear. The State was required to prove that the defendant was driving on August 12; had an accident on August 12; knew he had had an accident on August 12; failed to immediately stop and fulfill his duties on August 12. Any confusion was clarified and the clarification inheres in the guilty verdict. The instruction did not mislead the jury. No constitutional error occurred.

3. If An Error Occurred, It Was Harmless Because The Evidence On The Knowledge Element Was Overwhelming And Uncontroverted.

An instructional error that omits an element of an offense can be harmless if the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). If error occurred in the present case, the error was harmless because the evidence that the defendant knew an accident occurred was overwhelming and uncontroverted.

The court instructed the jury on knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 145.

The accident that occurred in this case was major. This was not a minor collision where the defendant swerved causing another car to crash. Instead, the defendant-driver flipped his truck and was inside it when it came to rest on the wrong side of the roadway. The defendant climbed out of the driver's window. The defendant

had to have been aware of the fact and circumstances of the accident because he was trapped in the center of it. It was impossible to miss.

The evidence regarding the defendant's behavior at the scene is uncontroverted. Both Cross and Clark testified to the defendant's state of sobriety, his shouts of "Let's go," and his flight from the scene as Cross chased him and tried to bring him back. All of their evidence pointed to the defendant's knowledge that he had been in an accident.

The defendant's statements to the arresting officer offered nothing to suggest otherwise. The defendant did not say that he was unaware of the accident when he fled the scene. Rather, he said he could not remember the accident. He remembered being sober. He remembered driving. And he even remembered hitting his head. His only claim was that he did not remember events that occurred after the accident, not that he was unaware of the events of August 12 as they were happening. Memory and knowledge are not the same.

That the defendant knew of the accident when he fled was uncontroverted by any evidence at trial. Even if there was an instructional error, it was harmless.

IV. CONCLUSION

The defendant did not preserve the error for review. Nonetheless, the court properly instructed the jury on the elements of the crime of hit and run injury accident and the instruction was not misleading. No manifest constitutional error occurred. If error did occur, it was harmless because the evidence was overwhelming and uncontroverted.

As to costs, the defendant has presented no citation to authority or legal argument for the court not to impose costs should the State prevail. RAP 14.2 clearly contemplates that indigent defendants may be required to pay costs for failed appeals. The defendant has presented no evidence that he is not included in that group.

Respectfully submitted on January 14, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. CHAD R. MYERS, Appellant.	No. 73443-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of January, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Marla L. Zink, Washington Appellate Project, marla@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of January, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office