Supreme Court No.: 93584-0
Court of Appeals No.: 73443-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHAD MYERS,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

To prove Mr. Myers committed felony hit and run, the State had to show Mr. Myers knew he was in an accident when he failed to remain at the scene. When Chad Myers' truck flipped over and went off the road, he and his passenger hit their heads. At trial, Mr. Myers asserted that, due to his injury, he was unaware he was in an accident and left the scene. The to-convict instruction was misleading because it allowed the jury to convict if Mr. Myers did not know he was in an accident when he walked away but became aware of the accident days later. Despite jury inquiries on the misleading language, the Court of Appeals held no ordinary juror would find the instruction misleading. This Court should accept review and reverse.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Chad Myers requests this Court grant review pursuant to RAP 13.4(b)(1) and (4) of the decision of the Court of Appeals, Division One, in *State v. Myers*, No. 73443-1-I, filed August 1, 2016. A copy of the opinion is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should grant review to determine whether a to convict instruction for hit and run misleads if "on or about" language permits conviction where the driver was in an accident but, due to head injuries sustained in the accident, did not know of the accident until a later time, after he had already left the scene, and where the jury twice inquired about this language during deliberations?

D. STATEMENT OF THE CASE

On the evening of August 12, 2012, Chad Myers was driving home in his pick-up truck with a passenger he barely knew. 2/17/15 RP 37, 42-43, 48, 81, 86-87. Probably because Mr. Myers was going too fast around a curve, his truck flipped over and skidded across the roadway on its roof. 2/17/15 RP 48-51, 87.

Mr. Myers and his passenger both hit their heads in the accident, causing at least the passenger to black out "a little bit." 2/17/15 RP 51-52.[1] They crawled out their respective windows, and Mr. Myers walked away from the scene. 2/17/15 RP 52-54. The passenger blacked out a few more times that day. 2/17/15 RP 70-71.

[1] Their girlfriends were following in a car behind them and stopped to provide assistance. 2/17/15 RP 31-32, 44-46, 86-88.

Officer Craig Bartl and medical aid arrived and attended to the passenger's injuries, which included a head injury that affects his short-term memory and scratches or scrapes on his left arm. 2/17/15 RP 55-59, 70, 90-91; 2/18/15 RP 4-6.

There is no dispute that this accident took place on August 12. 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19.

Officer Bartl eventually contacted Mr. Myers in the driveway to his home on August 17. 2/18/15 RP 10-11. Mr. Myers told the officer that he had been driving on August 12, "he didn't remember anything because he hit his head during the accident," and he did not know his passenger had sustained any injuries. 2/18/15 RP 10-11, 29. The State charged Mr. Myers with hit and run – injury under RCW 46.52.020. CP 166-67.

At trial, Mr. Myers urged the jury to acquit because the State failed to prove he knew of the accident when he failed to remain at the scene, render aid and provide information to his passenger. 2/18/15 RP 45-47, 50-52, 54. In instruction six, the court provided,

> 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 to any person injured in the accident reasonable assistance; and

(5) That any of these acts occurred in the State of Washington.

CP 144 (emphasis added). This instruction was proposed by the State and Mr. Myers generally objected to the instructions. CP 179; 2/18/15 RP 35-37.

During deliberations, the jury asked the court two questions related to this instruction. First, the jury inquired,

> Q: On instruction 6: #3) **That the defendant knew that he had been involved in an accident: → is this for the day of the accident or for the full week after**.

CP 51-52 (emphasis added). Mr. Myers proposed a detailed response, but the court simply responded to the jury, "you are to refer to your jury instructions." CP 151-52; 12/18/15 RP 65.

A short time later, the jury inquired,

> Q: for instruction No 6 (1) That on or about the 12th of August, 2012. → Can you **define "about"**

CP 149-50 (emphasis added). Mr. Myers asked the court to instruct the jury "that instruction No. 6 refers to the 12th of August 2012" or "instruction No. 6 refers to the date of the charged incident." 2/18/15 RP 68, 69. Counsel explained,

> I guess my concern now is, taken in light of the last question, is that at least some of the jurors are looking at extending the period of time for the knowledge issue, and I don't think that's appropriate.
>
> I know the Court would certainly be concerned about the issue of commenting, but it would seem that clearly the issue of the knowledge element applies to the 12th of August, 2012.

2/18/15 RP 67-68.

The trial court noted that the "about" language "is in the instruction" and "there have been plenty of cases where it says 'about' is even more than – it's not just that day." 2/18/15 RP 68-69. Worried it would comment on the evidence if it defined "about," the court

simply responded, "you need to refer to your jury instructions." 2/18/15 RP 68-70; CP 149-50. The jury then convicted Mr. Myers. CP 135.

Mr. Myers moved for a new trial, arguing the erroneous instructions and responses to the jury allowed it to convict him for an accident that occurred on August 12, even if he only knew of the accident days later. CP 30-47. The motion was denied, with the explanation, "Obviously that's something the Court of Appeals will take up." 4/1/15 RP 2-3; *cf.* CP 2-18 (notice of appeal). The Court of Appeals affirmed.

E. ARGUMENT

The Court should grant review to determine whether a to convict instruction that broadly describes the date of the crime, allowing elements to occur on different dates, is misleading where the defense is that the defendant lacked mens rea on the date of the crime even if he learned of the accident at a later time and where the jury twice inquired about the language.

1. A to-convict instruction that misstates the law or misleads the jury is erroneous.

This Court has held that "jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal*,

152 Wn.2d 333, 339, 96 P.3d 974 (2004). Moreover, the to-convict instruction is a yardstick by which the jury measures the evidence to determine guilt or innocence and therefore must contain all the elements of the crime. *E.g.*, *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). Appellate courts "will not look to other jury instructions to supplement a defective 'to convict' instruction." *Id.*[2]

2. The hit and run-injury offense criminalizes knowledge of an accident coupled with an immediate failure to stop and remain at the scene.

"To convict a defendant of felony hit and run, the State must prove (1) an accident resulting in death or injury to a person; (2) 'failure of the driver of the vehicle involved in the accident to stop his vehicle and return to the scene in order to provide his name, address, vehicle license number and driver's license and to render reasonable assistance to any person injured . . . in such accident'; and (3) the driver's knowledge of the accident." *State v. Sutherland*, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001) (quoting *State v. Bourne*, 90 Wn. App. 963, 969, 954 P.2d 366 (1998)).

[2] The adequacy of a challenged to-convict instruction is reviewed de novo. *Johnson*, 180 Wn.2d at 300; *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

Knowledge is an essential, non-statutory element. *Id.* at 129-32; *State v. Martin*, 73 Wn.2d 616, 625-26, 440 P.2d 429 (1968). Criminal liability does not attach if a person is injured or incapacitated to the extent of being physically incapable of complying. RCW 46.52.020(4)(d).

The knowledge element must occur at, or very near, the time of the accident. *See State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008) ("mens rea is '[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime.'" Black's Law Dictionary 1006 (8th ed. 2004)), *aff'd* 168 Wn.2d 476, 229 P.3d 704 (2010). The Legislature has not imposed any requirements upon a driver who lacks capacity at the time of the accident but becomes aware of the accident later. No court has read this requirement into RCW 46.52.020 and the Court of Appeals here did not hold otherwise. *See* Slip Op. at 7 & n.11 (noting State does not dispute the issue).

This result is compelled for several reasons. At the heart of the statute is the requirement that a driver involved in an accident immediately stop, remain at the scene, and provide assistance to injured parties. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). If a driver becomes aware of an accident days later, it is highly unlikely that

there would still be an accident scene or injured passenger to attend to. Thus, the period immediately following the accident is the critical time period.

Likewise, the statute excuses compliance if the driver involved is himself injured or incapacitated. RCW 46.52.020(4)(d). It does not require the driver to return to the scene or provide the specified information when he later regains capacity. *See id.* On the other hand, if the injured parties lack capacity, the statute does require the driver to take further action by reporting the accident to law enforcement. RCW 46.52.020(7). The fact that the Legislature included a continuing obligation in this instance further demonstrates that it did not intend such a continuing obligation when it is the driver who is incapacitated. *See State v. Conover*, 183 Wn.2d 706, 712-13, 355 P.3d 1093 (2015) (the Legislature's use of different language in different sections indicates a difference in legislative intent).

The general principle that the relevant time for mens rea is at the time of the crime further compels that knowledge of the accident must be at the time of the accident. "When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge

at the time of the crime." *State v. Bottrell*, 103 Wn. App. 706, 712, 14 P.3d 164 (2000). The mens rea element, after all, is the "criminal intent with which one performs the criminal act." *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). Here, the criminal act is performed upon "immediately" failing to comply with the statutory provisions. RCW 46.52.020(1); CP 144 (to-convict instruction). To the extent there is an ambiguity, the rule of lenity requires interpretation in Mr. Myers' favor. *Conover*, 183 Wn.2d at 712.

Here, the accident and alleged crime occurred on August 12. The knowledge element must be tied to that date as well.

3. Contrary to the statute, this to-convict instruction told the jury it could impose liability where an accident occurred on one date and the mens rea was acquired at another later date.

The use of "on or about" language in the to-convict instruction here allowed the jury to convict Mr. Myers of hit and run if he was in an accident and later became aware of it. "Unquestionably, the giving of a so-called 'on or about' instruction can constitute prejudicial error in an appropriate case." *State v. Danley*, 9 Wn. App. 354, 356, 513 P.2d 96 (1973). The instruction creates a prejudicial error, for example, when it misleads the jury into rejecting a defense for improper reasons. *Id.*

When the evidence fixes an exact time when the charged act was committed, the commission of the crime on that exact date is a controlling issue if the defense depends upon it. *See State v. Brown*, 35 Wn.2d 379, 383, 213 P.2d 305 (1949). This rule is regularly applied, for example, where the defendant presents an alibi defense. *E.g.*, *id.*; *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942).

In *State v. Morden*, this Court applied this rule to a similar situation. 87 Wash. 465, 151 P. 832 (1915). There, the evidence tied the alleged crime, statutory rape, to a particular date. *Id.* at 473-74. The defendant presented evidence that the complaining witness was not on his premises, the purported crime scene, on the day she alleged the rape occurred. *Id.* The trial court, meanwhile, instructed the jury that "the date stated is not one of the material allegations of the information, which has to be proved as laid." *Id.* at 472. Given the nature of the defense and the evidence fixing the alleged crime to a particular date, the Court held that the date of the crime was material to the case. *Id.* at 474.

> While under the statute . . . , it is not essential that the precise time of the offense charged be alleged in the indictment or information, the question here presented is not one of allegation, but of proof, and of the necessity of an instruction applicable to the proof.

Morden, 87 Wash. at 474. The trial court's instruction that the date of the crime was not important "withdrew from the jury the appellant's chief defense." *Id.* The erroneous instruction required reversal. *Id.* at 474, 477.

Mr. Myers' lack of knowledge defense was equally focused around the time of the accident. The evidence here unquestionably fixed the precise date when the crime was alleged to have occurred. 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19. Mr. Myers' defense was that, because he hit his head during the accident, he lacked knowledge that the accident occurred. *See* CP 154; 2/18/15 RP 10-11, 29. While all evidence pointed to the accident occurring on August 12, the court failed to tie this time to each of the elements of the offense. *Compare, e.g.*, 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19 (evidence showing accident occurred on August 12) *with* CP 144-45 (to-convict instruction stating defendant was driver of vehicle "on or about" August 12).

As the trial court recognized, "'[a]bout' is an all-embracing word, and covers a great extent of time." *State v. Wolpers*, 121 Wash. 193, 195, 208 P. 1094 (1922); 2/18/15 RP 68-69.

The jury was "hung up" on this part of the instruction. 2/18/15 RP 67 (trial court's statement). The jury twice questioned the court on the timeframe relevant to the knowledge element and the scope of the "on or about" language. CP 149-52.

The jury asked whether the knowledge element in instruction six applied "for the day of the accident or for the full week after." CP 151-52. Receiving no substance response from the court, the jury next asked the court to define the term "about." CP 149-50. Even in the face of this juror confusion, the court did not remedy the error. *Id.*; *see United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976) (error to respond to jury question in manner that allows jury to misapply the requisite knowledge requirement).[3]

The Court of Appeals disregarded the jury's inquiries to hold the instruction was not misleading because no ordinary juror would "interpret the instruction to require conviction if Myers was in the accident on the 12th but learned of the accident on a later day." Slip

[3] The Court of Appeals did not address Mr. Myers' assignment of error to the court's failure to correct the jury's misunderstanding because Mr. Myers "makes no specific arguments relevant to that assignment of error." Slip Op. at 10-11. However, Mr. Myers made this same argument regarding the failure to correct the misleading instruction in his opening brief. Op. Br. at 12-13.

Op. at 6-8 (holding instruction not misleading)[4], 9 (relying on *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) to disregard jury inquiries). Mr. Myers does not ask the Court to rely on the two jury inquiries to prove that the entire jury was in fact confused. Rather, the fact that the jury inquired twice about the instruction persuasively supports the argument that the to convict instruction's "on or about" language was, at least, subject to multiple reasonable interpretations. *See State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (instructions must make legal standard manifestly apparent to the average juror).

"[A] conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir.1971) (citing *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 (1946)). Yet here, in the

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[4] The Court of Appeals decided the substance of the issue raised despite holding the issue was neither preserved nor reviewable under RAP 2.5. Slip Op. at 4-9. Mr. Myers' objections preserved the issue to the same extent as in *State v. Brown*, 35 Wn.2d 379, 382-83, 213 P.2d 305 (1949), where this Court reviewed the "on or about" language which was objected to after deliberations commenced. 2/18/15 RP 65-66, 67-70 (counsel objected when jury returned with questions and court found counsel "made [his] record"); *see also* CP 179; 2/18/15 RP 35-37 (State proposed instruction and defense counsel made general objection); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (error reviewable because lower court had opportunity to correct it and avoid an appeal and consequent new trial).

face of questions from the jury and Mr. Myers' objection, the trial court refused to correct its erroneous instruction.

Even if the State fixes a date for the crime, misleading instructions may deprive a defendant of his defense. *State v. Pitts*, 62 Wn.2d 294, 297-98, 382 P.2d 508 (1963). "The vice of the 'on or about' instruction is that the Jury may be misled into rejecting an otherwise valid defense." *Danley*, 9 Wn. App. at 357. By failing to instruct the jury that the knowledge requirement was tied to the timeframe of the alleged criminal act, the court committed prejudicial error. *See Severns*, 13 Wn.2d at 560-61; *Brown*, 35 Wn.2d at 382-83.

F. CONCLUSION

This Court should accept review because the to convict instruction misleadingly deprived Mr. Myers of his defense. The instruction allowed the jury to convict if the hit and run accident occurred on August 12, but Mr. Myers' did not acquire the relevant mens rea (knowledge) until a later date.

DATED this 31st day of August, 2016.

Respectfully submitted,

s/ Marla L. Zink
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHAD REGAN MYERS, Appellant.	No. 73443-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 1, 2016

TRICKEY, A.C.J. — Chad Myers appeals his judgment and sentence for a hit and run injury accident conviction. His defense was that he did not know he had been in an accident when he left the scene. He argues the to-convict instruction was misleading because it would have allowed the jury to convict him even if the jurors believed his defense. We hold that an ordinary juror would not interpret the to-convict instruction in the way Myers finds misleading. We affirm.

FACTS

On August 12, 2012, Myers was driving home in his pickup truck with a passenger. As Myers rounded a curve, he flipped the truck, and it skidded to a stop. The passenger sustained mild injuries. Myers left the scene without attending to his passenger or waiting for the police. The accident happened about a mile from Myers' home.

That same day, the police identified Myers as the driver because Myers had left his wallet at the scene. They attempted to reach Myers at home but he did not answer.

Within the next few days, the police spoke to Myers. Myers said that, because he hit his head, he could not remember leaving the scene of the accident. The State charged Myers with hit and run injury accident. The case proceeded to a jury trial.

The State proposed a "to-convict" instruction that matched the pattern jury instruction for this offense.[1] The instruction required the State to prove that "on or about the 12th day of August, 2012, [Myers] was the driver of a vehicle."[2] When discussing the State's proposed instructions with both parties, defense counsel stated, "And then just for the purposes of the record, Your Honor, with the objections and exceptions, for maximum protection, potential appellate issues, defense would object to the State's instructions as given."[3] The court asked if he was objecting to all of the instructions, generally, and if he had any specific objections.[4] He responded that he did not have any specific objections.[5]

The court gave the State's "to-convict" instruction:

> 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;

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[1] Clerk's Papers (CP) at 179-80.
[2] CP at 179.
[3] Report of Proceedings (RP) (Feb. 18, 2015) at 37.
[4] RP (Feb. 18, 2015) at 37.
[5] RP (Feb. 18, 2015) at 37.

> (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 to any person injured in the accident reasonable assistance; and
> (5) That any of these acts occurred in the State of Washington.[6]

During deliberations, the jury posed two questions about the to-convict instruction. First, the jury asked, "On Instruction 6: #3) That the defendant knew that he had been involved in an accident: is this for the day of the accident or for the full week after[?]"[7] Myers agreed with the trial court's plan to refer the jury to its instructions.

Next, the jury asked, "[F]or instruction No. 6 (1) That on or about the 12th of August, 2012. Can you define 'about'?"[8] This time, Myers requested that the court instruct the jury that "on or about the 12th of August, 2012, refers to the date of the incident in question."[9] The court pointed out that the specific question was to define "about," and expressed concern that, because there was no definition of "about," any further explanation from the court could be seen as a comment on the evidence.[10] The trial court referred the jury to its instructions again.

The jury convicted Myers. Myers moved for a new trial on the basis of the trial court's answers to the jury's questions. The trial court denied his motion. Myers appeals.

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[6] CP at 144.
[7] CP at 152.
[8] CP at 153.
[9] RP (Feb. 18, 2015) at 69.
[10] RP (Feb. 18, 2015) at 68:21-69:2; 69:21-22.

ANALYSIS

To-Convict Instruction

Myers challenges the adequacy of the trial court's to-convict instruction. He argues that, by stating that the crime occurred "on or about" the date of the accident, the instruction allowed the jury to convict him of hit and run injury accident even if it believed that he did not know about the accident until after he left the scene. Before we reach the merits of this issue, we must determine if Myers may raise it.

Issue Preservation

The State argues that Myers did not preserve this objection for review. Because Myers did not object specifically to the to-convict instruction before the trial court instructed the jury, we agree.

To object to a jury instruction, a party must specify "the number, paragraph, and particular part of the instruction" to which it is objecting and state its reasons for doing so. CrR 6.15(c). The objections "must be put in the record to preserve review." State v. Sublett, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012). This procedure is necessary to "'apprise the trial judge of the nature and substance of the objection.'" Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (quoting Crossen v. Skagit Cty., 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)). The purpose of the exception is to inform the trial court "of the alleged error" and afford "it the opportunity to rectify any possible mistakes without the necessity and expense of an appeal." State v. Gosby, 85 Wn.2d 758, 763, 539 P.2d 680 (1975).

Here, Myers objected to all of the State's proposed instructions, generally.

He did not object to any specific instruction or state any reason for his general objection. This general objection did not apprise the trial court of any problems with the to-convict instruction. It was not sufficient to preserve the issue for review.

Myers argues that his response to the second jury's question was sufficient to inform the trial court of the nature of his objection. He relies on State v. Gosby, which held that an exception is sufficient if it "is taken in such a fashion that the purpose of the rule requiring specificity is satisfied." 85 Wn.2d at 763. Myers asserts that his objection was sufficient because the trial court could have rectified the alleged error during deliberations. But Gosby is distinguishable. There, the defendant objected to the instruction *before* the court gave it. 85 Wn.2d at 763.

Here, the jury's question came after the trial court had given the to-convict instruction. Myers cites no authority for the position that his objection to the court's response to a jury's question is sufficient to preserve for review alleged errors in the original instructions.

RAP 2.5(a)(3)

Myers argues that, even if he did not preserve the issue, he may still raise it as a manifest error affecting a constitutional right. Specifically, Myers argues that the to-convict instruction deprived him of his right to present a defense. We disagree.

A party may raise a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). To raise an issue under RAP 2.5(a)(3), the party must show that "the error is truly of a constitutional magnitude" and that it is manifest. State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). To

determine if an error is of constitutional magnitude, this court previews the argument's merits. State v. Reeder, 181 Wn. App. 897, 912, 330 P.3d 786, review granted in part, 337 P.3d 325 (2014), aff'd, 184 Wn.2d 805, 365 P.3d 1243 (2015).

Right to Present a Defense

Myers' primary defense was that, as a result of injuries sustained in the accident, he did not know he had been in an accident when he left the scene. He contends that the "on or about" language misstated the law and misled the jury into rejecting this valid defense. Because we do not believe the instruction was misleading or a misstatement of the law, we reject Myers' argument.

Alibi defense cases show that a misleading jury instruction can interfere with a defendant's right to present a defense. See, e.g., State v. Morden, 87 Wash. 465, 474, 151 P. 832 (1915) (holding that an erroneous instruction "withdrew from the jury the appellant's chief defense"); State v. Brown, 35 Wn.2d 379, 381-83, 213 P.2d 305 (1949) (reversing conviction in case where "on or about" instruction, combined with State's comments on that instruction, "in effect destroyed appellant's defense of an alibi"); State v. Danley, 9 Wn. App. 354, 356, 513 P.2d 96 (1973) (holding that the use of "on or about" instruction can be erroneous and prejudicial in an alibi case). Accordingly, if the to-convict instruction was misleading or misstated the law in a way that interfered with Myers' right to present a defense, it would be a constitutional error. But first we must determine whether the instruction is misleading.

"Jury instructions are sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the

applicable law." City of Seattle v. Pearson, 192 Wn. App. 802, 821, 369 P.3d 194 (2016). "An instruction is not misleading if it is readily understood by the ordinary mind." State v. Noel, 51 Wn. App. 436, 439-40, 753 P.2d 1017 (1988). Similarly, it is not misleading simply because it is *possible* to interpret it an erroneous way. State v. Moultrie, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008). Rather, the question is "'whether the ordinary juror would'" interpret the instruction erroneously. Moultrie, 143 Wn. App. at 393-94 (quoting Noel, 51 Wn. App. at 440). We review constitutional challenges to jury instructions de novo. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

Here, Myers asserts that he would be guilty only if knew that he had been in an accident when he left the scene of the crime. Thus, if he learned of the accident *after* he left the scene, he would not be guilty.[11] According to Myers, the instruction is misleading on this point.

He argues the jury would have read the "on or about" language in the to-convict instruction as requiring it to convict Myers if it believed that Myers was in an accident on the 12th of August but gained knowledge of that accident on *about* the 12th of August. We do not agree with Myers that ordinary jurors would interpret the instruction the way he suggests.

The instruction opens with a time frame for the events that follow. The most logical reading of the to-convict instruction is that it describes a sequence of events. The incident begins with Myers driving. He is in an accident. Knowing he has been in an accident, he immediately fails to take certain actions related to

[11] The State does not dispute either of these points.

that accident. It does not make sense to interpret the events as spanning more than one day or as happening out of order. Either all the events took place on August 12th or they all took place on another day that is near August 12th.

The requirement that the defendant "knew that he had been involved in an accident" appears in between the requirements that he was in an accident and that he failed to satisfy several obligations to act *immediately*.[12] It is unreasonable to interpret the instruction to require conviction if Myers was in the accident on the 12th but learned of the accident on a later day. The jury instruction was not misleading.

Myers' reliance on alibi cases is misplaced. Ordinarily the State has to prove that a crime occurred during a certain charging period, but does not have to prove that it occurred on a specific day. State v. Severns, 13 Wn.2d 542, 560-61, 125 P.2d 659 (1942). But, when "the complaining witness has fixed the exact time when the act charged was committed, and the defense is an alibi," the State must prove that the event happened on the exact date, and the court should instruct the jury accordingly. Severns, 13 Wn.2d at 560-61. The "on or about" instruction can be misleading about whether the State has to show that the event took place on a specific day.

In State v. Brown, for example, the State's evidence fixed a particular date that the crime must have occurred, if it occurred at all. 35 Wn.2d at 381. The defendant offered an alibi for that day. 35 Wn.2d at 381. But the to-convict instruction used the "on or about" language. 35 Wn.2d at 382. The prosecutor, "in

[12] CP at 144.

an apparent attempt to escape the force of [the defendant's] alibi" read that section of the instruction to the jury, reminding them that they were "'bound to follow'" the court's instructions. 35 Wn.2d at 382. The Supreme Court held that the instruction could have misled the jury into rejecting the defendant's alibi defense. 35 Wn.2d at 383.

To improperly reject an alibi defense, the jury would have to interpret the "on or about" language the same way that we described above. The jury could have believed that the crime was committed on a different day. When an alibi is the defense, the possibility of the crime occurring on a different day is misleading. But, here, it is not misleading. Myers did not offer an alibi for the day of the accident. Myers' defense centers on what happened on the day of the accident, not what day the accident occurred. Nothing in the alibi cases suggests that the jury would read the "on or about" language in the to-convict instruction the way Myers does. These cases do not support Myers' argument.

Myers also relies on the jury's questions as evidence that the to-convict instruction was misleading. The jury's questions indicate the jury's collective thought process and therefore inhere in the verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). They cannot be used to attack the verdict. 110 Wn.2d at 43.

In short, the "on or about" language in the to-convict instruction was not misleading and does not implicate Myers' constitutional right to present a defense.

Elements

In his opening brief, Myers refers to the "on or about" instruction as a

misstatement of the law and as a defect in the "knowledge element."[13] For the reasons explained above, the instruction was not misleading or a misstatement of the law. Moreover, the instruction included all the necessary elements of the offense.

We review the adequacy of a to-convict instruction de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Although we generally review jury instructions as a whole, the to-convict instruction must contain all the elements of the charged crime. 154 Wn.2d at 7. We will not look to other instructions to supply missing elements. 154 Wn.2d at 7.

Here, there were no missing elements in the to-convict instruction. The elements of a hit and run injury accident are

> (1) an accident resulting in death or injury to a person; (2) "failure of the driver of the vehicle involved in the accident to stop his vehicle and return to the scene in order to provide his name, address, vehicle license number and driver's license and to render reasonable assistance to any person injured in such accident"; and (3) the driver's knowledge of the accident.

State v. Sutherland, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001) (quoting State v. Bourne, 90 Wn. App. 963, 969, 954 P.2d 366 (1998)). The to-convict instruction included all these elements.

Myers has not shown that the to-convict instruction suffered from any constitutional defects.

Myers also assigned error to the trial court's failure to correct the jury's alleged misunderstanding of the to-convict instructions. He makes no specific

[13] Br. of Appellant at 7-10.

arguments relevant to that assignment of error.[14] He has waived this assignment of error. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Appellate Costs

Myers requests that we not award appellate costs on appeal, even if the State substantially prevails. Myers presents evidence that he is indigent. Under State v. Sinclair, we exercise our discretion to not award costs for this appeal. 192 Wn. App. 380, 393, 367 P.3d 612, review denied, No. 92796-1, 2016 WL 3909799 (Wash. June 29, 2016).

We affirm Myers' judgment and sentence.

Trickey, ACJ

WE CONCUR:

Dwyer, J.

Becker, J.

[14] Instead, he uses the jury's questions as evidence that the original instruction was erroneous and that the error was prejudicial.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73443-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 31, 2016