

66069-1

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NO. 66069-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NESTOR OVIDIO-MEJIA,

Appellant.

REC'D

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King County Prosecutor  
Appellate Unit

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura Gene Middaugh, Judge

REPLY BRIEF OF APPELLANT

ANDREW ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. OVIDIO-MEJIA DID NOT INVITE THE TRIAL COURT'S INSTRUCTIONAL ERROR.

In the Brief of Appellant (BOA), Ovidio-Mejia argued the trial court erred by instructing the jury it had a "duty to return a verdict of guilty" if it found the state presented evidence sufficient to prove each element beyond a reasonable doubt. Brief of Appellant (BOA) at 11-22.

The state first responds that Ovidio-Mejia invited any error because he proposed lesser-included manslaughter instructions that included the same language as the challenged "to-convict" instructions for first degree murder and attempted second degree assault. Brief of Respondent (BOR) at 6.

The invited error rule forbids a party from setting up a trial error by seeking a specific action of the court and then complaining of it on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); State v. Young, 129 Wn. App. 468, 472, 119 P.3d 870 (2005), review denied, 157 Wn.2d 1011 (2006). This typically occurs when a party challenges an instruction on appeal that he or she proposed at trial. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (because defendants proposed faulty instructions and trial court gave instructions, defendants invited error and may not challenge instructions

on appeal); State v. Henderson, 114 Wn.2d 867, 868-69, 792 P.2d 514 (1990) (because trial court gave defense-proposed erroneous attempted burglary instruction, invited error rule prohibits defendant from attacking instruction on appeal); State v. Fields, 87 Wn. App. 57, 63-64, 940 P.2d 665 (1997) (accused proposed incorrect self-defense instruction, but also instruction that corrected self-defense instruction; state invited error by objecting to defendant's proposed corrective instruction).

The purpose of the rule is to prevent rewarding appellants for misleading the trial court; *i.e.*, *inducing* the trial court to err. Henderson, 114 Wn.2d at 868; State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008); *see* State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002) ("The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error."); State v. Frank, 112 Wn. App. 515, 520, 49 P.3d 954 (2002) ("The doctrine of invited error precludes a party from benefiting from an error that he induced at the trial court level."); City of Bellevue v. Kravik, 69 Wn. App. 735, 739, 850 P.2d 559 (1993) ("The doctrine of invited error prevents a party from complaining on appeal about an issue it created at trial.")

The invited error rule "should not be applied without regard to its purpose." City of Seattle v. Patu, 147 Wn.2d 717, 722, 58 P.3d 273

(2002), Johnson, J. (dissenting). That is what would happen if this Court applied the rule in Mejia's case. This purpose of the invited error doctrine is not served where the state's argument relies on defense-proposed instructions that are refused by the trial court. Instructions that do not go to the jury obviously cause no "error." Similarly, a defendant does not "mislead" a trial judge or "induce" error when the court refuses purportedly misleading instructions.

For these reasons, Ovidio-Mejia urges this Court to reject the state's argument that he invited any error.

2. OVIDIO-MEJIA MAY CHALLENGE THE TRIAL COURT'S "TO-CONVICT" INSTRUCTIONS FOR THE FIRST TIME ON APPEAL.

The state asserts Ovidio-Mejia waived a challenge to the trial court's "to-convict" instructions because he failed to object to the challenged language. BOR at 7-8.

But under RAP 2.5(a)(3), certain instructional errors that are of constitutional magnitude may be challenged for the first time on appeal.<sup>1</sup> Constitutional errors are treated specially because they often result in

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<sup>1</sup> In pertinent part, RAP 2.5(a) provides, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors in the appellate court: . . . (3) manifest error affecting a constitutional right. . . ." By its terms, RAP 2.5(a) is a discretionary, not mandatory, rule. Ford Motor Co. v. Seattle Exec. Services Dept., 160 Wn.2d 32, 49 n.4, 156 P.3d 185 (2007), cert. denied, 552 U.S. 1180 (2008).

serious injustice to the accused. State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The appellant must demonstrate the error is (1) manifest; and (2) truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is manifest if it results in actual prejudice or had practical and identifiable consequences in the trial. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999).

Errors affecting a defendant's constitutional right to jury trial can be raised for the first time on appeal. State v. Camarillo, 115 Wn.2d 60, 62-64, 794 P.2d 850 (1990); State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (defendant's failure to request election by prosecutor or unanimity instruction not waiver); State v. Hansen, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) ("Failure to give Petrich instructions affects the defendant's constitutional right to jury trial . . . and thus may be raised for the first time on appeal.") (citations omitted).

The trial court erroneously affected Ovidio-Mejia's right to trial by a jury empowered to nullify when it instructed jurors they had a "duty to return a verdict of guilty" if they found from the evidence that each element had been proved beyond a reasonable doubt. See State v. Primrose, 32 Wn. App. 1, 2, 4, 645 P.2d 714 (1982) (reversal of bail jumping conviction required where trial court instructed jurors that, "[a]s a matter of law the defendant has not introduced evidence concerning a

lawful excuse for his failure to appear[;]" court ignored "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power."); United States v. Leach, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980) ("Jury nullification -- the right of a jury to acquit for whatever reasons even though the evidence supports a conviction -- is an important part of the jury trial system guaranteed by the Constitution.").

This Court should reject the state's assertion that Ovidio-Mejia may not raise his challenge to the trial court's "to-convict" language for the first time on appeal.

3. THAT PORTION OF THE TRIAL COURT'S "TO-CONVICT" INSTRUCTIONS STATING THE JURY HAD A "DUTY TO RETURN A VERDICT OF GUILTY" IMPROPERLY AFFECTED OVIDIO-MEJIA'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The state argues Ovidio-Mejia fails to establish this Court's decision in State v. Meggyesy<sup>2</sup> was incorrect. BOR at 8-14. Among other claims, the state assails Ovidio-Mejia's failure to address State v. Wilson, 9 Wash. 16, 36 P. 967 (1894). BOR at 13. The state maintains that Wilson held the trial court did not err by instructing jurors that "the law made it their duty" to find the accused guilty if they found from the

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<sup>2</sup> 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

evidence that the accused committed every act necessary to constitute the crime. BOR at 13.

What the state fails to note, however, is that the Court also concluded "it would have been better that the word 'may' should have been substituted" for the word "must" in the phrase, "if they [jurors] found that the game was carried on for gain, they must find defendant guilty." Wilson, 9 Wash. at 21. Contrary to the state's position, this portion of Wilson supports Ovidio-Mejia's contention that "at the time the Constitution was adopted [in 1889<sup>3</sup>], courts instructed juries using the permissive 'may' as opposed to the current practice of requiring the jury to make a finding of guilt." BOA at 15-16.<sup>4</sup>

For this reason and those contained in the Brief of Appellant, Mejia requests that this Court reject the state's argument that Meggyesy and its progeny must continue to be followed.

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<sup>3</sup> See Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978) (referring to "original version of the constitution adopted in 1889").

<sup>4</sup> In New Hampshire, jurors are instructed in part that "[I]f you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty." State v. Wentworth, 118 N.H. 832, 839, 395 A.2d 858, 863 (N.H. 1978) (emphasis added).

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Mejia's convictions and remand for a new trial.

DATED this 7 day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON/DSHS,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66069-1-1
	)	
NESTER OVIDIO-MEJIA,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8<sup>TH</sup> DAY OF JULY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NESTER OVIDIO-MEJIA  
DOC NO. 343949  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF JULY 2011.

x *Patrick Mayovsky*

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