

NO. 70319-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT CASADY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of felony driving under the influence and first-degree driving while license suspended. He challenges certain language in each of the “to convict” jury instructions given in his case. Over 15 years ago, in State v. Meggyesy,¹ this Court rejected a challenge to the same standard WPIC language challenged here. Has the defendant proven that the holding of Meggyesy is “incorrect and harmful” as required by In re Stranger Creek,² to overturn this precedent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with felony driving under the influence (DUI) and first-degree driving while license suspended (DWLS 1). CP 62-63. A jury convicted him as charged. CP 70-71. With an offender score of 8, the defendant received a standard range sentence of 60 months on the DUI, concurrent to 180 days on the DWLS 1. CP 93-103.

¹ 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).

² 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

2. SUBSTANTIVE FACTS

The substantive facts of the crimes committed are not relevant to the legal issue raised on appeal, and thus, they will not be repeated here.

C. ARGUMENT

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 his case rendered the instructions unconstitutional. Specifically, the defendant contends that the following language is a misstatement of the law:

If you find from the evidence that elements (1), (3), (4) and any of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty.*** To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4) then it will be your duty to return a verdict of not guilty.

CP 85 (emphasis added).³ The language he complains is included in every “to convict” WPIC jury instruction. See, e.g., WPIC 26.02, 26.04, 26.06. This same argument has been rejected in State v. Wilson,⁴ State v. Brown,⁵ State v. Bonisisio,⁶ and State v. Meggyesy, supra. The Supreme Court has repeatedly denied review. 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 at 653. The defendant has failed to make any new arguments sufficient to meet this burden. In addition, his claim is not properly before this Court.

1. Any Error Was Invited And Precludes Appellate Review.

The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). With respect to the application of the doctrine to jury instructions, the Supreme Court has held that “[a] party may not request an instruction and

³ CP 85 pertains to the DUI. The “to convict” jury instruction for the DWLS 1 contains the same challenged language. See CP 90.

⁴ 176 Wn. App. 147, 307 P.3d 823 (2013), rev. denied, ___ P.3d ___ (Jan 8, 2014).

⁵ 130 Wn. App. 767, 124 P.3d 663 (2005).

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

later claim on appeal that the requested instruction was given.”
State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The doctrine of invited error applies when an instruction given by the trial court contains the same error as the defendant’s proposed instruction. State v. Neher, 112 Wn.2d 347, 352-53, 770 P.2d 1040 (1989).⁷

Here, the State provided the court and counsel with a set of proposed jury instructions. 1RP 109; 2RP 195-96. When specifically asked, the defendant did not have an objection to the “to convict” instructions. 2RP 197-98, 201. To the contrary, defense counsel stated that the instructions proposed by the State were appropriate. Specifically, after raising an objection to a different instruction than at issue here, defense counsel was asked, “[a]re there any other instructions of the State that you have objections to?” Defense counsel responded, “no.” 2RP 197. Moments later, after discussing the other instruction the defense did have an issue with, the court asked, “[a]nything else, Mr. Conant [defense counsel], on the State’s instructions?”

⁷ See also State v. Jacobson, 74 Wn. App. 715, 724, 876 P.2d 916 (1994), rev. denied, 125 Wn.2d 1016 (1995); State v. Ahlquist, 67 Wn. App. 442, 447-48, 837 P.2d 628 (1992); State v. Miller, 40 Wn. App. 483, 486, 698 P.2d 1123 (1985), rev. denied, 104 Wn.2d 1010 (1985).

Defense counsel responded, “No, they all appear to be correct and appropriate.” 2RP 198. When the court finalized the instructions, defense counsel, given the opportunity, did not take exception to the “to convict” jury instructions. 3RP 36-37.⁸

In light of the defendant’s endorsement of the “to convict” jury instructions that were given by the trial court, he invited the error and may not complain of it on appeal. See State v. Donald, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 6410340 (Div. 1, Dec. 9, 2013) (This Court refused to hear Donald’s argument regarding the “to convict” jury instructions – the same argument as made here – because the defendant failed to object below and failed to demonstrate prejudice as required under RAP 2.5).

2. The Alleged Error Is Not Manifest Allowing For Appellate Review Absent An Objection.

An instructional error not objected to below may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on “knowledge” was not manifest error). To obtain review, the defendant must show

⁸ For an unknown reason, the State’s proposed jury instructions that the trial court and counsel were discussing were not made a part of the record. However, the conversation of the parties below make it clear that the court’s instructions used the “to convict” instructions from the State’s proposed instructions.

that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). A reviewing court will not assume that an error is of constitutional magnitude. Id. The court will look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. Id.

If the claimed error is of constitutional magnitude, the court will determine whether the error is manifest. Manifest requires a showing of "actual prejudice." Id. To demonstrate actual prejudice there must be a "plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." Id.

The defendant never objected to the instructions given here. In fact, as stated above, the defendant agreed to the instructions that contained the exact same alleged error. This bars review unless the defendant can prove the error is manifest constitutional error with identifiable consequences. See Jacobson, 74 Wn. App. at 724; State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Here, there can be nothing more than pure speculation that the alleged error--the inclusion of the disputed language in the jury

instructions--had identifiable consequences. This is insufficient to allow for appellate review. Donald, supra.

3. The Defendant's Claim That Prior Case Law Is Incorrect Is Not Persuasive.

In Meggyesy, the defendant made the same argument as made here--that the language that the jury had a duty to convict if they found beyond a reasonable doubt each element of the crime had been proven, violated the defendant's "right to trial" under the state and federal constitutions. This Court rejected this argument. In short, the defendant claims that this Court got it wrong. Specifically, he argues, like Meggyesy did, that under the state constitution, a different result is required.

In Meggyesy, 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, 90 Wn. App. 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, followed by Wilson, supra; Brown, supra; and Bonisisio, supra; all rejected this argument.

In determining whether the state constitution provides broader protection in a certain area, the court considers the Gunwall factors.⁹ Under Gunwall, the court is guided in deciding whether to conduct an independent analysis under the state constitution based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Meggyesy, at 701.

As to the first Gunwall factor, there is nothing in the language of article I, section 21 that addresses the particular concern herein. See Meggyesy, at 701. In pertinent part, article I, section 21 simply provides that “[t]he right to trial by jury shall remain inviolate.”

⁹ Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

As to the second Gunwall factor, the defendant seems to agree that while the language of article I, section 21 and the sixth amendment is different, nothing in the language of either provision--or the difference in language--addresses the particular concern herein. See Meggyesy, at 701-02. In pertinent part, the sixth amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” In State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), the Supreme Court held that the language of the sixth amendment and article I, section 22 is substantially similar.

The third Gunwall factor, state constitutional history, also does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right. Meggyesy, at 702. The Supreme Court has previously held that “the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right.” Brown, 132 Wn.2d at 596.

In Meggyesy, this Court found that the fourth factor, preexisting state law, “does not aid the appellants.” Meggyesy,

at 702. This Court noted that the Supreme Court has held that article I, section 21 preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted. Id. This Court found that Meggyesy had provided no pre-constitutional case establishing a rule prohibiting the challenged language used herein. The defendant here claims this is incorrect and cites to Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885). This claim is of no moment.

Meggyesy cited to Leonard as well, and the Court properly considered the case for its limited value. Leonard was convicted of murder and sentenced to death. He challenged a great number of the jury instructions provided in his case on a number of grounds-- none of which, the Meggyesy court noted, involved the legal challenge made by Meggyesy (or herein by the defendant).

However, the defendant herein argues that the point of citing Leonard is that one of the instructions in Leonard contained the following language, "If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty..." Thus, according to the defendant, this shows the prevailing practice at the time the state constitution was ratified. This argument fails for a variety of reasons.

First, all five jury instructions challenged in Leonard were general instructions dealing with the burden of proof and defenses, and every single instruction was found to misstate the law. It is abundantly clear from the opinion, that the instructions were crafted by the trial court (or trial counsel) and were not a type of standard jury instruction used in other cases. If they were standard instructions, then every single case during this time period would have been reversed. Obviously that did not happen.

Second, there is nothing in the Leonard opinion, or anything else the defendant cites, that demonstrates what the standard practice was at the time in regards to the issue he raises here.

And third, the defendant does not address State v. Wilson,¹⁰ discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, the jury “must” find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court stated that taking all the language in context, “it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law **made it their duty** to find him guilty.” Wilson, at 21 (emphasis added). The

¹⁰ 9 Wash. 16, 36 P. 967 (1894).

Court held that there was no instructional error. Id. The defendant's argument that this Court erred in regards to the fourth factor is not persuasive.

As to the fifth factor, the differences in the structures of the federal and state constitutions, the State conceded in Meggyesy that this factor always supports an independent analysis. Meggyesy, at 703.

As to the sixth, and final Gunwall factor, matters of particular state or local concern, while criminal law is a matter of state and local concern, there is nothing about this concern that would suggest that there is any different standard in regards to the issue at hand than any other area of the country or the federal court system--a jurisdiction that as already noted has rejected the argument the defendant makes here.

This argument has been made multiple times, in Meggyesy, Brown, Bonisisio, and Wilson, if not other cases. The Supreme Court has denied review of this issue at least three times (Meggyesy, Wilson, and Bonisisio). 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, supra. The defendant has failed to make any new arguments sufficient to meet this burden.

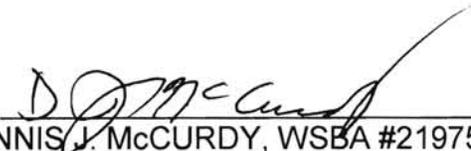
D. CONCLUSION

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

DATED this 28 day of January, 2014.

Respectfully submitted,

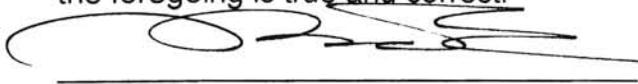
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CASADY, Cause No. 70319-6-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
Done in Seattle, Washington

01-28-14

Date