

FILED  
OCT 16, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 306526-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

MARTIN THOMAS ANDERTON, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 11-1-00844-8

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BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

1. Does the invited error doctrine bar the defendant from claiming that the court's jury instructions were unconstitutional when they were the same as those proposed by the defendant?
2. Do the standard "to convict" instructions, published in the Washington Pattern Jury Instructions, violate a defendant's right to trial by jury?
3. Did the trial court err by imposing 36 months of community custody?

## II. STATEMENT OF THE CASE

On August 9, 2012, the defendant, Martin Anderton, attempted to burn down the home of his grandmother, Minnie Anderton, after voicing threats that he wanted to kill his family members who were present at the residence. (CP 96; 02/14/12, RP 13). As a result, he was charged with Attempted Arson in the First Degree, as well as three counts of Felony Harassment, all of which included domestic violence allegations. (CP 3-5). The case proceeded to trial on February 13, 2012.

Once the parties rested, both the State and defense proposed jury instructions to the court. The defendant's proposed instructions included a number of "to convict" instructions; all of which were taken directly from the Washington Pattern Jury Instructions, and all of which contained the language: "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." (CP 114, 116, 118, 119, 120, 127, 129, 131, 132, 133).

After considering the instructions proposed by both sides, the court assembled its instructions for the jury. Among these instructions were the pattern "to convict" instructions, all of which contained the language quoted above. (CP 29-84). Other than objecting to the court's exclusion of a lesser included instruction for Attempted Arson in the Second Degree, the defense made no further objections to the court's instructions. (2/15/12, RP 2).

The defendant was subsequently convicted of Attempted Arson in the First Degree, with Domestic Violence; and three counts of the lesser included offense of Harassment, with Domestic Violence. (CP 99). As a consequence of these convictions, the defendant was sentenced to 32 months in prison, and 36 months of community custody. (CP 104-05).

The defendant now appeals, arguing that the court's "to convict" instructions violated his constitutional rights. (App. brief at 8). Additionally, the defendant points out that the court erroneously imposed 36 months of community custody, rather than 18, as directed by statute. (App. brief at 26).

### III. ARGUMENT

1. THE COURT DID NOT ERR BY UTILIZING THE "TO CONVICT" INSTRUCTIONS PUBLISHED IN THE WASHINGTON PATTERN JURY INSTRUCTIONS.

**A. The Defendant's Argument is Barred  
by the Invited Error Doctrine.**

The defendant alleges that the pattern "to convict" instructions utilized by the trial court, erroneously informed the jury that they had a "duty to convict" in the event they found all of the elements of the crime had been proved. This "duty to convict," argues the defense, has no basis in the law which instead recognizes the jury's power to acquit, regardless of the strength of the State's evidence. As interesting as the defendant's argument may be, by proposing instructions identical to those that he now opposes, his argument is barred by the invited error doctrine. *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990).

Under the invited error doctrine, a defendant cannot propose an instruction, and then appeal based upon a purported error in that instruction. *Henderson*, 114 Wn.2d 867; *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); *State v.*

*Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999); *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). This doctrine is strictly applied even when the error at issue is of constitutional magnitude. *State v. Studd*, 137 Wn.2d at 546-47 (citing *State v Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

In *Henderson*, cited above, the defendant was tried and convicted of Attempted Burglary in the Second Degree. At trial, the defense proposed instructions defining that charge using language consistent with the Washington Pattern Jury Instructions. *State v. Henderson*, 114 Wn.2d at 868-69. On appeal, the reviewing Court concluded that the instructions at issue had violated Mr. Henderson's due process rights because they did not properly instruct the jury on every element of the offense. *Id.* Nevertheless, since the defense had proposed the instruction, the Court affirmed Henderson's conviction on the basis that his argument was barred by the invited error doctrine.

*Id.* at 869-71. The Court noted in its opinion that "even if error was committed, of *whatever kind*, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." (Emphasis added). *Id.* at 870.

Such should be the result in this case. Even if the defendant is correct in his assertion that the jury was misinformed regarding their role in the system, because the offending language was contained within the defendant's proposed instructions, he has lost his right to appeal the constitutional validity of that language.

**B. The Court's "To Convict" Instructions Neither Misstated the Law Nor Violated the Defendant's Constitutional Rights.**

In *State v. Meggyesy*, 90 Wn. App. 693, 698, 958 P.2d 319 (1998), the Court held that neither the Federal nor State Constitutions precluded giving the pattern "to convict" instruction which includes the "duty to convict" language. Contrary

to the defendants' assertions, the Court reasoned that the instruction did not direct a verdict, invade the province of the jury, coerce the jury, nor express an opinion as to the accused's guilt. *Id.* at 699-700. Moreover, the Court held that a "to convict" instruction informing the jury that it "may convict," would be tantamount to expressly permitting "jury nullification," which is strictly prohibited. *Id.* at 699. As is requested by the defendant in this case, the *Meggyesy* Court applied the *Gunwall* factors to the issue. *Id.* at 704. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). After doing so, the Court concluded that there was no "independent state constitutional basis to invalidate the challenged instructions." *Id.*

Subsequently, Division II, in *State v. Bonisisio*, 92 Wn. App 783, 964 P.2d 1222 (1998) was asked to decide the identical issue posed to Division I in *State v. Meggyesy*. The *Bonisisio* Court agreed with the reasoning and conclusion of

the *Meggyesy* Court, and ruled accordingly. *State v. Bonisisio*, 92 Wn. App. at 793-4. The Court noted:

As here, the defendants in *Meggyesy* argued for an instruction telling the jury it "may" convict. We agree with the reasoning in *Meggyesy* that such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction.

(Citations omitted) *State v. Bonisisio*, 92 Wn. App. at 794.

The defendant acknowledges that he is asking this Court to overrule *Meggyesy* and *Bonisisio*; however, he does not apply the proper analysis that his request requires. In Washington State, the three divisions of the Courts of Appeals are viewed as a single unified body, and as such, each division speaks for the Court as a whole. Const. art. IV; RCW 2.06.010; DeForrest, Mark Edward, *Stare Decisis and Conflicts between the Divisions of the Washington State Court of Appeals: Resolving a Problem at the Trial Court Level*

(August 16, 2011). Consequently, one division of the Court of Appeals will not overrule a prior holding of another division unless it finds that the prior decision is "demonstrably 'incorrect or harmful.'" *Intl. Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36, 42 P.3d 1265 (2002). The defendant has failed to demonstrate that *Meggyesy* and *Bonisisio* were incorrectly decided, or that their holdings were harmful.

The defendant cites several cases to support his argument that jury nullification is part of a defendant's constitutional right to trial. However, the defendant's argument is based upon a fundamental misconception of those cases. The defendant mistakes the jury's role as an ultimate fact finder, that operates behind a shield of secrecy, for a body legally authorized to ignore the law and evidence, and render a verdict based upon emotion and personal values. *State v. Elmore*, 155 Wn.2d 758, 761, 123 P.3d 72 (2005) (citing *Black's Law Dictionary* 875 (8th ed.2004)).

The defendant cites *State v. Salazar*, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) as an example of a Court's recognition of the jury's "constitutional prerogative to acquit." (App. brief at 17-18). However, the defendant's reliance on *State v. Salazar*, is misguided. Although the *Salazar* Court acknowledges the jury's power to nullify the verdict, it in no way condones the jury's exercise of that power; in fact, quite the opposite.

In *Salazar*, over the objection of defense, the trial court allowed the State to introduce evidence that the search performed on Salazar's automobile was based upon a lawful warrant. *Id.* at 210. Under the circumstances of that case, the Court allowed the testimony to avoid the jury's assumption that the defendant's vehicle was searched unlawfully. *Id.* The trial court was concerned that had the lawfulness of the search not been addressed, the jury's verdict may have been tainted by jurors' sympathy for the

defendant, or disapproval of the officers' actions. *Id.* at 210-211.

Acknowledging the legitimacy of the trial court's concern, the *Salazar* Court approved of the precautionary action taken by the trial court to discourage jury nullification. *Id.* at 211. As such, the *Salazar* Court did not recognize jury nullification as a protected right; to the contrary, the Court recognized it as something courts have an obligation to avoid. *Merced v. Mcgrath*, 426 F.3d 1076, 1079 (9th Cir. 2005).

Moreover, other cases have discussed the obligation of a trial court to investigate potential juror nullification. *State v. Elmore*, 155 Wn.2d at 761. If it is revealed that a juror has or plans to engage in nullification, the court has the power to dismiss that juror, even during deliberations. *Id.* Federal case law also recognizes jury nullification as a power and not a right. *Merced v. Mcgrath* notes:

[i]nasmuch as no juror has a right to engage in nullification-and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court-trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations, ... by dismissal of an offending juror from the venire or the jury.

*Merced v. Mcgrath*, 426 F.3d 1076, 1079-1080 (9<sup>th</sup> Cir. 2005) (citing *United States v. Thomas*, 116 F.3d 606, 616 (2nd Cir. 1997)).

In sum, based upon the above cited authority, the defendant's arguments are not supported by either State or Federal law. Neither jurisdiction views jury nullification as part of a defendant's right to trial by jury, nor as an exercise of a jury's lawful authority. *State v. Meggyesy*, 90 Wn. App. 693; *Merced v. Mcgrath*, 426 F.3d 1076. A jury is prohibited by law from basing its verdict upon bias, sympathy, or emotion. *State v. Salazar*, 59 Wn. App. 202. Instead, the law requires a jury to base its verdict solely upon the evidence

before it. *Id.* Consequently, the modification suggested by the defendant to the pattern "to convict" jury instruction, would encourage the very misconduct that courts are required to prevent. On the other hand, the pattern instruction used by the trial court in this case, correctly informed the jury of its duty and oath to the court, and reflected an accurate statement of the law.

## 2. COMMUNITY CUSTODY

The State agrees that the defendant should have been sentenced to 18 months of community custody rather than 36 month.

## IV. CONCLUSION

As argued above, the issue raised by the defendant is barred by the invited error doctrine. This is so because the defendant proposed a "to convict" instruction identical to that of which he now complains. The instructions provided to the jury by the trial court accurately stated the law,

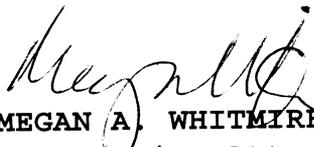
and correctly advised the jurors of their duty to the court. As such, the defendant's right to a trial by jury was not violated, and the State asks this Court to affirm his conviction.

However, because the defendant was erroneously sentenced to 36 months of community custody, rather than 18 months as required by statute, the State agrees that this matter should be remanded to modify the defendant's sentence accordingly.

**RESPECTFULLY SUBMITTED** this 16th day of  
October 2012.

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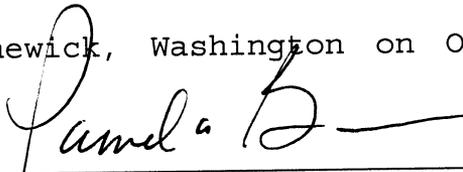
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