

No. 30913-4-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

FILED  
June 28, 2013  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

IVAN BUSTOS IZAZAGA,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Ruth E. Reukauf, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Primarily Mr. Izazaga relies upon his Brief of Appellant to address the issues raised by the State. Additionally he states as follows in direct Reply.

1. Jury Instruction 21 impermissibly lowered the State's burden of proof, defense counsel was ineffective in proposing it and the error was not harmless.

The State concedes counsel performed deficiently by proposing the instruction, but asserts the incorrect recklessness definition constituted harmless error. Brief of Respondent 5–9. To the contrary, The State cannot prove beyond a reasonable doubt that this error did not prejudice Mr. Izazaga.

It takes much, much less to establish knowledge and disregard of a substantial risk of any "wrongful act" than it does to establish knowledge and disregard of a substantial risk of death. Mr. Izazaga was clearly convicted as an accomplice and not as a principal. The jury concluded that Lucio, the principal, disregarded a substantial risk of a wrongful act by shooting a gun towards a moving car, but it may not have concluded beyond a reasonable doubt that he knew this behavior would create a substantial risk of death. Indeed, the jury acquitted Mr. Izazaga of first degree (premeditated) murder, first degree (indifference to human life)

murder, and second degree intentional murder, indicating that it *rejected* the State's theory that Lucio as principal (or Mr. Izazaga as accomplice) was pointing the gun at an occupant of the car.

A "wrongful act" could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other non-homicidal acts. The erroneous jury instruction substantially lowered the State's burden of proof, prejudicing Mr. Izazaga. There was no logical or tactical reason for defense counsel to lower the State's burden of proof and, under the facts of this case, Mr. Izazaga was prejudiced by the deficient performance. The conviction should be reversed and the case remanded for a new trial. State v. Mills, 154 Wn.2d 1, 15, 109 P.3d 415 (2005).

2. The evidence was insufficient to support the jury's verdict.

Mr. Izazaga relies on his argument at Brief of Appellant, 17–19.

3. As an issue of first impression, Mr. Izazaga's constitutional right to a jury trial was violated by the court's instruction, which affirmatively misled the jury about its power to acquit.

Our Washington State Supreme Court has not ruled on the issue whether the language "it will be your duty to convict" in a jury instruction affirmatively misleads a jury about its power to acquit, in violation of a defendant's constitutional right to a jury trial. Nor have Divisions I and II

ruled on the precise issue. Division III has not ruled on the precise issue or the peripheral issues ruled on by the Division I and II opinions.

*Standard of review.* As an initial matter, the State asserts that because appellant did not object to the “to convict” instruction, he has waived the right to contest it on appeal. However, Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other grounds*, 174 Wn.2d 707, \_\_\_ P.3d \_\_\_ (June 7, 2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the “yardstick” by which the Jury measures a defendant’s guilt or innocence, the error directly prejudiced Mr. Izazaga’s right to a fair trial and, thus, constituted a manifest constitutional error. RAP 2.5(a). The issue is properly before this Court for resolution.

*Supplemental argument.* Appellant has set forth his supporting arguments in the brief of appellant. The State responds that the law is “well-settled” in its favor. The State cites no Washington Supreme Court authority that has ruled on the issue, for there is none.

The State further argues that the Division I and II Washington appellate court cases cited by appellant support its position. However it does so without addressing the distinctions raised and addressed by appellant in his briefing, including appellant’s conclusion that Divisions I and II have not addressed the issue on appeal herein.

Further, the State does not claim that Division III has in any manner ruled on the issue. Yet there is authority that recognizes that the choice of words does have subtle distinctions in the world of law. For example, “duty” is the challenged language herein. As this Court’s very recent decision in State v. Smith, \_\_\_ Wn. App. \_\_\_, 298 P.3d 785 (2013) suggests, a more accurate and complete elements instruction would substitute the word “should” for “duty.” For as this Court has recognized, the term “duty” is equivalent to the obligatory or mandatory terms “ought”, “shall” or “must”, while the term “should” strongly encourages a particular course of action but is still the “weaker companion” to the obligatory “ought”. Smith, \_\_\_ Wn.2d \_\_\_, 298 P.3d at 790 (citations

omitted). By substituting “should” for “duty”, a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Id. Yet, by using the term “should”, the trial court would no longer be affirmatively misleading jurors about their power to nullify.<sup>1</sup>

The particular words used in law are critical. As is evident from the briefing of both parties and despite the State’s assertions to the contrary, the law on the issue raised by appellant is not “well-settled” but instead is non-existent. For this and the reasons previously asserted in Brief of Appellant at 19–37, the instruction creating a “duty” to return a verdict of guilty was an incorrect statement of law. The trial court’s error violated Mr. Izazaga’s state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial.

4. Erroneous sentences may be addressed for the first time on appeal and the unsupported findings regarding legal financial obligations must be stricken from the Judgment and Sentence.

Mr. Halls did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State

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<sup>1</sup> For example, a constitutionally proper instruction would read as follows:

v. Calvin, No. 67627-0-I, 2013 WL 2325121 at \*11 (Wash.Ct.App. May 28, 2013), citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). For this and the reasons previously asserted in Brief of Appellant at 37-44, the clearly erroneous findings must be stricken from the record. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011).

B. CONCLUSION

For the reasons stated here and in the brief of appellant, the conviction should be reversed and dismissed. In the alternative, the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration should be stricken from the Judgment and Sentence.

Respectfully submitted on June 28, 2013.

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If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 28, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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