

66069-1

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NO. 66069-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NESTOR OVIDIO-MEJIA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I

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A. ISSUE PRESENTED

The defendant was convicted of First-Degree Murder and three counts of Attempted Second-Degree Murder. He challenges certain language in each of the "to convict" jury instructions given in his case. Over 12 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 in Count I with First-Degree Murder (victim: Mario Spearman), in Count II with Attempted First-Degree Murder (victim: David Route), in Count III with Attempted First-Degree Murder (victim: Paige Sauer), and in Count IV with Attempted First-Degree Murder (victim: two-year-old

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).

N.S.).³ CP 14-16. Each charge carried a firearm sentence enhancement. Id. A jury convicted the defendant as charged on count I, and with lesser-included offenses of Attempted Second-Degree Murder on counts II, III and IV. CP 70, 73-74, 76-77, 79-80. The jury returned findings that the defendant was armed with a firearm on each count. CP 71, 75, 78, 81. The defendant received a standard range sentence on each count, with firearm enhancements, for a total sentence of 757 months. CP 100-07.

2. SUBSTANTIVE FACTS

Dominick Reed, Antonio Davis, Jontae Chatman and the defendant, Nestor Ovidio-Mejia, are all close friends. 12RP⁴ 41-43, 50-51. On April 7, 2009, the defendant and Reed were driving down Rainier Avenue South looking to score some marijuana when they came upon a number of police cars at a crime scene.

³ The defendant was charged along with three co-defendants, Dominick Reed, Jontae Chatman, and Antoine Davis. None of the co-defendants are part of this appeal.

⁴ The verbatim report of proceedings is cited as follows: 1RP--6/21/10, 2RP--6/22/10, 3RP--6/23/10, 4RP--6/24/10, 5RP--6/30/10, 6RP--7/1/10, 7RP--7/6/10, 8RP--7/7/10 (volume I), 9RP--7/7/10 (volume II), 10RP--7/8/10, 11RP--7/12/10, 12RP--7/13/10, 13RP--7/14/10, 14RP--7/15/10, 15RP--7/19/10, 16RP--7/20/10, 17RP--7/21/10, 18RP--7/22, 7/23, 7/26 & 7/28/10, 19RP--8/3/10 and 20RP--9/24/10.

12RP 44-46. They discovered that their friend, Ronald "Ron Ron" Preston had been shot. 12RP 48. The word on the scene from a couple of their friends was that Mario Spearman had someone shoot Ron Ron. 12RP 48.

Shortly thereafter Reed, Davis, Chatman and the defendant met at Chatman's residence and decided to seek revenge for their friend having been shot. 12RP 51, 53-54, 70. Davis got his AK-47 and put it in Reed's car. 12RP 57. In addition to the AK-47, Davis and the defendant were armed with handguns. 12RP 81, 85-86. The four then got in Reed's car and headed for Pacific Highway in search of Spearman. 12RP 70.

At the intersection of 188th Avenue South and Pacific Highway, the defendant spotted Spearman's car, telling the others, "there's that nigger's car right there." 7RP 64-65; 12RP 68. When the light turned red, Reed stopped a few cars behind Spearman as Davis, Chatman and the defendant jumped out. 12RP 70, 73. Chatman took the AK-47 while the defendant confirmed that he had Chatman's back. 12RP 74.

In the shooting spree that followed, Spearman's car was riddled with bullets, with well over 30 shots fired and evidence that multiple guns were fired by more than one of the co-defendants.

7RP 142, 146, 150, 154; 8RP 3, 43; 9RP 229; 15RP 143-46. In the car were Mario Spearman, David Route, 19-year-old Paige Sauer, and her two-year-old son N.S.. 16RP 8-9, 15. As the four co-defendants fled the scene, blood dripped from the driver's side door on to the ground. 7RP 108; 12RP 78. Spearman was executed, having been struck multiple times by the multitude of shots fired. 16RP 56-57, 63-65. Route was struck at least once in the leg but survived. 7RP 71; 12RP 24-25. When the shooting started, Paige got on top of N.S. in the back seat and miraculously, N.S. was not hit and Paige suffered only a grazing wound from a single bullet. 16RP 16, 26-27.

Additional facts are included below.

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 each of these elements has been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty...***

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

CP 136, 163, 164, 165 (emphasis added). 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. Fleming,⁵ State v. Brown,⁶ State v. Bonisio,⁷ 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.

⁵ 140 Wn. App. 132, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008).

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

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

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 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).⁸

Here, the defendant proposed lesser-included "to convict" instructions with the exact same language he now complains and he did not complain of the instructions given. CP 67, 69; 18RP 3-4, 7-9. Thus, in light of the defendant's own proposed jury instructions and his consent to the instructions given by the trial court, he invited the error and may not complain of it on appeal.

⁸ 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).

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 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 proposed 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.

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, jury's 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 Fleming, 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

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

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."

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. While the defendant here states otherwise (Def. br. at 14), he provides no argument or support for this claim. In contrast to the defendant's assertion, 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.

Second, there is nothing in the Leonard opinion, or anything else the defendant cites herein, that demonstrates the actual standard practice 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 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.

¹⁰ 9 Wash. 16, 36 P. 967 (1894).

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 Fleming, if not other cases. The Supreme Court has denied review of this issue at least three times (Meggyesy, Fleming, 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.

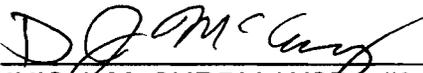
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 7 day of June, 2011.

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 Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. OVIDIO-MEJIA, Cause No. 66069-1-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.

W Brame
Name
Done in Seattle, Washington

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