

71622-1

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NO. 71622-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AIGALELEI PUA,

Appellant.

2016 FEB -9 AM 9:33
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

REPLY BRIEF

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A. ARGUMENT

Neither the doctrines of invited error, nor of waiver, prohibit this Court from reaching the constitutional issue of the trial court's interrogatory.

The State concedes that when a trial court instructs a jury in a manner suggesting the jury needs to reach an agreement, this violates a criminal defendant's constitutional right to a fair and impartial jury. Brief of Respondent at 12; State v. Boogaard, 90 Wn.2d 733, 735, 585 P.2d 789 (1978); U.S. Const. Amend. VI; Art. I, §§ 21, 22. However, the State argues that because Mr. Pua's counsel did not object to the interrogatory drafted by the trial court, he has invited the error to which he now objects. Brief of Respondent at 8-10.

The doctrine of invited error is intended to prohibit a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). In the context of an erroneous jury instruction, arguably an analogous situation to this, the Supreme Court has applied the invited error doctrine only where the appellant *requested* the instruction at issue. See, e.g., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they proposed erroneous instructions); State v.

Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel proposed instructions identical to instructions given to jury that defendant later challenged on appeal); Henderson, 114 Wn.2d at 868 (defense counsel requested instructions later challenged on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel participated in drafting instructions later challenged on appeal).

The rule applying the invited error doctrine only where the erroneous instruction at issue was proposed by the defense has been consistent over time. See, e.g., Patu, 147 Wn.2d at 719, 721 (applying invited error doctrine where defense counsel proposed instruction he later challenged); State v. Boyer, 91 Wn.2d 342, 244-45, 588 P.2d 1151 (1979) (instruction at issue was one defendant himself proposed). The rule as stated in Boyer is well settled and has been regularly followed by courts in this state. Henderson, 114 Wn.2d at 870-71 (and cases cited therein).

Here, defense counsel did not propose the erroneous interrogatory, but he did not object to the interrogatory proposed by the trial court. Counsel's failure to object to the erroneous interrogatory, alone, is not invited error. State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999)

(“[F]ailing to except to an instruction does not constitute invited error.”).
Therefore, the invited error doctrine should not apply.

Next, the State argues that, in the alternative, Mr. Pua waived any constitutional challenge to the use of the trial court’s interrogatory. Brief of Respondent at 10-11. However, manifest constitutional errors may be challenged for the first time on appeal, when they are of constitutional dimension, and when the error is manifest. RAP 2.5(a); State v. O’Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

As argued in Appellant’s Opening Brief, here, the trial court’s additional instructions violated Mr. Pua’s right to a fair and impartial jury. The additional day of deliberations, as well as the court’s comments and interrogatory, suggested to the jury that they were expected to return a unanimous verdict and, to that end, they would be required to remain in the courthouse until they reached agreement.

It is well-settled law that the jury always had three options, rather than two: to agree to find Mr. Pua guilty, to agree to find him not guilty, or to reach the point they could not agree to a verdict. State v. Ford, 171 Wn.2d 185, 203, 350 P.3d 97 (2011) (Stephens, J., dissenting).

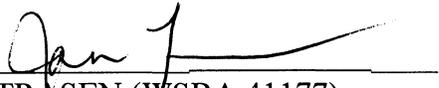
Because the trial court's improper instruction removed the third available option from the jury, it thus interfered with the jury's deliberative process.

B. CONCLUSION

For the foregoing reasons, as well as those enunciated in the Opening Brief, Mr. Pua respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 5th day of February, 2015.

Respectfully submitted,



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Respondent,)	
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)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> AIGALELEI PUA 350036 LARCH CORRECTIONS CENTER 15314 DOLE VALLEY RD YACOLT, WA 98675-9531	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF FEBRUARY, 2015.

X _____ *epw*

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