68275-0

68275-0

NO. 68275-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PIERCE DuBOIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PRESENTED

DuBois was convicted of murder in the second degree and unlawful possession of a firearm in the first degree. 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 failed to prove 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

By amended information, the State charged the defendant, Pierce DuBois, with murder in the first degree and unlawful possession of a firearm in the first degree. CP 7-8; RCW 9A.32.030(1)(a); RCW 9.41.040(1).[3] For purposes of a sentence enhancement, the State also alleged that DuBois had been armed with a firearm when he committed the murder. CP 7; RCW

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[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).

[3] Mr. DuBois stipulated to a prior conviction for a "serious offense." Ex. 179.

9.94A.533(3). The jury convicted DuBois of the lesser crime of murder in the second degree while armed with a firearm during the commission of the offense and unlawful possession of a firearm in the first degree. CP 17-19; RCW 9A.32.050(1)(a). The trial court imposed a standard range sentence. CP 71. DuBois appeals. CP 79.

2. SUBSTANTIVE FACTS

Until October 23, 2010, when Mr. DuBois fatally shot Jarret Jackson, DuBois and Jackson were good friends. 5/9/11 RP 70. According to DuBois, Jackson was his "homey." CP 56 (finding of fact "finding" 11).[4]

On October 23, around 2:30 A.M., DuBois, his cousin, David Duckett, and Jackson drove around in DuBois' car.[5] 4/26/11 RP 142, 151-52. During the drive, DuBois and Jackson argued about Nyika Williams (the mother of Jackson's three children). 4/26/11

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[4] The State has cited to the trial court's findings of fact and conclusions of law entered following a CrR 3.5 hearing to determine the admissibility of DuBois' multiple statements because the trial testimony mirrored the testimony at the CrR 3.5 hearing. CP 53-62. DuBois has not challenged the court's findings or conclusions on appeal. The sole issue on appeal is DuBois' challenge to the "to-convict" jury instructions; *i.e.*, the appeal turns on whether, as a matter of law, the jury instructions correctly stated the law.

[5] Duckett drove, DuBois sat in the front passenger's seat and Jackson rode in the backseat. 4/26/11 RP 152.

RP 32, 166-67; 5/9/11 RP 70. Jackson accused DuBois of having a sexual relationship with Williams. 5/9/11 RP 70. At 12th Avenue and South King Street, DuBois and Jackson got out of the car to fight. 4/26/11 RP 154; CP 54, 56-57 (findings 1, 11, 13). It was there that DuBois emptied his six-shot revolver by firing each bullet into Jackson, who died sometime later from a gunshot that had pierced his aorta. 4/26/11 RP 76-77; 4/27/11 RP 104; 4/28/11 RP 108, 117; Ex. 8 (at approximately 1 minute and 16 seconds, Jackson is seen "crumpled up" on the ground).[6] Duckett said that after DuBois and Jackson got out of the car, he pulled into a parking lot and "texted" several people. 4/26/11 RP 154-65. Duckett heard multiple gunshots and then only DuBois returned to the car. DuBois told Duckett to, "Drive." 4/26/11 RP 154-57.

At 2:40 A.M. on October 23, 2010, Seattle Police Officers Renick and Bourdon were at 12th and South Jackson on an unrelated call when they heard the "volley of gunfire" – a rapid succession of shots followed by a short pause and then another succession of shots. 4/26/11 RP 45-48, 72, 94-95; Ex. 8

[6] Police officers did not initially see Jackson. Approximately 13 minutes after the shooting, Seattle Police Officer Wade Murray started an area search for evidence; he located Jackson on the ground. 4/26/11 RP 76-77; 4/27/11 RP 64-65. Jackson had been shot and he was semiconscious. 4/27/11 RP 65, 99. Officer Murray reviewed his dash-cam video and determined that in his haste to respond to the shots fired call, he had driven past Jackson. 4/27/11 RP 68-70.

(at approximately 45 seconds). Seattle Police Officer Moore, who had just gotten off duty, also heard the shots. 4/26/11 RP 131-33. Officer Moore saw a "dude" in a white shirt flee from the direction of the gunshots. 4/26/11 RP 134-36, 139. He provided that information to officers Renick and Bourdon, who seconds later pulled over DuBois' car.[7] 4/26/11 RP 48-49, 77-78, 97, 137, 139.

The officers drew their weapons. 4/26/11 RP 49, 107. DuBois got out of the car. 4/26/11 RP 49, 66, 101-02, 107-08. He wore a white shirt and blue jeans. 4/26/11 RP 49, 66, 101-02. DuBois then fled into a heavily brushed area known as the "jungle." 4/26/11 RP 49, 66-67, 75, 77-78, 112.

A few minutes later, as additional police officers arrived at the other end of the jungle, DuBois emerged.[8] 4/26/11 RP 67, 117. DuBois looked over his shoulder, saw the police car, held his arms up and complied with Officer Callow's command to get on the ground. 4/27/11 RP 11-12, 31-33. DuBois was arrested.[9] 4/26/11 RP 117; 4/27/11 RP 12, 32-33; Ex. 8 (at approximately three

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[7] The car was registered to DuBois' girlfriend.

[8] Seattle Police Officer Karla Cockbain and her student officer, William Callow. 4/27/11 RP 8-11. Seconds later two more police officers arrived (Losleben and Evans). 4/27/11 RP 12; Ex. 17 (at 6 minutes and 11 seconds).

[9] The police officers' dashboard cameras recorded the police response to the gunfire, the stop of DuBois' car and Duckett's and DuBois' arrests. Exs. 8, 17.

minutes). At that time, DuBois did not have a gun. 4/26/11 RP 69; 4/27/11 RP 13, 33.

A K-9 unit also responded to where officers Renick and Bourdon had stopped DuBois' car. 4/27/11 RP 124-31. "Moose" and his handler tracked DuBois from the car and through the jungle until Moose lost DuBois' scent – within 10 feet of the patrol car where Officer Callow had placed DuBois post-arrest. 4/27/11 RP 124-31. Moose searched the general area around DuBois' route, which was overgrown with blackberry bushes, but he did not locate a firearm.[10] 4/27/11 RP 137, 151-52, 155.

DuBois made several inconsistent statements to the police. Upon arrest, DuBois said that he initially fled because he thought that he had an outstanding warrant (he did not). 4/27/11 RP 35-38; 5/9/11 RP 68; Ex 17 (at approximately six minutes and 45 seconds). During the search incident to DuBois' arrest, DuBois said that he did not have a gun, that he did not do anything, and

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[10] The blackberry bushes were three to four feet high. 5/9/11 RP 16-17. There were two other K-9 units present, including one unit from the Bureau of Alcohol, Tobacco and Firearms. These dogs searched unsuccessfully for the firearm. 4/28/11 RP 47-48. A few days later, police officers searched the roofs of buildings adjacent to the jungle where DuBois could have thrown his firearm. The officers did not locate a firearm. 5/9/11 RP 13, 50-53.

that he ran because he had a warrant. CP 55 (finding 5). While DuBois remained alone in the patrol car – and with knowledge that he was being audio and video taped – DuBois made some statements to the effect that the police got "'the wrong dude,'" that the officers did not see the "'other dude' dressed all in black," that he is "not going to tell the police the name of that person, and that he 'socked him in the mouth.'" CP 55-56 (findings 5, 9); Ex. 17 (at approximately 10 minutes and 18 seconds through approximately 11 minutes and 30 seconds and at approximately 17 minutes).

As Officer Callow tried to verify whether DuBois had a warrant, an unidentified police officer advised over the radio that an unknown black male, who had a gunshot wound to his chest, had been found at 12th and King. CP 56 (finding 11); Ex 17 (at approximately 12 minutes and 20 seconds). DuBois then said something to the effect of, "'That's my homie,' and, 'I socked him in the. . . .'" CP 56 (finding 11); Ex. 17 (at approximately 12 minutes and 25 seconds).[11] Later, DuBois stated that the police should

[11] During the deputy prosecutor's closing argument, she asked rhetorically, "[I]f he (DuBois) doesn't know anything about a shooting, how does he know there is a shooting victim at 12th and King?" 5/10/11 RP at 29; see also CP 57 (finding 13).

"'test' his hands,[12] that he didn't do anything, that he only socked Jackson in the mouth, and that the police should check Jackson's mouth."[13] CP 56 (finding 12).

At police headquarters, DuBois told detectives that he, Duckett, and Jackson were in his car when he and Jackson argued, because Jackson accused him of sleeping with Nyika Williams, the mother of Jackson's three children. 5/9/11 RP 69-70; CP 56-57 (finding 13). DuBois said that he and Jackson had gotten out of the car and continued to argue when DuBois "'stole one," on Jackson, meaning that he had sucker-punched him. 5/9/11 RP 69-71; CP 57 (finding 13). DuBois stated that he and Duckett then left. 5/9/11 RP 71. DuBois denied knowing anything about the shooting. 5/9/11 RP 71-72.

One week later, a search and rescue volunteer found the gun (a revolver) that DuBois had discarded along his path through

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[12] The deputy prosecutor argued to the jury that it was reasonable to infer that DuBois knew the results of a gunshot residue test on his hands would be negative because DuBois had wrapped the gun in a sock. 5/9/11 RP 18, 22-23; 5/10/11 RP 30; see also CP 56 (finding 12). The Seattle Police Department does not test for gunshot residue because the results are unreliable. 4/28/11 RP 63-64; 5/9/11 RP 136.

[13] During the autopsy, the medical examiner did not find any injury to Jackson's mouth. 4/28/11 RP 106. Also, a detective examined DuBois' hands at police headquarters. DuBois had no injuries to his hands or knuckles; nothing indicated that he had been in a fistfight. 5/9/11 RP 8.

the jungle.[14] 4/27/11 RP 148, 151-52. The volunteer located the gun underneath brush so thick that he had to cut through it with a machete. 4/27/11 RP 151-52. The gun had a white sock pulled up over the firearm's grips, trigger and over the hammer.[15] 5/9/11 RP 18. Forensic analysis determined that the bullets recovered from Jackson during the autopsy had been fired from this gun.[16] 5/9/11 RP 120, 131-35, 140-41.

C. ARGUMENT

DuBOIS HAS FAILED TO SHOW THAT THE WPIC "TO CONVICT" JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

DuBois claims for the first time on appeal that the trial court's "to convict" instructions (11, 14 and 21) misstated the law and violated his right to a jury trial under the state and federal

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[14] The volunteer recovered the gun near where Moose had tracked DuBois' scent one week earlier. 4/27/11 RP 124-32.

[15] A bullet is fired from a revolver when the trigger is squeezed and the hammer goes back and then forward again. 5/9/11 RP 22-23, 122. Forensic tests of the small amount of DNA located on the revolver's trigger and the sock were unable to produce a DNA profile. DuBois stipulated that he could neither be "included nor excluded" as a possible source of the DNA. Ex. 179; 5/9/11 RP 37-39.

[16] The medical examiner recovered five bullets from Jackson's body. 4/28/11 RP 111-18, 129-31, 138-39; 5/9/11 RP 34-35. Police officers located an additional bullet by Jackson. The bullet had entered Jackson's body and exited approximately two inches from the entry wound. 4/28/11 RP 113. The bullet was deformed because it had struck a very hard surface, such as asphalt or concrete. 4/28/11 RP 22-27; 5/9/11 RP 134.

constitutions.[17] Specifically, DuBois contends that the following language misstates 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 33, 36, 43. DuBois asserts that the court should have instructed the jury that it "may" convict upon a finding of proof beyond a reasonable doubt. U.S. CONST. AMEND. VII, Washington Const. art. I, § 21 and Leonard v. Territory, 2 Wash. Terr. 381, 399, 7 P. 872 (1885).

This Court rejected this same argument over 12 years ago. State v. Meggyesy, 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). Since Meggyesy, every court to consider the issue has adhered to its reasoning, and

[17] The language challenged mirrors the pattern jury instructions. Compare CP 33, 36, 43 with WPICs 27.02, 27.04 and 133.02.

the Supreme Court has repeatedly denied review.[18] DuBois acknowledges the precedent, but argues Meggyesy was wrongly decided. Yet, under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect and harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) ("The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned."). DuBois makes no new arguments sufficient to meet this burden. Moreover, 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 later claim on appeal that the requested instruction was given."

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[18] State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

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).[19]

Here, DuBois proposed "to convict" instructions with the identical language that he now claims is erroneous and he did not take exception to the trial court's "to convict" instructions.[20] 4/27/11 RP 3-4; 5/9/11 RP 151-65; 5/10/11 RP 3-5. Thus, in light of DuBois' 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.

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[19] 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, rev. denied, 104 Wn.2d 1010 (1985).

[20] The defendant's proposed jury instructions were never filed in the court record. However, it is clear by the record that the defendant did propose instructions and the instructions were discussed at great length. It is precisely because there is a distinction between failing to object to an erroneous instruction (waiver) and proposing an erroneous instruction (invited error), that the State filed a motion asking the trial court to enforce CrR 6.15. See State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999); 4/27/11 RP 3-4; Supp CP __ (Sub. No 32A (The State filed a supplemental designation of Clerk's Papers on September 12, 2012)).

2. RAP 2.5(a) Precludes Appellate Review.

Even if this Court finds that DuBois did not invite error, he failed to preserve the jury instruction issue for appellate review. "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An instructional error not objected to below may be raised for the first time on appeal only if it is "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). A reviewing court will not assume that an error is of constitutional magnitude. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). 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.

An error is manifest if it resulted in actual prejudice. 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." Kirkman, 159 Wn.2d at 135 (alteration in original).

DuBois never objected to the instructions given here. In fact, as stated above, DuBois proposed instructions that contained the identical alleged error. This bars review unless DuBois can prove

the error is manifest constitutional error with identifiable consequences. See 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. DuBois Fails To Demonstrate That Meggyesy Was Wrongly Decided.

DuBois makes the exact argument as Meggyesy – 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. Specifically, DuBois argues, as Meggyesy did, that under the state constitution, a different result is required. In short, DuBois claims that the Court got it wrong. The Court should reject this argument because DuBois has failed to demonstrate that the decision in Meggyesy is incorrect and harmful. See In re Stranger Creek, 77 Wn.2d at 653.

In Meggyesy, the Court held that the "to convict" instruction did not implicate the federal constitutional right to a jury trial or

misstate the law, and that neither the state nor the federal constitutions invalidated the instruction. Meggyesy, 90 Wn. App. at 701-04 (applying the six-step analysis set forth in State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986)).[21] The Court stated that because the judge did not instruct the jury to render a guilty verdict, but only to convict if all elements of the charge were met beyond a reasonable doubt, the instruction did not invade the province of the jury. Id. at 699-701.

Moreover, the Court recognized that instructing the jury that it "may" convict, is tantamount to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction. Meggyesy, 90 Wn. App. at 700. The Court acknowledged that with general verdicts, juries do have the power to acquit against the evidence. Id. (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

[21] The Gunwall factors are: (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.

that an accused is entitled to a jury nullification instruction. DuBois has not cited contrary authority here.[22]

DuBois argues, as did Meggyesy, that under the state constitution, the result must be different. The Court (followed by Fleming, supra; Brown, supra; and Bonisisio, supra) rejected this argument. The Court concluded, after it applied a Gunwall analysis, that there was no state constitutional basis to invalidate the challenged instruction. Meggyesy, 90 Wn. App. at 701-04.

The language in the three instructions at issue is identical to the language used in Meggyesy's "to convict" instructions. Because DuBois has failed to demonstrate that the decision in Meggyesy is incorrect and harmful, the Court should hold that the "to convict" instructions in this case were not error.

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[22] DuBois does not address State v. Wilson, 9 Wash. 16, 36 P. 967 (1894), 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.

D. CONCLUSION

For the reasons stated above, this Court should affirm DuBois' convictions for murder in the second degree and unlawful possession of a firearm in the first degree.

DATED this 12 day of September, 2012.

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 Jennifer Winkler, 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. DUBOIS, Cause No. 68275-0-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.

C Brame
Name

9/13/12
Date

Done in Seattle, Washington