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STATE OF CONNECTICUT *v.* JASON SHOLA AKANDE
(SC 18325)

Rogers, C. J., and Norcott, Katz, Palmer and Zarella, Js.

*Argued April 28, 2010—officially released January 5, 2011**

Katherine C. Essington, special public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, and *Kevin M. Shay*, assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. The defendant, Jason Shola Akande, appeals from the judgment of the Appellate Court affirming his conviction, rendered after a jury trial, of two counts of forgery in the second degree in violation of General Statutes § 53a-139 (a) (1) and (2),[1] and two counts of larceny in the sixth degree in violation of General Statutes §§ 53a-119 (2)[2] and 53a-125b.[3] *State* v. *Akande*, 111 Conn. App. 596, 614, 960 A.2d 1045 (2008).

We granted certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the defendant waived his claim that the jury instructions were constitutionally deficient?" *State* v. *Akande*, 290 Conn. 918, 919, 966 A.2d 237 (2009). We conclude that the Appellate Court properly determined that the defendant waived his claim, and affirm the Appellate Court's judgment.

The Appellate Court opinion sets forth the following facts. "The defendant and the victim, Nelson Estremera, became acquainted at It's A Gee Thang barber shop on Main Street in Hartford. The defendant drove a black Mercedes-Benz and was dressed professionally each time Estremera saw him at the barber shop or around Hartford. The defendant told Estremera that his name was James Limerick. In conversation, the defendant told Estremera that he had a degree in computer engineering, that he was in the process of opening his own insurance business and that if Estremera ever needed any insurance to let him know.

"In October, 2004, Estremera's nephew gave him a car, a 1992 Chevrolet Lumina, and Estremera contacted the defendant to obtain automobile insurance for it. Estremera called the defendant, who told him to meet the defendant at what was known as the defendant's 'spot,' on a street off of Main Street, and to bring his birth certificate, social security card, the title to the car and his driver's license. The defendant arrived in his Mercedes-Benz and Estremera got into the defendant's car, where the transaction took place. The defendant told Estremera that it would cost only $250 to insure the Chevrolet Lumina because older people pay lower rates. Estremera gave the defendant all of the paperwork, and the defendant told Estremera that he would contact him within a few days. Once the defendant got in touch with Estremera, the two men met again in the defendant's car in the same spot. Estremera gave the defendant $250 in cash, and the defendant gave him an insurance card. The defendant told him that he would be able to register the car with the department of motor vehicles with this insurance card, and Estremera was in fact able to register the Lumina with no problems.

"About one month later, in November, 2004, Estremera needed insurance for another vehicle, an Olds-

mobile, and he got in touch with the defendant again to obtain insurance for this vehicle. The defendant told Estremera that he needed to bring the defendant only the title to the new car because he already had all of Estremera's other information on file. The defendant again met with Estremera at the same location as their previous meetings, in the defendant's car, to complete the transaction. The defendant gave Estremera an insurance card in exchange for another $250 cash. This second insurance card had both of Estremera's cars listed on it, which Estremera found odd.

"On November 18, 2004, Estremera went to the department of motor vehicles in Wethersfield to register the Oldsmobile. Estremera gave an agent the new insurance card he had received from the defendant. After taking it, the agent indicated that a supervisor would be coming to speak to Estremera. The supervisor questioned him about where he got the card and eventually the police arrived. Estremera spoke to an officer and later went, of his own volition, to the Wethersfield police department where he gave a written statement and was shown a photographic array, from which he identified the defendant's photograph. The defendant was arrested in February, 2005, and charged with two counts of forgery in the second degree and two counts of larceny in the sixth degree." *State* v. *Akande*, supra, 111 Conn. App. 598–99.

Following a trial, the jury returned a verdict of guilty. Id., 599–600. The trial court rendered judgment in accordance with the verdict and sentenced the defendant to five years incarceration, execution suspended after time served, followed by three years probation. Id., 600. The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that the trial court's jury instructions on the elements of forgery in the second degree, which consisted of an initial instruction and a written supplemental instruction, violated his constitutional due process rights by failing to sufficiently emphasize certain elements of the forgery offense. Id., 604. Specifically, the defendant claimed that the trial court's instruction should have "define[d] the issues or possesses elements of the crime of forgery in the second degree . . . ." (Internal quotation marks omitted.) Id., 606. Because the defendant had failed to preserve his claim at trial, he sought review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[4] *State* v. *Akande*, supra, 111 Conn. App. 606. The Appellate Court held that the defendant was not entitled to *Golding* review because his acquiescence to the content of the trial court's supplemental jury instruction constituted a waiver of his claim of instructional error, and affirmed the judgment of the trial court. Id., 608–609. This appeal followed.

On appeal, the defendant claims that the Appellate Court improperly held that he waived his instructional

error claim because "defense counsel did not affirmatively express his satisfaction with the charge" and because "[t]here is no indication in the record . . . [of] any substantive discussion between the court and the attorneys concerning the instruction on the elements of forgery." Accordingly, the defendant claims that his claim of instructional error is reviewable under *Golding*.[5] The state claims that the Appellate Court correctly construed defense counsel's acquiescence to the trial court's supplemental instruction as an implied waiver of the defendant's claim. We agree with the state.

The following additional facts relate to the defendant's claim of instructional error. The source of that claim—the trial court's alleged incomplete description of the elements of forgery in the second degree—appeared in both the trial court's initial jury instruction and a later written supplemental instruction that the trial court provided in response to a specific request from the jury.[6] Defense counsel failed to submit a request to charge or to take exception to any instructional language during the trial. Indeed, there is no indication in the record that any discussion of the proposed instructional language occurred prior to the trial court's recital of its initial jury charge. At the conclusion of the initial charge, however, the trial court solicited input from both parties by asking: "Anything about the charge?" The state replied: "No, Your Honor," but defense counsel failed to respond to the trial court's inquiry.[7]

During deliberations, the jury sent out a note signed by the foreman that stated: "We would like a copy of the text listing the points of forgery and of larceny for reference." In a discussion outside the presence of the jury, the court stated: "My suggestion on this is that we make copies of—I make a copy of what I read to them earlier on forgery and larceny given the length of those—those instructions. And given the late hour, since it's now 4:25 and we still haven't gotten through this and counsel's got to take a look at it, I will dismiss the jury now, tell them at 10 o'clock tomorrow they will get copies of that, and they can begin their deliberations again tomorrow.

"They really haven't even started because they sent a note out and then they asked for a break, which was understandable also. So what I'll do is I'll make copies of this. I'll give it to both counsel. We'll meet before court tomorrow, make sure it's all—everything's in order, and then we'll give it to them and they can get started fresh at 10 o'clock in the morning."

The trial court then solicited input from both counsel by asking: "Anybody have any other thoughts?" Defense counsel and the state both answered: "No, Your Honor."

The next morning, the trial court addressed the adequacy of its proposed written supplemental instruction

by stating: "We had some discussions yesterday. We made some copies of the charge that they asked for, the forgery and the larceny. I—we made copies last night for both sides here. Anybody have any comments on what we want to do with this?" Again, defense counsel declined an opportunity to object to the proposed instructional language and simply answered: "No, Your Honor."

The trial court then directed both counsel to review the written supplemental instruction that the jury would receive to "make sure it doesn't have anything that's odd." After pausing to allow both parties to review the proposed language, the court indicated that it was assured that both counsel had examined the copy and asked a final time whether either counsel had "[a]nything else?" Again, defense counsel failed to comment on the proposed instructional language by answering: "No, Your Honor." The trial court then provided the jury with a copy of the written supplemental instruction as an exhibit.[8]

We have recently held that defense counsel's failure to object to a trial court's supplemental instruction constitutes waiver of a claim of instructional error. *State* v. *Foster*, 293 Conn. 327, 342, 977 A.2d 199 (2009). In *Foster*, at the conclusion of the court's initial charge, defense counsel expressly stated that the trial court's instructions were proper but requested that the trial court remind the jury that it had to find beyond a reasonable doubt that the defendant was at the crime scene. Id., 340. The court responded by proposing a supplemental instruction that essentially repeated a portion of its initial alibi instruction. Id., 340–41. Defense counsel failed to object to either the proposed supplemental instruction or the supplemental instruction that the trial court actually delivered to the jury. Id., 341. Despite his express agreement at trial, on appeal, the defendant claimed that the trial court's supplemental instruction diluted the state's burden of proof. Id., 339. Relying on our decisions in *State* v. *Jones*, 193 Conn. 70, 475 A.2d 1087 (1984), and *State* v. *Whitford*, 260 Conn. 610, 799 A.2d 1034 (2002), we held that the defendant had waived his claim of instructional error by "assent[ing] to the [trial] court's instructions." *State* v. *Foster*, supra, 342.

The defendant relies, in part, on our decision in *State* v. *Ebron*, 292 Conn. 656, 975 A.2d 17 (2009), to distinguish his claim from the claim in *Foster*. In *Ebron*, this court held that, so long as the defendant did not actively induce the trial court to act on the challenged portion of the instruction, acquiescence to a trial court's instruction as given at trial does not amount to waiver. Id., 680. Accordingly, the defendant claims that, unlike the defendant in *Foster*, he did not actively induce the alleged instructional error by requesting or affirmatively advocating for the instruction he now challenges on appeal. Instead, he alleges that he merely acquiesced

to the instructional language that the trial court delivered in response to the jury's request. In *State* v. *Kitchens*, 299 Conn. 447, A.3d (2011), however, we recently overruled the distinction between active inducement and acquiescence set forth in *Ebron* and held that certain conduct short of active inducement may be deemed an implicit waiver of an instructional error claim.[9] In *Kitchens*, we held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83.

In the present case, the trial court provided defense counsel with a verbatim copy of the proposed supplemental instruction that the defendant now challenges, and a chance to review that copy overnight. The proposed supplemental instruction consisted of six pages and addressed only the elements of larceny and forgery. Defense counsel, therefore, had a meaningful opportunity to review a written copy of the trial court's specific proposed supplemental instruction in a deliberate manner without undue time constraints.[10] In addition, because the jury's note specifically referred to the "points of forgery," defense counsel had the benefit of reviewing the proposed instructional language with the knowledge that the elements of forgery in the second degree were a particular concern for the deliberating jury. Under these circumstances, we conclude that the rule of *Kitchens* applies to compel the conclusion that defense counsel was aware of the alleged instructional error and chose to waive any objection to it.

In sum, because defense counsel had a meaningful opportunity to review the supplemental instructional language and because the jury's specific request was sufficient to focus defense counsel's attention on the elements of forgery—the specific portion of the instruction that the defendant now challenges—we construe defense counsel's acceptance of the trial court's supplemental instruction as an implied waiver of the defendant's claim of instructional error.

The judgment of the Appellate Court is affirmed.

In this opinion NORCOTT and ZARELLA, Js., concurred.

* January 5, 2011, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-139 (a) provides in relevant part: "A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged, which is or purports to be, or which is calculated to become or represent if completed: (1) A deed, will, codicil, contract, assignment, commercial instrument or other instrument which does or may evidence, create, transfer,

terminate or otherwise affect a legal right, interest, obligation or status; or (2) a public record or an instrument filed or required or authorized by law to be filed in or with a public office or public servant . . . ."

[2] General Statutes § 53a-119 provides in relevant part: "Larceny includes . . .

"(2) Obtaining property by false pretenses. A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person. . . ."

[3] General Statutes (Sup. 2010) § 53a-125b (a) provides in relevant part: "A person is guilty of larceny in the sixth degree when he commits larceny . . . and the value of the property or service is five hundred dollars or less." In 2004, when the defendant's alleged criminal conduct occurred, the statute specified the amount of $250 or less. Number 09-138, § 6, of the 2009 Public Acts increased that amount to $500.

[4] *Golding* permits a defendant to "prevail on [an unpreserved] claim of constitutional error . . . only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *State* v. *Golding*, supra, 213 Conn. 239–40.

[5] The defendant also reasserts his claim that the trial court improperly omitted an instruction concerning the essential elements of the crime of forgery in the second degree by failing to define the words "issuing," "possessing" and "knowledge." In support of his claim, the defendant notes that the model instruction for forgery by means of "issuing or possessing" a forged instrument includes definitions of those terms. See J. Pellegrino, A Collection of Connecticut Selected Jury Instructions: Criminal (3d Ed. 2001) § 10.5, p. 538. The state counters that there was no instructional error and points out that the defendant is not claiming that the trial court's instruction contained any incorrect statement of law. Because we find that defense counsel's actions at trial support a finding of waiver, we will not reach the merits of the defendant's claim.

We emphasize, however, that the defendant's trial did not turn on the nuances of issuing, possessing or knowledge. The state's theory of the case was that the defendant created the insurance card and sold it to Estremera. The defendant never argued that his conduct failed to satisfy the dictates of the "issues or possesses" prong of the forgery statute. Rather, his defense was that Estremera was lying. Therefore, the omitted instructions pertain to an issue that was not a particular focus of the trial.

[6] The transcript of the trial court's initial jury instruction provides in relevant part: "A person is guilty of forgery in the second degree when with intent to defraud, deceive or injure another he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged which is or purports to be or which is calculated to become or represent if completed a deed, will, codicil, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or two, a public record or an instrument filed, required or authorized by law to be filed in or with a public office or public servant.

"Now, the information charges the defendant with two counts of forgery. The law states that a person is guilty of forgery when with intent to defraud, deceive or injure another, he falsely makes, completes or alters the written instrument. A 'written instrument' is any instrument or article containing written or printed matter or the equivalent thereof used for the purpose of reciting, embodying, conveying or recording information. A written instrument may be complete or incomplete.

"A 'complete written instrument' is one fully drawn with respect to every essential feature thereof whereas an 'incomplete written instrument' is one that requires additional matter or content to render it complete.

"Forgery may be consummated in any one of the following ways: Falsely making a completed written instrument, falsely making an incomplete written instrument, falsely completing an incomplete written instrument, falsely altering a complete written instrument, falsely altering an incomplete written instrument *or issuing or possessing any written instrument that he knows to be forged.* The law in reference to this crime uses the term 'falsely makes,' 'falsely completes,' 'falsely alters' a written instrument.

* * *

"Thus, the crime of forgery may be committed by falsely making or preparing a written instrument, placing liability on a particular person or entity, or the maker or drawer did not authorize the making or drawing of the instrument; or, two, by falsely inserting or changing matter in an incomplete written instrument so as to make it appear as a genuine, fully authorized, complete written instrument; or, three, by falsely altering any complete or incomplete written instrument by erasure, obliteration, deletion or insertion so as to make it appear genuine and fully authorized.

"Now, if you find that the state has proven beyond a reasonable doubt each of the elements of the crime of forgery in the second degree, then you will find the defendant guilty. On the other hand, if you find that the state has failed to prove beyond a reasonable doubt any one of the elements, then you shall find the defendant not guilty. Remember, that goes to both counts of forgery." (Emphasis added.)

[7] Given the lack of evidence relating to defense counsel's opportunity to review the trial court's *initial* instruction, if the jury had not requested a supplemental instruction, this court could not construe defense counsel's acquiescence to the trial court's instruction as an implied waiver of the defendant's claim. Our waiver analysis focuses instead on defense counsel's opportunity to review and take exception to the *supplemental* instruction that the trial court provided in response to the jury's request.

[8] The defendant concedes that the trial court's written supplemental instruction on the elements of forgery in the second degree was virtually identical to the initial instruction that the trial court delivered from the bench.

[9] Specifically, in *Kitchens*, we held that "to the extent we concluded in *Ebron* that the claim of an improper jury instruction is reviewable under *Golding* only if the instructional error is not induced or invited, even if counsel fails to object or demonstrates by other conduct that he or she is satisfied with the charge as given . . . we now overrule our holding in that case." *State* v. *Kitchens*, supra, 299 Conn. 472–73.

[10] Justice Katz, in her dissent, contends that we should not imply waiver in this case because the supplemental instruction was requested by the jury rather than defense counsel and that such requests "arise from unforeseen circumstances and often require prompt response to avoid undue interruption in jury deliberations." In fact, in this case, the trial court released the jury for the day and allowed both parties to review the copy of its written supplemental instruction overnight. We have no reason to believe that all of our trial court judges, particularly where the jury has expressed concern or confusion regarding jury instructions, will not allow adequate time for counsel to provide meaningful input.