IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 66069-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
NESTER OVIDIO-MEJIA,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 12, 2012
	)	

Ellington, J. — More than 10 years ago, we held in State v. Meggyesy that a court does not err by instructing a jury that it has a duty to convict if it finds all of the elements of the crime proven beyond a reasonable doubt.[1] The jury in Nestor Ovidio-Mejia's trial was so instructed. Although he did not object, Ovidio-Mejia now challenges the instruction as erroneous under the state and federal constitutions. Because he offers no basis to distinguish controlling precedent and does not persuade us of its error, we adhere to our decision in Meggyesy. We further find sufficient evidence supports Ovidio-Mejia's conviction, and affirm.

BACKGROUND

After learning that their friend Ronald Preston had been shot at the direction of Mario Spearman, Ovidio-Mejia, Dominick Reed, Antoine Davis, and Jontae Chatman

[1] 90 Wn. App. 693, 958 P.2d 319 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

met at Chatman's residence. Reed, Davis, and Chatman decided to get revenge. Davis put his AK-47 assault rifle in Reed's car. Davis also had a handgun, as did Ovidio-Mejia. Reed, Davis, Chatman and Ovidio-Mejia then went looking for Spearman.

The four men drove to Pacific Highway South, where they expected to find Spearman "pimping on girls."[2] At the intersection of 188th Avenue South and Pacific Highway, Ovidio-Mejia pointed out Spearman's car. When the light turned red, Reed stopped a few cars behind Spearman as Davis, Chatman, and Ovidio-Mejia jumped out. Chatman took the AK-47. Ovidio-Mejia indicated he had Chatman's back. Reed stayed in the car and soon heard automatic gunfire.

Over 30 shots were fired by multiple guns and by more than one person. Spearman's car was riddled with bullet holes. He had been hit numerous times and died six days later. Spearman's front seat passenger was also wounded. A woman and her two year old son were in the back seat. Aside from a grazing wound from a single bullet, the woman and child were unharmed.

Reed stopped his car in a nearby driveway and waited for the others. Chatman returned with the AK-47, and both Ovidio-Mejia and Davis had guns in their hands. Reed drove off. As Ovidio-Mejia was "messing with" his gun, it went off and struck Reed in the thigh.[3]

Since Reed could no longer drive, Ovidio-Mejia took over and Reed joined

[2] Report of Proceedings (RP) (July 13, 2010) at 62.

[3] Id. at 83.

Davis and Chatman in the back seat. Davis and Chatman later jumped out, and Ovidio-Mejia dropped Reed off at the hospital and drove away in Reed's car.

The police soon found Reed's car moving down the street near Ovidio-Mejia's home. When he pulled over, officers arrested him. Though he initially denied owning such a weapon, Ovidio-Mejia later admitted he had been armed with a .380 on the day of the shooting.

Ovidio-Mejia, Davis, Chatman and Reed were arrested and charged with first degree premeditated murder and three counts of attempted first degree murder. The State also alleged each offense was committed with a firearm. Reed later pleaded guilty to second degree murder and three counts of second degree assault, each while armed with a firearm. Reed then testified against the remaining defendants at a joint trial.

The jury convicted Ovidio-Mejia of first degree murder and of three counts of the lesser degree attempted murder in the second degree. The jury found he committed each offense while armed with a firearm. The court imposed consecutive standard range sentences, plus four firearm enhancements, totaling 757 months.

DISCUSSION

Ovidio-Mejia argues that the to convict instructions were erroneous because the court informed the jury that it had a "duty to return a verdict of guilty" if it found all elements of the crime beyond a reasonable doubt.[4] He argues the jury had no such legal duty and thus, the pattern instruction given misstates the law.

[4] Clerk's Papers at 136, 163, 164, 165.

The State contends Ovidio-Mejia may not challenge the instruction on appeal because he not only failed to object to the instruction below, but also proposed instructions containing identical language. 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."[5] An error is manifest if it resulted in actual prejudice.[6] 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.'"[7]

Assuming without deciding that this issue is preserved, the argument is precluded by controlling precedent. In Meggyesy, we held that instructing the jury it had a duty to convict if it found the elements were proved beyond a reasonable doubt did not invade the province of the jury, deprive the jury of its power to acquit against the evidence, direct a guilty verdict, or coerce the jury to convict.[8] After applying the six-step analysis set forth in Gunwall,[9] we further concluded there was no state constitutional basis to invalidate the challenged instruction.[10] Since Meggyesy, every court to consider the issue has adhered to its reasoning, and the Supreme Court has repeatedly denied review.[11]

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[5] RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).

[6] State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009).

[7] Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (alteration in original).

[8] Meggyesy, 90 Wn. App. at 699-701.

[9] State v. Gunwall,106 Wn.2d 54, 59, 720 P.2d 808 (1986).

[10] Meggyesy, 90 Wn. App. at 701-04.

[11] State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007); State v. Brown, 130

Ovidio-Mejia acknowledges the precedent, but argues Meggyesy was wrongly decided. He makes no new arguments, however, and fails to persuade us the decision is incorrect and harmful.[12] Thus, following Meggyesy, we hold the instruction in this case was not in error.

In his statement of additional grounds for review, Ovidio-Mejia argues his convictions are not supported by sufficient evidence. In a challenge to the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the accused.[13] Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[14]

To convict Ovidio-Mejia of murder in the first degree, the jury was instructed it must find that he acted with premeditated intent to cause Spearman's death and that Spearman died as a result of Ovidio-Mejia's acts. To convict him of attempted second degree murder, the jury had to find that he "did an act that was a substantial step toward the commission of Murder in the Second Degree" of the three passengers in Spearman's car and that the act was done with intent to commit murder in the second degree.[15] A person commits murder in the second degree when "with intent to cause the death of another person but without premeditation, he causes the death of such

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Wn. App. 767, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998)/

[12] 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.").

[13] State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

[14] Id. at 596-97.

person or of a third person."[16] A person is guilty as an accomplice if he aids or agrees to aid another person in planning or committing the crime.[17]

The State produced evidence that Ovidio-Mejia, Chatman, Davis and Reed sought revenge against Spearman for shooting their friend. Chatman, Davis, and Ovidio-Mejia armed themselves, and together with Reed, hunted Spearman down. When they found him, Chatman, Davis, and Ovidio-Mejia jumped out and approached Spearman's car. Ovidio-Mejia confirmed he had Chatman's back. A witness saw a Hispanic man in a light colored shirt and a black male firing into the car. Ovidio-Mejia was wearing a white t-shirt at the time. When Chatman, Davis, and Ovidio-Mejia returned to Reed's car, each had a gun in hand. The evidence showed that Spearman's car was struck 30 times by bullets fired by more than one person and more than one type of gun. Spearman died as a result of multiple gunshot wounds, and two of the other passengers were injured in the attack.

Ovidio-Mejia points out that most of this evidence came from Reed, who he argues is "an established liar."[18] But the jury was free to believe or disbelieve Reed's testimony. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal."[19]

With inferences drawn in the State's favor, the evidence was sufficient to show

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[15] CP 163-65. The State also had to prove that all alleged acts occurred in the state of Washington.

[16] Clerk's Papers at 155.

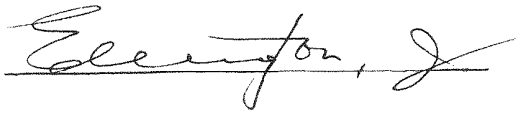
[17] Clerk's Papers at 130.

[18] Statement of Additional Grounds at 1.

[19] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 950 (1990).

beyond a reasonable doubt that Ovidio-Mejia committed first degree murder and attempted second degree murder as principal or accomplice.

Affirmed.



WE CONCUR: