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

STATE OF WASHINGTON, Respondent, v. MATTHEW MARK NEDEAU, Appellant.	)	No. 29979-1-III Consolidated with No. 30255-5-III UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. MAGGIE M. TYLER, Appellant.	)	

Brown, J. • In this consolidated appeal, Maggie Mae Tyler challenges her second degree murder conviction and deadly weapon sentence enhancement, while Matthew Mark Nedeau challenges his second degree murder conviction, second degree assault conviction, and deadly weapon sentence enhancement. First, Mr. Nedeau and Ms. Tyler

(Appellants) contend the trial court erred in giving a special verdict unanimity instruction, and claim ineffective assistance because their attorneys failed to object to it. Second, Appellants contend insufficient evidence supports their second degree murder convictions; Ms. Tyler separately argues insufficient evidence rebuts her defense-of-other claim. Third, Ms. Tyler separately contends the trial court erred in calculating her offender score. We agree with Ms. Tyler's offender score concerns and remand for resentencing, but reject all other contentions. Accordingly, we affirm in Mr. Nedeau's appeal, and affirm in part and reverse in part in Ms. Tyler's appeal.

FACTS

Because we review Appellants' evidence sufficiency challenges, we relate the facts in the light most favorable to the State. We give a general factual overview here and present details in our evidence sufficiency analysis.

In July 2009, Appellants engaged Vitaliy Shevchuk in two confrontations on a Spokane street. The first confrontation began when Mr. Shevchuk became involved in a yelling incident with occupants of a passing vehicle driven by Mr. Nedeau, who was accompanied by Ms. Tyler and two other passengers; it ended when Mr. Nedeau stabbed Mr. Shevchuk in the chest while Ms. Tyler, wielding a knife, fought alongside. The second confrontation began when Mr. Shevchuk threw a rock through the rear window of Appellants' vehicle as it drove off; it ended when Ms. Tyler stabbed Mr. Shevchuk in the

neck while Mr. Nedeau, wielding a bottle, confronted Mr. Shevchuk, who defensively held a flimsy metal pole above his head.

As a result of the confrontations, the State charged Ms. Tyler and Mr. Nedeau as principals or accomplices to second degree intentional murder or, alternatively, second degree felony murder. And, the State charged Mr. Nedeau with first degree assault. The State included special deadly weapon allegations as aggravating circumstances. Appellants stood trial together.

Without objection, the trial court partly instructed the jury:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Clerk's Papers (CP) at 246; Report of Proceedings (RP) at 1106-07. Mr. Nedeau earlier proposed a substantially identical instruction. The court additionally instructed the jury on intentional murder and felony murder as alternative means.

The jury found Ms. Tyler and Mr. Nedeau guilty, by general verdicts, of second degree murder as charged. The jury found Mr. Nedeau guilty of second degree assault as a lesser included offense of first degree assault. By special verdict, the jury found the defendants committed each crime while armed with a deadly weapon. Appellants moved unsuccessfully to arrest the judgment or for a new trial. At sentencing, the trial court

calculated Ms. Tyler's offender score by counting her two prior forgery convictions separately. The court enhanced both Appellants' sentences in light of the deadly weapon special verdicts. Ms. Tyler and Mr. Nedeau appealed separately.

ANALYSIS

A. Unanimity Instruction and Ineffective Assistance

The issue is whether the trial court erred in giving its deadly weapon enhancement instruction. Relying on *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled by State v. Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012), Appellants contend the court misstated the law by instructing the jury it must be unanimous to answer the special verdict form either affirmatively or negatively. Appellants additionally contend ineffective assistance of counsel because their attorneys failed to object to the deadly weapon enhancement instruction.

We review claimed legal errors in jury instructions de novo. *State v. Vander Houwen*, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). Jury instructions are erroneous if they misstate the law. *Id.* However, under the invited error doctrine, "'[a] party may not request an instruction and later complain on appeal that the requested instruction was given.'" *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (alteration in original) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). Further, a party generally may not raise a claim of error for the first time on appeal unless

it is "a manifest error affecting a constitutional right." RAP 2.5(a)(3).

Here, the State does not argue the invited error doctrine applies, even though Mr. Nedeau proposed a special verdict instruction substantially identical to the one the trial court gave. *See Studd*, 137 Wn.2d at 546. Instead, the State argues Appellants waived their challenges to the special verdict instruction by failing to object to it at trial. In *State v. Guzman Nunez*, 160 Wn. App. 150, 153-54, 165, 248 P.3d 103 (2011), *aff'd sub nom.*, *Nuñez*, 174 Wn.2d 707, this court held the issue could not be raised for the first time on appeal, as the error was not constitutional in magnitude. However, in *State v. Ryan*, 160 Wn. App. 944, 948, 252 P.3d 895 (2011), *rev'd*, 174 Wn.2d 707, Division Two of this court held the opposite. Our Supreme Court granted review of both cases and consolidated them, affirming *Guzman Nunez*, reversing *Ryan*, and remanding both cases without addressing waiver. 174 Wn.2d 707. Because we previously held the error was not constitutional in magnitude, and our Supreme Court has not held otherwise, Appellants waived their challenges to the special verdict instruction by failing to object to it at trial. *See* RAP 2.5(a)(3); *Guzman Nunez*, 160 Wn. App. at 153-54, 165.

Even so, Appellants' contention is untenable because it relies on the special verdict instruction given in *Bashaw* and later rejected in *Nuñez*. In *Nuñez*, our Supreme Court overruled *Bashaw*'s nonunanimity rule, concluding it "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and

frustrates the purpose of jury unanimity." 174 Wn.2d at 709-10. In reaching this decision, the court noted that for aggravating circumstances under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose *or reject* an aggravator." *Id.* at 715 (emphasis added) (construing RCW 9.94A.537(3)). Applying *Nuñez*, we hold the trial court properly instructed the jury concerning the deadly weapon special verdict.

Because the court did not err in giving its deadly weapon enhancement instruction, we necessarily reject Appellants' ineffective assistance contentions based on failure to object. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) ("The failure to show either deficient performance or prejudice defeats a defendant's [ineffective assistance of counsel] claim.").

B. Evidence Sufficiency

The joint contention is whether sufficient evidence supports the jury's guilty findings in Appellants' second degree murder convictions. Ms. Tyler additionally contends insufficient evidence rebuts her defense-of-other claim. Mr. Nedeau additionally contends insufficient evidence supports his accomplice liability for Mr. Shevchuk's death.

"Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential

elements of the crime beyond a reasonable doubt." *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). "A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence." *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). We defer to the jury on witness credibility and evidence weight or persuasiveness. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

Where, as here, the State charges, presents evidence on, and argues alternative means (second degree intentional murder and, alternatively, second degree felony murder) of committing a crime (second degree murder);[1] the trial court instructs the jury on each alternative; and no way exists to determine which alternative the jury relied on to find the defendant guilty, sufficient evidence must support each alternative. *State v. Lobe*, 140 Wn. App. 897, 905, 167 P.3d 627 (2007).

First, concerning Ms. Tyler's intentional murder conviction, a defendant commits second degree intentional murder if he or she causes another's death "[w]ith intent . . . but without premeditation." RCW 9A.32.050(a). Intent is "the objective or purpose to accomplish a result which constitutes a crime." Former RCW 9A.08.010(1)(a) (2008). The defendant's "'specific criminal intent . . . may be inferred from the conduct where it

[1] Intentional murder and felony murder are alternative means of committing second degree murder. RCW 9A.32.050(a)-(b); *State v. Berlin*, 133 Wn.2d 541, 553, 947 P.2d 700 (1997). However, "principal and accomplice liability are not alternative means of committing a single offense." *State v. McDonald*, 138 Wn.2d 680, 687, 981 P.2d 443 (1999).

is plainly indicated as a matter of logical probability.'" *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

Ms. Tyler admitted she swung the knife at Mr. Shevchuk and fatally stabbed him in the neck. She testified she did so accidentally because she swung the knife at him solely to make him back away from Mr. Nedeau, not intending to stab or kill him. The jury apparently disbelieved Ms. Tyler; we defer to that credibility assessment. The State's supporting evidence showed Ms. Tyler exclaimed, "I got him, I got him, I stabbed that fool" immediately after she stabbed Mr. Shevchuk. RP at 736. From this evidence, a rational jury could reasonably infer Ms. Tyler intended to cause Mr. Shevchuk's death because as a matter of logical probability, her act of swinging the knife at his neck plainly indicated her objective or purpose to stab and kill him. Therefore, viewing the evidence in the light most favorable to the State, a rational jury could find the essential elements of second degree intentional murder beyond a reasonable doubt.

Second, concerning Ms. Tyler's felony murder alternative, second degree felony murder occurs if the defendant commits or attempts a predicate felony, including assault, and either the defendant or a coparticipant causes another's death "in the course of and in furtherance of," or "in immediate flight" from the felony. RCW 9A.32.050(b). The State alleged Ms. Tyler committed the predicate felony of second degree assault with a deadly

weapon. RCW 9A.36.021(2)(a). This crime occurs when the defendant "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). A deadly weapon includes any weapon "which, under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). A killing occurs in the course of and in furtherance of, or in immediate flight from a predicate felony if there is an intimate, causal connection between the events, and the killing is within the res gestae of the predicate felony based on close proximity in time and distance. *State v. Brown*, 132 Wn.2d 529, 608, 940 P.2d 546 (1997).

Based on her statement, a rational jury could find Ms. Tyler committed the predicate felony of second degree assault when she swung the knife at Mr. Shevchuk and stabbed him in the neck. And, the jury could find Ms. Tyler killed Mr. Shevchuk in the course of and in furtherance of this predicate felony assault because an intimate, causal connection existed between the events and the killing was within the res gestae of the assault based on close proximity in time and distance. Therefore, viewing the evidence in the light most favorable to the State, a rational jury could find the essential elements of second degree felony murder beyond a reasonable doubt.

Third, concerning Ms. Tyler's contention that the State failed to rebut her defense-of-other claim, the State responds it presented sufficient evidence to prove Ms. Tyler was an initial aggressor along with Mr. Nedeau, and thus did not act in his lawful defense.

Homicide is justifiable when committed "[i]n the lawful defense of the slayer, . . . or of any other person in his or her presence or company." RCW 9A.16.050(1). In a second degree murder case, the defendant must produce some evidence showing he or she acted in lawful defense of self or others and, once the defendant does so, the State must prove the absence of lawful defense beyond a reasonable doubt. *State v. Brightman*, 155 Wn.2d 506, 520, 122 P.3d 150 (2005).

A slayer acts in lawful defense of self or others where "there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury," "there is imminent danger of such design being accomplished," RCW 9A.16.050(1), and "the use of deadly force was necessary under the circumstances," *Brightman*, 155 Wn.2d at 523 (emphasis omitted). However, an initial aggressor cannot act in lawful defense of self or others "unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).

When Ms. Tyler fatally stabbed Mr. Shevchuk, he held a flimsy metal pole above his head, ready to strike Mr. Nedeau. Others present held a wooden chair and broom handle. The State portrayed these actions as defensive and the jury apparently accepted that portrayal after deciding credibility and evidence weight disputes. Ms. Tyler testified

she intervened in the confrontation solely because she was terrified Mr. Shevchuk and others would pummel Mr. Nedeau. Apparently, the jury disbelieved Ms. Tyler, and we defer to that credibility assessment. Even so, because Ms. Tyler produced some evidence showing she acted in Mr. Nedeau's lawful defense, the State was required to prove the absence of lawful defense beyond a reasonable doubt. *Brightman*, 155 Wn.2d at 520.

Witnesses indicated Mr. Nedeau initiated the first face-to-face encounter by stopping and exiting the vehicle, confronting Mr. Shevchuk, and lunging at him with a knife. Mr. Shevhuk's friend, Timofei Dmitriev, testified Ms. Tyler fought alongside Mr. Nedeau in the first encounter, wielded a knife to assist him in attempts to corner Mr. Shevchuk. Once he stabbed Mr. Shevchuk in the chest, Mr. Nedeau started to leave in the vehicle with Ms. Tyler. But as Mr. Nedeau drove away, Mr. Shevchuk hurled a rock through the vehicle's rear window. Witnesses indicated Mr. Nedeau then initiated the second confrontation by returning and exiting the vehicle after he had already driven a block away, accosting Mr. Shevchuk, and throwing a glass liquor bottle at him. Mr. Dmitriev testified Ms. Tyler again wielded a knife and fought alongside Mr. Nedeau. Ms. Tyler stated she acted in the second encounter to back up Mr. Nedeau, and her exclamations noted above undermine her defense. From this evidence, a rational jury could find Ms. Tyler was an initial aggressor along with Mr. Nedeau, and the two did not withdraw in good faith, but rather returned to carry out more belligerent acts after they

had already left. Therefore, a rational jury could find the State proved the absence of lawful defense beyond a reasonable doubt.

Fourth, concerning Mr. Nedeau's accomplice liability to second degree intentional murder and second degree felony murder, a defendant is responsible for another's crime if the defendant "solicits, commands, encourages, or requests," or "aids or agrees to aid" another to plan or commit the crime, and does so "[w]ith knowledge that it will promote or facilitate" the crime. Former RCW 9A.08.020(3)(a)(i) (2008). "Aid can be accomplished by being present and ready to assist." *State v. Collins*, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995). Knowledge is "aware[ness] of a fact" or "information which would lead a reasonable man in the same situation to believe that facts exist." Former RCW 9A.08.010(1)(b) (2008). The accomplice must have general knowledge of the particular crime charged, but specific knowledge of every element is not required. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000).

To hold Mr. Nedeau liable as an accomplice to second degree intentional murder and second degree felony murder, the State had to prove he generally knew he was facilitating Ms. Tyler's fatal stabbing. *See In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836-38, 844-45, 39 P.3d 308 (2001). This required the State to prove Mr. Nedeau knew Ms. Tyler was armed with a knife and intended to wield it against Mr. Shevchuk. *See id.* at 836-37 (concluding that to prove a driver generally knew he was

facilitating a drive-by shooting, the State had to prove he knew the principal was armed with a gun and intended to shoot from the vehicle). But because a reasonable person would know wielding a knife was likely to result in a fatal stabbing, the State was not required to prove Mr. Nedeau knew Ms. Tyler formed the intent to kill Mr. Shevchuk. *See id.* at 837-38 (reasoning the State was not required to prove the driver knew the principal formed the intent to kill the people he shot at because a reasonable person would know a drive-by shooting was likely to result in death).

Mr. Dmitriev testified Ms. Tyler fought alongside Mr. Nedeau and wielded a knife in both the first and second encounters. He testified Ms. Tyler assisted Mr. Nedeau in the first encounter by using the knife in attempts to corner Mr. Shevchuk. From this evidence, a rational jury could reasonably infer that when Mr. Nedeau exited the vehicle the second time, he knew Ms. Tyler was still armed with a knife and intended to wield it against Mr. Shevchuk once again. Further, Mr. Nedeau admitted he threw the glass liquor bottle at Mr. Shevchuk. A rational jury could find doing so aided Ms. Tyler's homicidal act by distracting Mr. Shevchuk's defenses, allowing her to wield the knife against him unimpeded. Again, we must defer to the jury's credibility and evidence weight determinations.

In sum, we conclude sufficient evidence supports the jury's guilty findings in Ms. Tyler's and Mr. Nedeau's second degree murder convictions, and sufficient evidence

exists to rebut Ms. Tyler's defense-of-other claim.

C. Offender Score Calculation

The issue is whether the trial court erred by counting Ms. Tyler's two prior forgery convictions separately in calculating her offender score. Ms. Tyler contends the court abused its discretion or misapplied the law when it failed to find these prior convictions encompass the same criminal conduct.

We review an offender score calculation de novo, but review a "'determination of what constitutes the same criminal conduct . . . [for] abuse of discretion or misapplication of the law.'" *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (omission and alteration in original) (quoting *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999)). A trial court abuses its discretion if its decision "(1) adopts a view that no reasonable person would take and is thus 'manifestly unreasonable,' (2) rests on facts unsupported in the record and is thus based on 'untenable grounds,' or (3) was reached by applying the wrong legal standard and is thus made 'for untenable reasons.'" *State v. Sisouvanh*, No. 85422-0, 2012 WL 4944801, at *7 (Wash. Oct. 18, 2012) (publication forthcoming) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

The sentencing court calculates an offender score based on the offender's "other current and prior convictions." RCW 9.94A.589(1)(a). If the prior sentencing court found two or more offenses "encompass the same criminal conduct," the current

sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether the prior convictions "encompass the same criminal conduct" and, if they do, must count them as one offense. *Id.*; *State v. Torngren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008).

Offenses encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Whether offenses involve the same criminal intent depends on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This analysis may include "'whether one crime furthered the other'" or the two were "part of a recognizable scheme or plan." *State v. Lewis*, 115 Wn.2d 294, 301-02, 797 P.2d 1141 (1990) (quoting *Dunaway*, 109 Wn.2d at 215). If any statutory element of same criminal conduct is not met, the offenses must be counted separately in calculating offender score. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

On December 1, 2004, Ms. Tyler drew two fraudulent checks from the same victim's account and cashed them at a Spokane Bank of America branch.[2] She later

[2] The summary of facts says Ms. Tyler cashed each check "at a Spokane County branches [sic] of Bank of America." CP at 982. This grammatical error creates an ambiguity because, from this statement, it is *possible* to conclude Ms. Tyler cashed each

"admitted to cashing . . . [the] checks while involved in [an] on-going scheme of multiple fraudulent check cashing." CP at 982. The State alleged Ms. Tyler committed each act with "intent to injure and defraud." CP at 978. Ms. Tyler was convicted of two counts of forgery. The prior sentencing court counted these convictions separately in calculating her offender score, but nonetheless ordered her to serve the sentences consecutively. Consequently, the current sentencing court was required to independently evaluate whether Ms. Tyler's prior forgery convictions encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i); *Torngren*, 147 Wn. App. at 563. The court found they encompass separate criminal conduct.

The record before the current sentencing court showed Ms. Tyler committed the prior forgeries at the same time and place, and against the same victim. Ms. Tyler's admission that she cashed the fraudulent checks as part of an ongoing scheme shows she committed the forgeries with the same criminal intent to injure and defraud. But her admission supports no contrary conclusion. Thus, the court's decision was manifestly unreasonable. The court was required to independently evaluate whether Ms. Tyler's prior convictions encompass the same criminal conduct. But the court appeared to rely on a prior sentencing court's conclusion without separate inquiry into the facts of each

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check at the same branch at the same time, at the same branch at different times, or at different branches at different times. However, at the trial court, the State did not argue Ms. Tyler committed the forgeries at different times and places. Further, on appeal, the State concedes Ms. Tyler committed the forgeries at the same time and place. Br. of Resp't at 11.

forgery. As a result, the current sentencing court misapplied the statutory elements of same criminal conduct and made its decision for untenable reasons.

Because Ms. Tyler's prior forgery convictions clearly fit the statutory elements of same criminal conduct, we conclude the trial court abused its discretion and misapplied the law by finding they encompass separate criminal conduct. In reaching this conclusion

we acknowledge the State's contrary assertions. First, the State argues Ms. Tyler agreed the prior sentencing court should count her forgery convictions separately in calculating her offender score, but we find no support for that proposition in the record. Second, the State argues Ms. Tyler did not ask the current sentencing court to treat her prior forgery convictions as the same criminal conduct. But on both her statement of criminal history and her judgment and sentence, the court specifically noted Ms. Tyler's objection that her two prior forgery convictions involved the "same course of conduct." CP at 1008, 1013. And, both sides briefed the issue and discussed it at sentencing. Finally, the State argues Ms. Tyler agreed to the sentencing court's offender score calculation, but she merely agreed the court had a full list of her criminal history.

Affirmed in part; reversed in part, and remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Siddoway, A.C.J. Kulik, J.