# In the
# Indiana Supreme Court

Dustin J. McKee,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
23A-CR-00549

Trial Court Case No.
20C01-2108-MR-5


## Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 3/18/2024.

Loretta H. Rush
Chief Justice of Indiana

Goff, J., concurs.

Rush, C.J., concurs with separate opinion in which Massa, Slaughter, and Molter, JJ., join.

**Rush, Chief Justice, respecting the denial of transfer.**

I join my colleagues in voting to deny transfer, but I write separately to caution against expanding Indiana's invited-error doctrine.

On appeal, Dustin McKee challenged two jury instructions given by the trial court without objection. Since counsel didn't object, McKee argued that the instructional infirmities amounted to fundamental error. But the Court of Appeals did not address this argument, finding counsel "invited the error" because he agreed with the prosecutor "that the instructions should be provided to the jury in their proposed form." *McKee v. State*, No. 23A-CR-549, at *4 (Ind. Ct. App. Nov. 3, 2023) (mem.). Though the panel is correct that invited error precludes appellate review for fundamental error, this is not a case where counsel invited the alleged instructional errors.

A party invites an error when it takes an affirmative action that is "part of a deliberate, 'well-informed' trial strategy." *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019) (quoting *Brewington v. State*, 7 N.E.3d 946, 954 (Ind. 2014)). Thus, a party does not invite an error through passive action, simple neglect, or mere acquiescence. *Id.* And when a review of the record "fails to disclose enough information, courts should resolve any doubts **against** a finding of invited error rather than engage in speculation." *Id.* Further, when a party does not raise the invited-error doctrine on appeal, our appellate courts should be very reluctant to invoke it *sua sponte*. That is because the doctrine "typically forecloses appellate review altogether," *id.* at 556, and conflicts with our well-settled preference to resolve claims on their merits, *id.* at 558.

Here, there is no evidence that McKee's counsel made an affirmative request for the challenged jury instructions, let alone that he intended to exploit them as part of a well-informed trial strategy. Rather, counsel simply acknowledged with three-word answers that he had reviewed the final instructions, had no objections or amendments to them, and agreed with them being given. These passive actions amount to nothing more than simple neglect or mere acquiescence. As a result, the Court of Appeals should not have invoked the invited-error doctrine. And applying it here is particularly concerning, as the State did not mention

invited error in its appellate brief. Thus, the panel should have addressed the merits of McKee's fundamental-error claim.

That said, after thoroughly reviewing the parties' arguments and the record, McKee has not established that the alleged instructional errors either "made a fair trial impossible" or clearly violated basic due process principles resulting in an "undeniable and substantial potential for harm." *Id.* at 559 (quotation omitted). Because McKee has failed to establish fundamental error, I agree with the Court's decision to deny transfer.

Massa, Slaughter, and Molter, JJ., join.