NO. 73443-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD MYERS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

When his truck flipped over and went off the road, Chad Myers and his passenger hit their heads. Due to his mental state, Mr. Myers was unaware he was in an accident and left the scene. To prove Mr. Myers committed felony hit and run, the State had to show Mr. Myers knew he was in an accident when he failed to remain at the scene. The jury instructions, however, allowed the jury to convict even if Mr. Myers did not know he was in an accident when he walked away but became aware of the accident days later. The jury was confused about these instructions, but the court did not correct them. Mr. Myers is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it presented the jury with a to-convict instruction that misstated the law and was misleading.

2. The trial court erred when it failed to correct the erroneous instruction in its responses to jury questions about the instruction.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A jury instruction is erroneous if it misstates the law or misleads the jury. The giving of an erroneous instruction requires reversal unless the error can be said to have no effect on the verdict beyond a

reasonable doubt. The trial court misstated the law and misled the jury when it instructed that Mr. Myers' knowledge of the accident had to occur "on or about" the date of the accident. Mr. Myers claimed he was not aware of the accident at the time it occurred and the jury twice asked the court about this instruction. Is reversal required?

D. STATEMENT OF THE CASE

On the evening of August 12, 2012, Chad Myers was driving home in his pick-up truck with a passenger he barely knew. 2/17/15 RP 37, 42-43, 48, 81, 86-87. Their girlfriends were following in a car behind them. 2/17/15 RP 31-32, 44-46, 86-87. Probably because Mr. Myers was going too fast around a curve, his truck flipped over and skidded across the roadway on its roof. 2/17/15 RP 48-51, 87. Their girlfriends stopped behind them to provide assistance. 2/17/15 RP 88.

Mr. Myers and his passenger both hit their heads in the accident, causing at least the passenger to black out "a little bit." 2/17/15 RP 51-52. They crawled out their respective windows, and Mr. Myers walked away from the scene. 2/17/15 RP 52-54. The passenger blacked out a few more times that day. 2/17/15 RP 70-71.

Officer Craig Bartl and medical aid arrived and attended to the passenger's injuries, which included a head injury that affects his short-

term memory and scratches or scrapes on his left arm. 2/17/15 RP 55-59, 70, 90-91; 2/18/15 RP 4-6. There is no dispute that this accident took place on August 12. 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19.

Officer Bartl found Mr. Myers' wallet, along with other debris from the accident, in the roadway. 2/18/15 RP 9. Officers went to Mr. Myers' home but could not locate him. 2/18/15 RP 10. Officer Bartl left his business card and asked Mr. Myers to contact him between August 16 and 18. 2/18/15 RP 27-28, 30. Mr. Myers tried to contact Officer Bartl but was told he was off work. 2/18/15 RP 30. On August 17, Officer Bartl contacted Mr. Myers in his driveway. 2/18/15 RP 10-11. Mr. Myers told the officer that he had been driving on August 12, "he didn't remember anything because he hit his head during the accident," and he did not know his passenger had sustained any injuries. 2/18/15 RP 10-11, 29. The State charged Mr. Myers with hit and run – injury under RCW 46.52.020. CP 166-67.

At trial, Mr. Myers urged the jury to acquit because the State failed to prove he knew of the accident when he failed to remain at the scene, render aid and provide information to his passenger. 2/18/15 RP 45-47, 50-52, 54. In instruction six, the court provided,

> To convict the defendant of hit and run injury accident, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That **on or about the 12th day of August** 2012, the defendant was the driver of a vehicle;
>
> (2) That the defendant's vehicle was involved in an accident resulting in injury to any person;
>
> (3) **That the defendant knew that he had been involved in an accident**;
>
> (4) That the defendant failed to satisfy his obligation to fulfill all of the following duties:
>
> (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
>
> (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
>
> (c) Give his name, address, insurance company, insurance policy number and vehicle license number, and exhibit his driver's license, to any person injured in the accident;
>
> (d) Render to any person injured in the accident reasonable assistance; and
>
> (5) That any of these acts occurred in the State of Washington.

CP 144 (emphasis added). This instruction was proposed by the State and Mr. Myers objected to it. CP __ (Sub. 40);[1] 2/18/15 RP 35-37.

[1] A supplemental designation of clerk's papers has been filed for the State's proposed jury instructions at subfolder 40.

During deliberations, the jury asked the court two questions related to this instruction. First, the jury inquired,

> Q: On instruction 6: #3) **That the defendant knew that he had been involved in an accident: → is this for the day of the accident or for the full week after**.

CP 51-52 (emphasis added). The State asked the court to respond, "you know, you have your instructions on the law." 2/18/15 RP 65. Mr. Myers proposed the court respond "that instruction No. 6 relates to a specific date, and certainly would object to anything that would give the indication that this is a crime if he becomes aware that he was in an accident a week later but hadn't then earlier provided information when he wasn't aware." 12/18/15 RP 65. The court simply responded to the jury, "you are to refer to your jury instructions." CP 151-52; 12/18/15 RP 65.

A short time later, the jury inquired,

> Q: for instruction No 6 (1) That on or about the 12th of August, 2012. → Can you **define "about"**

CP 149-50 (emphasis added). Again, the State requested the court provide no further definitions. 2/18/15 RP 67. Mr. Myers asked the court to instruct the jury "that instruction No. 6 refers to the 12th of August 2012" or "instruction No. 6 refers to the date of the charged incident." 2/18/15 RP 68, 69. Counsel explained,

> I guess my concern now is, taken in light of the last question, is that at least some of the jurors are looking at extending the period of time for the knowledge issue, and I don't think that's appropriate.
>
> I know the Court would certainly be concerned about the issue of commenting, but it would seem that clearly the issue of the knowledge element applies to the 12th of August, 2012.

2/18/15 RP 67-68. The trial court noted that the "about" language "is in the instruction" and "there have been plenty of cases where it says 'about' is even more than – it's not just that day." 2/18/15 RP 68-69. Worried it would comment on the evidence if it defined "about," the court simply responded, "you need to refer to your jury instructions." 2/18/15 RP 68-70; CP 149-50. The jury then convicted Mr. Myers. CP 135.

Mr. Myers moved for a new trial, arguing the erroneous instructions and responses to the jury allowed it to convict him for an accident that occurred on August 12, even if he only knew of the accident days later. CP 30-47. The motion was denied, with the explanation, "Obviously that's something the Court of Appeals will take up." 4/1/15 RP 2-3; *cf.* CP 2-18 (notice of appeal).

E. ARGUMENT

Because the to-convict instruction contained a misstatement of law on an issue central to Mr. Myers' defense, a new trial is required.

1. A to-convict instruction that misstates the law or misleads the jury is erroneous.

The adequacy of a challenged to-convict instruction is reviewed de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

"[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Moreover, the to-convict instruction is a yardstick by which the jury measures the evidence to determine guilt or innocence and therefore must contain all the elements of the crime. *E.g.*, *Johnson*, 180 Wn.2d at 306. Appellate courts "will not look to other jury instructions to supplement a defective 'to convict' instruction." *Id*.

2. Mr. Myers can be convicted of a hit and run only if he knew the accident occurred and failed to immediately stop and remain at the scene.

"To convict a defendant of felony hit and run, the State must prove (1) an accident resulting in death or injury to a person; (2) 'failure of the driver of the vehicle involved in the accident to stop his

vehicle and return to the scene in order to provide his name, address, vehicle license number and driver's license and to render reasonable assistance to any person injured . . . in such accident'; and (3) the driver's knowledge of the accident." *State v. Sutherland*, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001) (quoting *State v. Bourne*, 90 Wn. App. 963, 969, 954 P.2d 366 (1998)). Knowledge is an essential, non-statutory element. *Id*. at 129-32; *State v. Martin*, 73 Wn.2d 616, 625-26, 440 P.2d 429 (1968). Likewise, criminal liability does not attach if a person is injured or incapacitated to the extent of being physically incapable of complying. RCW 46.52.020(4)(d).

The knowledge element is plainly constrained to at, or very near, the time of the accident. *See State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008) ("mens rea is '[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime.'" Black's Law Dictionary 1006 (8th ed.2004)), *aff'd* 168 Wn.2d 476, 229 P.3d 704 (2010). The Legislature has not imposed any requirements upon a driver who lacks capacity at the time of the accident but becomes aware of the accident later. No court has read this requirement into RCW 46.52.020.

This result is compelled for several reasons. At the heart of the statute is the requirement that a driver involved in an accident immediately stop, remain at the scene, and provide assistance to injured parties. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). If a driver becomes aware of an accident days later, it is highly unlikely that there would still be an accident scene or injured passenger to attend to. Thus, the period immediately following the accident is the critical time period.

Likewise, the statute excuses compliance if the driver involved is himself injured or incapacitated. RCW 46.52.020(4)(d). It does not require the driver to return to the scene or provide the specified information when he later regains capacity. *See id*. On the other hand, if the injured parties lack capacity, the statute does require the driver to take further action by reporting the accident to law enforcement. RCW 46.52.020(7). The fact that the Legislature included a continuing obligation in this instance further demonstrates that it did not intend such a continuing obligation when it is the driver who is incapacitated. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the Legislature's use of different language in different sections indicates a difference in legislative intent).

The general principle that the relevant time for mens rea is at the time of the crime further compels that knowledge of the accident must be at the time of the accident. "When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime." *State v. Bottrell*, 103 Wn. App. 706, 712, 14 P.3d 164 (2000). The mens rea element, after all, is the "criminal intent with which one performs the criminal act." *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). Here, the criminal act is performed upon "immediately" failing to comply with the statutory provisions. RCW 46.52.020(1); CP 144 (to-convict instruction). To the extent there is an ambiguity, the rule of lenity requires interpretation in Mr. Myers' favor. *Conover*, 355 P.3d at 1096.

Here, the accident and alleged crime occurred on August 12. The knowledge element must be tied to that date as well.

3. The to-convict instruction improperly told the jury it could impose liability where an accident occurred on one date and the mens rea was acquired at another later date.

"Unquestionably, the giving of a so-called 'on or about' instruction can constitute prejudicial error in an appropriate case." *State v. Danley*, 9 Wn. App. 354, 356, 513 P.2d 96 (1973). The

instruction creates a prejudicial error, for example, when it misleads the jury into rejecting a defense for improper reasons. *Id*. When the evidence fixes an exact time when the charged act was committed, the commission of the crime on that exact date is a controlling issue if the defense depends upon it. *See State v. Brown*, 35 Wn.2d 379, 383, 213 P.2d 305 (1949). This rule is regularly applied, for example, where the defendant presents an alibi defense. *E.g.*, *id*.; *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942).

In *State v. Morden*, the Supreme Court applied this rule to a similar situation. *State v. Morden*, 87 Wash. 465, 151 P. 832 (1915). There, the evidence tied the alleged crime, statutory rape, to a particular date. *Id*. at 473-74. The defendant presented evidence that the complaining witness was not on his premises, the purported crime scene, on the day she alleged the rape occurred. *Id*. The trial court, meanwhile, instructed the jury that "the date stated is not one of the material allegations of the information, which has to be proved as laid." *Id*. at 472. Given the nature of the defense and the evidence fixing the alleged crime to a particular date, the Court held that the date of the crime was material to the case. *Id*. at 474.

> While under the statute . . . , it is not essential that the precise time of the offense charged be alleged in the

> indictment or information, the question here presented is not one of allegation, but of proof, and of the necessity of an instruction applicable to the proof.

Morden, 87 Wash. at 474. The trial court's instruction that the date of the crime was not important "withdrew from the jury the appellant's chief defense." *Id*. The erroneous instruction required reversal. *Id*. at 474, 477.

Mr. Myers' lack of knowledge defense was equally focused around the time of the accident. The evidence here unquestionably fixed the precise date when the crime was alleged to have occurred. 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19. Mr. Myers' defense was that, because he hit his head during the accident, he lacked knowledge that the accident occurred. *See* CP 154; 2/18/15 RP 10-11, 29. While all evidence pointed to the accident occurring on August 12, the court failed to tie this time to each of the elements of the offense. *Compare, e.g.*, 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19 (evidence showing accident occurred on August 12) *with* CP 144-45 (to-convict instruction stating defendant was driver of vehicle "on or about" August 12).

As the trial court recognized, "'[a]bout' is an all-embracing word, and covers a great extent of time." *State v. Wolpers*, 121 Wash.

193, 195, 208 P. 1094 (1922); 2/18/15 RP 68-69. The jury questioned the court on the timeframe relevant to the knowledge element and the scope of the "on or about" language. CP 149-52. Even in the face of this juror confusion, the court did not remedy the error. *Id*.; *see United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976) (error to respond to jury question in manner that allows jury to misapply the requisite knowledge requirement). "[A] conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir.1971) (citing *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 (1946)). Yet here, in the face of questions from the jury and Mr. Myers' objection, the court refused to correct its erroneous instruction.

Even if the State fixes a date for the crime, misleading instructions, or other circumstances, may deprive a defendant of his defense. *State v. Pitts*, 62 Wn.2d 294, 297-98, 382 P.2d 508 (1963). "The vice of the 'on or about' instruction is that the Jury may be misled into rejecting an otherwise valid defense." *Danley*, 9 Wn. App. at 357. By failing to instruct the jury that the knowledge requirement was tied to the timeframe of the alleged criminal act, the court committed

prejudicial error. *See Severns*, 13 Wn.2d at 560-61; *Brown*, 35 Wn.2d at 382-83.

4. The jury asked twice about the erroneous instruction, which concerned the crux of Mr. Myers' defense, requiring reversal.

This instructional error is "presumed to be prejudicial." *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). It was proposed by the State, and Mr. Myers objected. 2/18/15 RP 35-37; CP __ (Sub 40); *State v. Barry*, 183 Wn.2d 297, 303-04, 352 P.3d 161 (2015) (prejudice presumed when erroneous instruction is given on behalf of the party who succeeded in the verdict).

Reversal is accordingly required unless the error affirmatively appears to be harmless. *Brown*, 147 Wn.2d at 340; *see Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The error is only harmless if this Court can conclude beyond a reasonable doubt that the verdict would have been the same if the jury had properly been instructed that, to convict, Mr. Myers had to know on August 12 that there had been an accident. *Brown*, 147 Wn.2d at 341.

Lack of knowledge was Mr. Myers' prime defense to the charge. 2/18/15 RP 45-47, 50-52, 54; *see* CP 154. The defense was

not without support: both Mr. Myers and his passenger hit their heads when the truck flipped and skidded across the road on its roof; the injuries caused his passenger to black out and suffer short term memory loss; and Mr. Myers' conduct walking away from the scene and leaving his wallet and vehicle behind suggests clouded judgment. 2/17/15 RP 51, 54, 58-59, 70-71; 2/18/15 RP 9, 50, 51-52. Moreover, the jury was clearly concerned about that element and about the timeframe for culpability because it asked the court two questions on these topics. CP 149-52. The State therefore cannot show beyond any reasonable doubt that the misleading, erroneous instruction did not contribute to the verdict. *See Chapman*, 386 U.S. at 24.

Consequently, the conviction must be reversed and the matter remanded for a new trial. *See Brown*, 147 Wn.2d at 344.

F. CONCLUSION

Because the court's instructions improperly allowed the jury to convict Mr. Myers if he lacked knowledge at the time immediately surrounding the accident but became aware of the accident days later, the conviction should be reversed and remanded for a new trial.

Alternatively, Mr. Myers asks the Court not to award appellate costs if his conviction is affirmed. RAP 14; RAP 1.2(a), (c); *State v.*

Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015); *see* RCW 10.01.160(3); GR 34(a).

DATED this 22nd day of December, 2015.

Respectfully submitted,

_s/ Marla L. Zink_____
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF DECEMBER, 2015.

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