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No. 51734-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

SAMMY B. WEAVER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Christopher Lanese, Judge

No. 17-1-02980-23

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR

In its to-convict jury instruction for the lesser included crime of criminal trespassing in the first degree, the trial court created an element that required proof beyond a reasonable doubt that Weaver knew that his entry into or remainder in the premises at issue was unlawful. Where neither party objected to the instruction, did reversible error occur even though Weaver suffered no prejudice due to the instruction?

B. FACTS AND STATEMENT OF THE CASE

On August 19, 2017, a citizen by the name of Kyle Ulrich was moving into an apartment that he had rented near Belfair, Washington. RP45-46, 53, 80. When he approached the apartment, he heard a noise inside that he thought was the sound of breaking glass, so he called the police. RP 53. Deputy Ellis of the Mason County Sheriff's Office arrived to investigate. RP 53, 80.

When Deputy Ellis arrived, he stood at the entrance to the apartment and knocked on the door while announcing that he was a police officer. RP 54, 81. Deputy Ellis received no response to his knock and

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announce. RP 54, 81. Deputy Ellis then knocked again and then announced that he was entering the apartment. RP 54, 82. But still, no one answered. *Id.* So, Deputy Ellis entered the apartment and while inside he announced again, but still, no one answered. RP 54, 83. Deputy Ellis then rounded a corner and saw the defendant, Sammy Weaver, on the floor. RP 83. Deputy Ellis placed Weaver under arrest. RP 83-85.

Neither Mr. Ulrich nor the owner of the apartment building had given Weaver permission to in the apartment. RP 49-50, 75. Weaver said that he had arrived at the apartment during the night and that he was tired and didn't have anywhere to sleep, so he knocked on the door and didn't get any response, so he walked inside. RP 85.

The State charged Weaver with residential burglary. CP 6-7. At trial, the court instructed the jury on the lesser included offense of criminal trespass in the second degree. CP 45-47. The jury returned a not guilty verdict on the charge of residential burglary but found Weaver guilty of the lesser included offense of criminal trespassing in the first degree. CP 51-52.

The instant appealed followed.

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C. ARGUMENT

In this case, Weaver was charged and tried for the crime of residential burglary. But the trial court also instructed the jury on the lesser included offense of criminal trespass in the first degree. The jury returned a not guilty verdict on the charge of residential burglary, but returned a guilty verdict for the charge of criminal trespass in the second degree. The court's jury instructions relating the lesser included crime of trespass in the first degree are now at issue on appeal.

RCW 9A.52.070(1) defines the crime of criminal trespassing in the first degree as follows: "A person is guilty of criminal trespass in the first degree if he or she knowingly *enters or remains unlawfully* in a building." (Emphasis added). The phrase "enters or remains unlawfully" is defined at RCW 9A.52.010(2), as follows: "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." Thus, the State contends that if these two statutes were strung together to form one sentence that expresses the combined meaning of the two statutes, it would read as follows: A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains in a building when he or she is not

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then licensed, invited, or otherwise privileged to so enter or remain. This reading of the statutes does not require the defendant to know that his conduct is unlawful. This reading is consistent with the legal principle that "[i]gnorance of the law is generally not a defense." *State v. Minor*, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008).

At jury instruction number 12 the trial court instructed the jury that "[a] person commits the crime of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a building." CP 46. At jury instruction number 14 the trial court instructed the jury on the definition of the term "knowingly," which included a statement that, to show that a person had knowledge or acted knowingly, "it is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime." CP 48. As was the case, above, when considering the RCW 9A.52.010(2) definition of "enters or remains unlawfully," jury instruction number 14, also, is consistent with the legal principle that "[i]gnorance of the law is generally not a defense." *State v. Minor*, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008).

At jury instruction number 8, the trial court instructed the jury that "[a] person enters or remains unlawfully in or upon premises when he is

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not then licensed, invited, or otherwise privileged to so enter or remain." CP 42. Jury instruction number 8 is a correct statement of the law as provided at RCW 9A.52.010(2) and provides context to jury instruction number 12.

The current controversy on appeal, however, arises at jury instruction number 13, where the trial court instructed the jury as follows:

> To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 19, 2017, the defendant knowingly entered or remained in a building;
>
> (2) That the defendant knew that the entry or remaining was unlawful; and
>
> (3) That this act occurred in the State of Washington.

CP 47. More specifically, the controversy arises with the language of the second element, which states that "the defendant knew that the entry or remaining was unlawful[.]" *Id.*

A more accurately worded description of element 2 should have incorporated the language of RCW 9A.52.010(2) and stated that "[a]t the time of entry or remaining in the building, the defendant was not then

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licensed, invited, or otherwise privileged to so enter or remain." Or, if the intent was to incorporate the defense found at RCW 9A.52.090(3) – that "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain" – then the instruction should have stated that "[a]t the time of entry or remaining in the building, the defendant *knew or reasonably should have known* that he was not then licensed, invited, or otherwise privileged to so enter or remain." Instead, the instruction as given appears to have created an additional element that the State was not otherwise required to prove – that Weaver knew that his act of entering or remaining in the premises without the owner's permission was against the law.

Neither party objected to the court's jury instructions, to include that there specifically was no objection to jury instruction number 13. RP 6, 17. Because there was no objection to it, jury instruction number 13 became the law of the case and is not subject to appeal except in the case of manifest error that affects a constitutional right. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); *State v. Duenhauer*, 103 Wn. App. 373, 376, 12 P.3d 661 (2000). The State contends that even if jury

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instruction number 13 were interpreted to require the State to prove beyond a reasonable doubt an additional element that it otherwise was not required to prove – that Weaver knew his conduct was against the law – the error benefited Weaver rather than to prejudice him, and it does not amount to constitutional error because it created an additional element for the State to prove rather than to relieve the State of its burden of proof on an element of the offense. *See, e.g., State v. Stewart*, 35 Wn. App. 552, 554, 667 P.2d 1139 (1983) (citing *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

Finally, although the State adheres to its contention that element 2 of jury instruction number 13 is not constitutional error, even if it were error, it was harmless beyond a reasonable doubt. Constitutional error that is harmless beyond a reasonable doubt does not require reversal. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967); *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

Here, even if accepting Weaver's interpretation of element two, which he brings for the first time on appeal, the jury's verdict of guilty would show that the jury necessarily found that Weaver knew that his entry into or remainder at the premises at issue was against the law. As

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the instructions as a whole define, Weaver's entry into or remainder at the premises was not unlawful if he was "licensed, invited, or otherwise privileged to so enter or remain" (as provided by instruction number 8). Thus, the jury found more than it was required to find, and its superfluous finding that Weaver knew that his entry or remainder at the premises was unlawful would necessarily incorporate and subsume a finding that he was not "licensed, invited, or otherwise privileged to so enter or remain" at the premises. As such, the error, if any, was harmless beyond a reasonable doubt. Harmless error does not require reversal. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967); *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

D. CONCLUSION

Weaver waived any appeal claim based on the wording of the jury instructions because he did not raise an objection at trial, and the error that he claims is not constitutional in nature. The effect of the error that Weaver claims is to add an additional element that the State was not otherwise required to prove – that Weave knew that his act of trespassing was against the law. But even if the jury instruction was constitutional

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error (which it wasn't), it nevertheless was harmless beyond a reasonable doubt, because the jury instructions otherwise correctly defined the law and the jury's function, allowed Weave to argue his theory of the case, and required the jury to find all necessary elements of the offense. The contention that the instructions also required the jury to find an additional, unnecessary element benefited Weaver and does not constitute prejudicial error. Therefore, the State contends that Weaver's appeal should be denied and that the jury's verdict should be sustained.

DATED: March 21, 2019.

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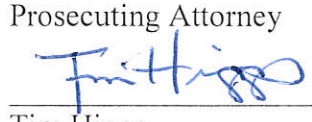

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