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COA NO. 36035-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JOHN RICHARDSON,

Appellant.

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

The Honorable Julie M. McKay, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. **THE JURY WAS INSTRUCTED IN A MANNER THAT LOWERED ITS BURDEN OF PROOF ON THE CONSPIRACY CHARGE, REQUIRING REVERSAL UNDER A TRIAL COURT ERROR OR INEFFECTIVE ASSISTANCE THEORY.**

a. **Instructional error that relieves the State of its burden of proof can be raised for the first time on appeal.**

The State says Richardson is barred from raising the instructional error on appeal due to invited error. Brief of Respondent (BOR) at 18-19. The State is mistaken. "In making this argument, the State is blurring the lines between the invited error doctrine and the waiver theory." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). The critical distinction is between affirmatively proposing an erroneous instruction or simply failing to object to one. State v. McLoyd, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997), aff'd sub nom. State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)). Invited error occurs when the defense proposes an erroneous instruction. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). Defense counsel did not propose any erroneous instruction in this case, and the State does not contend otherwise.

Rather, defense counsel did not object to the lack of proper instruction on what constitutes first degree robbery in relation to the State's burden of proof on the conspiracy count. Lack of objection to jury

instructions does not constitute invited error. Corn, 95 Wn. App. at 56; accord State v. Goble, 131 Wn. App. 194, 203 n.5, 126 P.3d 821 (2005); State v. Clark, 117 Wn. App. 281, 284 n.2, 71 P.3d 224, 225 (2003), aff'd sub nom. State v. Roggenkamp, 153 Wn. 2d 614, 106 P.3d 196 (2005).

The State's alternative argument that the instructional issue does not meet RAP 2.5(a)(3) criteria is somewhat unclear. On the one hand, it argues the *lack* of a definitional instruction is not an error of constitutional magnitude that can be raised for the first time on appeal, and suggests this principle applies to counsel's lack of objection to the instruction defining robbery. BOR at 18-19 (citing State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011)). But then the State acknowledges there is no instruction informing the jury as to what constitutes first degree robbery and therefore Richardson's "argument that the jury was not advised as to what constituted the crime of first-degree robbery is well-taken." BOR at 20. The State correctly describes the instructional error here as one that relieved the prosecution of its burden to prove an element of the crime. BOR at 21. The State addresses the merits of the argument and suggests the appropriate remedy is to reverse the conspiracy to commit first degree robbery conviction and enter a conviction for conspiracy to commit second degree robbery. BOR at 21-22.

Richardson hesitates to dive too far down the RAP 2.5(a)(3) rabbit hole given that the State ultimately concedes an instructional error here of constitutional magnitude and proposes a remedy for it. Richardson's opening brief addresses why this is a manifest error involving a constitutional right. In an abundance of caution, further argument will be provided here.

Instructional errors that can be raised for the first time on appeal under RAP 2.5(a)(3) are not limited to errors in the to-convict instruction. They include errors in definitional instructions that lower the State's burden of proof. See State v. Hayward, 152 Wn. App. 632, 643 n.4, 217 P.3d 354 (2009) (jury instruction defining recklessness relieved the State of its burden to prove the recklessness element and therefore the error was of a constitutional magnitude and ripe for appeal); Goble, 131 Wn. App. at 202-03 (erroneous instruction defining "knowledge" could be raised as issue for first time on appeal, as it "relieved the State of its burden of proving the knowledge element by allowing the jury to assume that an essential element need not be proven"); State v. Moran, 119 Wn. App. 197, 211, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004) (claimed erroneous accomplice liability instruction that relieved the State of its burden to prove an essential element of the charged crime could be raised for first time on appeal).

"Where an instructional error may be construed as relieving the State of the burden of proving an element of its case, the error is manifest and of constitutional magnitude and may therefore be raised for the first time on appeal." State v. Stovall, 115 Wn. App. 650, 656 n.7, 63 P.3d 192 (2003) (addressing erroneous accomplice liability instruction).

The rule applies to the error here. This is not a simple absence of definition case. There was a definition, but it was the wrong one. The jury was in effect instructed on the definition of second degree robbery when the to-convict instruction for conspiracy to commit first degree robbery required instruction on the definition of first degree robbery. CP 260. The definitional instruction that was given affirmatively misled the jury into believing it could convict Richardson of conspiracy to commit first degree robbery based merely on the State's proof that Richardson conspired to commit second degree robbery. An element of the State's case was that "the Defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of First Degree Robbery." CP 262. The instruction defining the conduct at issue in terms of second degree robbery impermissibly lowered the State's burden of proof on this element of the State's case. CP 260.

The error here is of constitutional magnitude because instruction that relieves the State of its burden of proof is an error of constitutional

magnitude. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011), abrogated on other grounds by State v. Johnson, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). The error is also manifest because it is obvious and has the practical and identifiable consequence of relieving the State of its burden of proof. State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014); State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015). The error can be raised for the first time on appeal under RAP 2.5(a)(3).

b. The remedy is reversal of the conviction and remand for a new trial on the charge of conspiracy to commit first degree robbery.

The State maintains the remedy for the instructional error is remand for entry of a conviction on conspiracy to commit second degree robbery because the jury was in effect instructed on and found the elements of that crime. BOR at 22. This is not the proper remedy.

Under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, "the jury trial right requires that a sentence be authorized by the jury's verdict." State v. Morales, 196 Wn. App. 106, 113, 383 P.3d 539 (2016) (quoting State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010)), review denied, 187 Wn.2d 1015, 388 P.3d 483 (2017). Here, the jury's verdict form states "We, the jury, find the defendant, Richard John Richardson, guilty of the crime of Conspiracy to Commit First Degree

Robbery as charged in count II." CP 277. On remand, the court would be without authority to enter a sentence for conspiracy to commit second degree robbery because the jury did not return a verdict on that offense. For this reason alone, the State's proposed remedy is unsound.

Further, "[w]here a constitutional error occurs, reversal is ordinarily the proper remedy unless the State can prove the error was harmless beyond a reasonable doubt." State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014). Here, the State concedes the instructional error is not harmless beyond a reasonable doubt. BOR at 22. The remedy for instructional error that relieves the State of its burden of proof is reversal of the conviction and remand for a new trial based on correct instructions. W.R., Jr., 181 Wn.2d at 770; State v. Brown, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). This has long been the law. E.g., State v. Emmanuel, 42 Wn.2d 799, 821-22, 259 P.2d 845 (1953).

When there is insufficient evidence to convict the defendant of a crime, and the jury was explicitly instructed on a lesser included offense and necessarily found the elements of the lesser included offense, the reviewing court may remand for entry of a conviction on the lesser offense. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 293-95, 274 P.3d 366 (2012). The State relies on Heidari for the remedy in Richardson's case, but this reliance is misplaced. BOR at 22.

Cases permitting imposition of conviction for a lesser-included offense or addressing the propriety of that remedy involve reversal of the greater conviction due to insufficient evidence as the predicate for the analysis. See, e.g., Heidari, 174 Wn.2d at 291 (addressing the propriety of remedy in case where there was insufficient evidence); State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980) (same); State v. Williams, 199 Wn. App. 99, 111, 398 P.3d 1150 (2017) (same); State v. Hummel, 196 Wn. App. 329, 358-59, 383 P.3d 592 (2016) (same); State v. Johnson, 185 Wn. App. 655, 669-70, 342 P.3d 338 (2015), review denied, 184 Wn.2d 1012, 360 P.3d 817 (2015) (same); State v. Scherz, 107 Wn. App. 427, 436-37, 27 P.3d 252 (2001) (where evidence insufficient to convict on greater offense, remanding for entry of conviction on lesser offense); State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009, 208 P.3d 1125 (2009) ("when an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proved at trial").

The error driving the remedy in that scenario is insufficient evidence to support the greater conviction, not instructional error. The distinction is significant because when a conviction is unsupported by sufficient evidence, the prohibition against double jeopardy prevents the

State from retrying the defendant. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Permitting imposition of conviction for a lesser-included offense in this context ameliorates the harshness of this result. See State v. Gilbert, 68 Wn. App. 379, 384, 842 P.2d 1029 (1993) ("If we simply reverse Gilbert's conviction, and if the prosecutor thereafter charged Gilbert with residential burglary, he would have a meritorious claim of double jeopardy for being tried a second time on the same facts"), abrogated on other grounds by In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012). The State is still able to secure a conviction instead of no conviction whatsoever. The remedy in this scenario is essentially a policy decision. The appellate courts cut the State a break because otherwise the State would be left with nothing and the defendant would escape punishment altogether.

Such considerations are absent for instructional errors. Reversing the conviction and remanding for a new trial on the affected count gives the State a second bite of the apple. The remedy of remand for entry of a conviction on a lesser offense is and should be limited to situations where the error is insufficient evidence. For instructional errors, the remedy is and always has been reversal and remand for a new trial.

Consider also that the State's proposed remedy would open the veritable can of worms. Every time an instructional error requiring reversal of the conviction occurs, the reviewing court would be tasked with scrutinizing whether the instructions that were given could be interpreted to mean the jury necessarily found all the elements of a lesser offense even where the jury was not explicitly instructed on a lesser offense as an option to convict. Such an unwieldy approach subject to uncertain outcomes has little to recommend itself as a matter of policy.

Even if a Heidari-type analysis is applicable here, the State's remedy argument still fails. According to the Supreme Court, "remand for simple resentencing on a 'lesser included offense' . . . is only permissible when the jury has been explicitly instructed thereon." Green, 94 Wn.2d at 234. "*Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense.*" Heidari, 174 Wn.2d at 293 (quoting Green, 94 Wn.2d at 234).

In Richardson's case, the jury was not *explicitly* instructed on conspiracy to commit second degree robbery as a lesser offense of conspiracy to commit first degree robbery. No instruction identified conspiracy to commit second degree robbery as a lesser included or inferior degree offense. The jury did not receive a separate instruction

setting forth the elements of the lesser offense and did not otherwise receive the customary instructions when such offense is presented. WPIC 4.11 (noting "there must be a separate elements instruction setting out what must be proved to convict a defendant of the lesser included crime or lesser degree"); WPIC 155.00 (concluding instruction). When "jurors are not asked to decide the defendant's guilt or innocence on a lesser included offense, the defendant is denied the opportunity of defending against such a charge and might forgo strategies, arguments, and the presentation of evidence relative to that charge." Heidari, 174 Wn.2d at 294. The same concerns present themselves here because neither the State nor defense counsel noticed the instructional error below and therefore tried the case as if only conspiracy to commit first degree robbery was at issue. Reversal of the conviction and remand for a new trial is the appropriate remedy here.

B. CONCLUSION

For the reasons stated above and in the opening brief, Richardson requests (1) the convictions be reversed; (2) the case be remanded for resentencing based on a lower offender score; (3), the challenged LFOs be vacated; and (4) the interest notation in the judgment and sentence be corrected.

DATED this 24th day of July 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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