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Court of Appeals
Division III
State of Washington
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No. 36275-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

TARESSA MAE MARCHAND,

Appellant.

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

The Honorable Christopher Culp

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Taressa M. Marchand accepts this opportunity to reply to the State's brief. Ms. Marchand requests that the Court refer to her opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. Whether the evidence to convict Ms. Marchand of first degree criminal trespass was insufficient where the law of the case doctrine applies, requiring the State prove unnecessary and added elements.

This argument pertains to Issue 1 raised in Ms. Marchand's opening brief. Ms. Marchand argues the trial court erred by finding her guilty of first degree criminal trespass where the jury instructions required the jury to find she unlawfully entered or remained in a building, to wit: fenced area. (CP 381; RP 445-446).

The State argues that because Ms. Marchand entered Mr. Ames' home and outbuildings, which were located inside his fenced property, the conviction must stand. (State's Response pgs. 6, 8-13). The State argues:

Clearly, Ms. Marchand knowingly entered and remained unlawfully in Mr. Ames' home and outbuildings, all of which were located in his fenced off property. Therefore, any rational person could have found the essential elements of Criminal Trespass in the First Degree beyond a reasonable doubt.

(State's Response pg. 6). However, Ms. Marchand was separately found guilty of three other counts of first degree criminal trespass—all of which cover the buildings the State refers to. (CP 391, 399, 403, 417-418). Ms. Marchand was found guilty of entering Mr. Ames' main residence, his single story outbuilding, and a double story outbuilding. (CP 391, 399, 403, 417-418). The State cannot now claim that Ms. Marchand's conviction under Count 1 for first degree criminal trespass must stand because she presumably

entered the buildings inside Mr. Ames' fenced property. The State has already secured its convictions for criminal trespass of those buildings and the State's proposed legal solution would subject Ms. Marchand to certain double jeopardy. *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013) (double jeopardy encompasses being twice convicted for the same crime).

Moreover, the State's arguments ignore the "law of the case" doctrine. As recognized by *State v. Johnson*, the State must always prove unnecessary elements erroneously and superfluously added into to-convict instructions. *State v. Johnson*, 188 Wn.2d 742, 760-761, 399 P.3d 507 (2017) (citations omitted). These unnecessary added elements may be challenged on appeal for sufficiency of the evidence. *Id.* (citation omitted). And here, the State added the unnecessary—and incorrect—element of a "fenced area surrounding Clint Ames property...." (CP 381). Not only does the law not recognize first degree criminal trespass as encompassing fenced property, the additional element had to be proven for the State to secure a conviction under the law of the case doctrine. *State v. Brown*, 50 Wn. App. 873, 878, 751 P.2d 331 (2012) (holding the legislature "clearly intended to exclude fenced areas from the definition of 'building' in the amended first degree criminal trespass statute"); RCW 9A.52.070 (first degree criminal trespass); *Johnson*, 188 Wn.2d at 760-761 (law of the case doctrine). The State's assertions are without merit.

The State further argues the to-convict jury instruction error was harmless. (State's Brief pgs. 11-13). However, Ms. Marchand raised the issue of whether there was sufficient evidence to convict, and did not raise the issue of whether the instructional errors warranted reversal for a new trial. (Appellant's Opening Brief pgs. 5-10). This is

the Appellant's right to appeal and the State cannot dictate what issues the Appellant raises in its opening brief. Harmless error does not apply. *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

C. CONCLUSION

Based upon the arguments set forth above and those set forth in Ms. Marchand's opening brief, her conviction for first degree criminal trespass in Count 1 should be reversed.

Respectfully submitted this 24th day of June, 2019.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36275-2-III
vs.)
TARESSA MAE MARCHAND) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 24, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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Having obtained prior permission, I also served a copy on the Okanogan County Prosecutor's Office at dstevens@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 24th day of June, 2019.

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