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Court of Appeals
Division III
State of Washington
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36387-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

ELI GALLEGOS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

- 1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Gallegos to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.**

Mr. Gallegos denied knowingly possessing the methamphetamine contained in a jacket he acquired from a neighbor. RP 105-09. But the court did not require the State to prove knowledge and instead shifted the burden of proof to Mr. Gallegos to prove he unwittingly possessed the methamphetamine. CP 25-27, 32; RP 118, 122. The jury convicted Mr. Gallegos because he was unable to prove his lack of knowledge by a preponderance of the evidence. CP 34.

As Mr. Gallegos argued in his opening and supplemental briefs, the presumption of innocence and due process of law require the State, not the defendant, to prove the defendant knowingly possessed a controlled substance. Brief of Appellant at 9-14; Supplemental Brief of Appellant at 1-9. Therefore, the court erred in requiring the defense, not the state, to prove this element and in so instructing the jury. Alternatively, if the Court construes the possession statute to lack a mens rea requirement, it violates the Due Process Clause and is unconstitutional. *State v. A.M.*, 194 Wn.2d 33, 44-66, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring). For these reasons, this Court must either find the statute unconstitutional

and reverse and dismiss Mr. Gallegos's conviction or find the State bears the burden of proving knowledge, reverse Mr. Gallegos's conviction, and remand for a new trial.¹

- 2. The Court should accept the State's proper concession that the court erred in giving contradictory jury instructions on the knowledge element of trespass and should find the State failed to prove the erroneous instructions were harmless, requiring reversal.**

The trial court misinstructed the jury and relieved the State of its burden of proving the knowledge element of the criminal trespass charge when it told the jury Mr. Gallegos need not know his actions were unlawful. CP 29 (Instruction No. 11). Jury instructions that relieve the State of its burden to prove each element beyond a reasonable doubt violate due process. U.S. Const. amend. XIV; Const. art. I, § 3. Such instructions are constitutionally erroneous, and prejudice is presumed. *State v. Stein*, 144 Wn.2d 236, 241, 246, 27 P.3d 184 (2001); *State v. Goble*, 131 Wn. App. 194, 203, 126 P.3d 821 (2005).

The State concedes the confusing and contradictory instructions on knowledge were erroneous. Brief of Respondent at 5, 16. This Court should accept the State's proper concession that Instruction Nos. 10 and

¹ The Supreme Court just accepted review of a case presenting the same issues. *State v. Blake*, Case No. 96873-0 (petition for review granted on January 30, 2020); https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf. Oral argument is not yet set.

11 contradicted each other and constitute instructional error. CP 28-29. See Brief of Appellant at 17-20. However, the State argues this constitutional error is harmless because the evidence of knowledge was uncontroverted. Brief of Respondent at 16-18. The State is wrong.

The State argues the instructional error is harmless because it presented evidence that Mr. Gallegos did not have permission to be on the Sauer property and two people told Mr. Gallegos he did not have permission to be on the property. Brief of Respondent at 16-17. But Mr. Gallegos is not challenging the sufficiency of the evidence; he is challenging the instructional error. Even where the State presents sufficient evidence, a reviewing court must reverse if the State cannot prove the verdict would have been the same without the instructional error. *State v. Walden*, 131 Wn.2d 469, 478-79, 932 P.2d 1237 (1997) (where erroneous instruction may have affected verdict, error is not harmless and requires reversal of conviction and remand for new trial).

Moreover, the State fails to mention the significant time lapse in the majority of the evidence to which it cites in support of proof of Mr. Gallegos's knowledge. Brief of Respondent at 16-17. Specifically, Ms. Sauer told Mr. Gallegos he could not return to the property *three years before* the incident. RP 73. And Sergeant Brown told Mr. Gallegos he could not return to the property *over a year before* the incident. RP 74-76.

Neither Ms. Sauer nor Sergeant Brown told Mr. Gallegos the duration for which he was prohibited from returning to the Sauer property. RP 73-77. And Sergeant Brown gave Mr. Gallegos no written documents explaining the trespass notice parameters or duration. RP 76-77. Finally, Mr. Gallegos testified he did not know he was not permitted to be on the Sauer property on the day in question. RP 105, 107.

The issue is not whether, at the time Sergeant Brown gave Mr. Gallegos a trespass warning *over a year earlier*, he understood that he could not return to the Sauer residence. RP 74-76. Nor is the issue whether, at the time Ms. Sauer told Mr. Gallegos he could not return *three years earlier*, he understood he could not go to the Sauer residence. RP 73. The issue is whether, on the date he allegedly trespassed, Mr. Gallegos understood he lacked permission to be on the Sauer property. Here, the evidence was contradictory, and it was a contested issue at trial.

The confusing and contradictory jury instructions relieved the State of its burden to prove knowledge of the unlawfulness, which is an essential element of trespass. RCW 9A.52.080(1). “If the jury instructions read as a whole are [] ambiguous, the reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation.” *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), *aff’d sub nom. State v. Studd*, 137 Wn.2d 533, 973

P.2d 1049 (1999) (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)). The Court must presume this constitutional error was prejudicial in Mr. Gallegos’s case and reverse unless the State proves the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Here, the knowledge element was not supported by “uncontroverted evidence.” *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004) (recognizing jury instruction misstating essential element is harmless where evidence of element is uncontroverted). The jury instructions, read as a whole, neither reflect a correct statement of the law nor “make the relevant legal standard manifestly apparent to the average juror.” *Walden*, 131 Wn.2d at 473. This Court should reverse the trespass conviction and remand for a new trial.

3. This Court should accept the State’s proper concession and strike the imposition of discretionary and prohibited legal financial obligations from the judgment and sentence.

The State concedes the court erred in imposing discretionary LFOs and agrees the case must be remanded for correction of the judgment and sentence.² Brief of Respondent at 5. Therefore, as Mr. Gallegos argued in

² The State does not explicitly address Mr. Gallegos’s argument that the court erred in conducting an inadequate indigency inquiry and in finding him not indigent, nor does it address the issue of prohibited interest. Brief of Appellant at 22-32. Instead, the

his opening brief, this Court should remand the matter for the trial court to strike the \$2,000 VUCSA fine and the interest on nonrestitution LFOs.

Brief of Appellant at 22-32.

At sentencing, after conducting an inadequate indigency inquiry, the court imposed a discretionary \$2,000 VUCSA fine pursuant to RCW 69.50.430. CP 38. The court also imposed interest on all legal financial obligations (LFOs), none of which included restitution. CP 38. However, the record demonstrates Mr. Gallegos was and remains indigent, as social security disability is his only source of income. CP 54; RP 145-46. In addition, RCW 10.82.090(1) prohibits interest on nonrestitution LFOs. Therefore, *State v. Ramirez* requires that these costs be stricken from his judgment and sentence. 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018).

In addition, the record before the court demonstrated Mr. Gallegos's sole source of income is social security disability. CP 54; RP 145-46. Funds from social security income may not be used to satisfy even mandatory fees, including the victim assessment fee. 42 U.S.C. § 407(a); *State v. Catling*, 2 Wn. App. 2d 819, 826, 413 P.3d 27 (2018), *aff'd in relevant part*, 193 Wn.2d 252, 438 P.3d 1174 (2019); *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016).

State simply states, "The State concedes it was error to impose all but the mandatory legal financial obligations. This matter should be remanded for correction." Brief of Respondent at 5.

Therefore, the trial court must denote on the judgment and sentence that no funds may be collected from Mr. Gallegos's social security disability. Brief of Appellant at 32-33.

The State failed to respond to Mr. Gallegos's argument that such a denotation is required on the judgment and sentence. Brief of Appellant at 32-33. This Court should construe the State's failure to address the argument as a concession. *In re Detention of Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) ("By its failure to address E.A.J.'s contention . . . the State apparently concedes the issue."). This Court should order the trial court to denote on the judgment and sentence that no costs may be collected from funds protected by the antiattachment clause.

B. CONCLUSION

Mr. Gallegos's conviction for possession of a controlled substance should be reversed because requiring Mr. Gallegos to prove unwitting possession unconstitutionally shifted the burden of proof and violated the presumption of innocence and due process of law.

In addition, the State concedes the court erred in instructing the jury that Mr. Gallegos need not know his entry or remaining was unlawful, contradicting an essential element of trespass. This error relieved the State

from its burden of proving the essential element of knowledge beyond a reasonable doubt. Because knowledge was a contested element and the State has failed to prove the constitutional error harmless, this Court should reverse the trespass conviction and remand for a new trial.

Finally, the Court should accept the State's proper concession that discretionary LFOs must be removed and should strike the VUCSA fine, strike the imposition of interest on nonrestitution LFOs, and order the judgment and sentence to denote no LFOs may be paid from fund protected by the antiattachment clause.

DATED this 5th day of February, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

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

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| STATE OF WASHINGTON, |) | |
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| RESPONDENT, |) | |
| |) | |
| v. |) | NO. 36387-2-III |
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| ELI GALLEGOS, |) | |
| |) | |
| APPELLANT. |) | |

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