

FILED
Court of Appeals
Division III
State of Washington
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NO. 37090-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

IBRAHIM HASSAN,

Appellant.

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

REPLY

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A. ARGUMENT

Due process required the State to prove beyond a reasonable doubt that Ibrahim Hassan knew it would be unlawful for him to enter or remain in Sayeda Hammed's apartment. The trial court's Instruction No. 16, however, told the jury it did not need to find Mr. Hassan knew he acted unlawfully. Because of this contradiction, it is impossible to know whether the jury found that Mr. Hassan knew he was not allowed in the apartment, as necessary to convict him of first-degree trespassing, or whether the erroneous instruction led it to believe no such knowledge was necessary.

- 1. The trial court's incorrect, confusing knowledge instruction relieved the State of its burden to prove all essential elements of first-degree criminal trespass beyond a reasonable doubt.**

The to-convict instruction on first-degree trespass correctly informed the jury that it must find Mr. Hassan knew entering or remaining in Ms. Hammed's apartment "was unlawful." CP 48; RP 358; RCW 9.52.070(1). The very next instruction, however, stated it was "not necessary" that Mr. Hassan knew any "fact, circumstance, or result" at issue

was “defined by law as being unlawful.” CP 49; RP 359. This conflict could have led the jury to believe it did not need to find that Mr. Hassan knew the entry or remaining was unlawful, relieving the State of its burden to prove every element of the offense. *State v. Goble*, 131 Wn. App. 194, 203–04, 126 P.3d 821 (2005). A panel of this Court recently found reversible error in nearly identical circumstances. *State v. Gallegos*, No. 36387-2-III, 2020 WL 3430075, at *7 (Wash. App. June 23, 2020) (unpub.); *see* GR 14.1(a).

a. Instruction No. 16 led the jury to believe it could find Mr. Hassan guilty of first-degree trespass without proof that he knew entering or remaining in the apartment was unlawful.

Contrary to the State’s repeated characterization, Mr. Hassan does not argue that the instruction “shift[ed] the burden of proof.” Br. of Resp. at 1, 5–6, 10. Mr. Hassan argues that the instruction *eliminated* the burden of proof, leading the jury to believe it did not need to find he knew his entry or remaining was unlawful. Br. of App. at 2, 8–9.

The State contends that Instruction No. 16 did not give rise to a “manifest error affecting a constitutional right” that

may be raised for the first time on appeal. Br. of Resp. at 4–6 (quoting RAP 2.5(a)(3)). The State is wrong, because an instruction that relieves the State of proving an essential element of the offense is just such an error. *State v. Stein*, 144 Wn.2d 236, 240–41, 27 P.3d 184 (2001); *Goble*, 131 Wn. App. at 202–03; *Gallegos*, 2020 WL 3430075, at *6. As RAP 2.5(a)(3) requires, Mr. Hassan “identif[ied] the constitutional error”—an instruction that relieved the State of its burden—as well as its “practical and identifiable consequences”—the jury may have convicted Mr. Hassan without finding one of the essential elements. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); see Br. of App. at 8–9, 12–13.

The State also confusingly suggests that the standard of review on this issue is both de novo and substantial evidence. Br. of Resp. at 6 (citing *State v. Soper*, 135 Wn. App. 89, 101, 143 P.3d 335 (2006)). In fact, whether the instructions as a whole accurately convey all essential elements of the offense is reviewed de novo. *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013) (citing *Gregoire v.*

City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924

(2010)). Whether the erroneous knowledge instruction was “supported by the evidence” or allowed Mr. Hassan to “argue his theory of the case” does not bear on this purely legal issue. Br. of Resp. at 9.

Read in context with the other instructions, the State contends, Instruction No. 16 merely told the jury that it did not need to find Mr. Hassan was “aware of any law defining his entry” into Ms. Hammed’s apartment “as a crime.” Br. of Resp. 8. The State misstates the knowledge instruction. The bracketed language from WPIC 10.02 included in the instruction says that an accused need not know a particular fact “is defined by law as being unlawful,” not that the accused need not know of a specific law with that effect. CP 49; RP 359. Instead, “defined by law as being unlawful” is just a longer way of saying “unlawful,” as by definition a fact or circumstance is “unlawful” only if a law declares it to be. *See Unlawful*, Black’s Law Dictionary (11th ed. 2019) (“Not authorized by law; illegal . . .”).

As to first-degree trespass, entering or remaining in a place is defined as “unlawful” if the accused was not “licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(2); CP 43; RP 358. Accordingly, if Mr. Hassan knew he was not “licensed, invited, or otherwise privileged” to be in Ms. Hammed’s apartment, then he knew his entry or remaining there was “defined by law as being unlawful.” *Id.*; CP 49; RP 359. The knowledge instruction told the jury to the contrary that it did not need to find Mr. Hassan had this knowledge, relieving the State of its burden to prove this element of first-degree trespass. CP 49; 359.

The State also argues the bracketed language from WPIC 10.02 was appropriate because Mr. Hassan argued no court order barred him from the apartment. Br. of Resp. at 9. This does not follow. If there was a risk the jury would think the lack of a court order meant Mr. Hassan did not trespass, the instruction that his entry or remaining was unlawful absent a license, invitation, or privilege avoided that risk. CP 43; RP 358. The only effect of the bracketed language was to

mislead the jury that it did not need to find Mr. Hassan knew his entry or remaining was unlawful. CP 49; RP 359.

Finally, the State attempts to distinguish *Goble*, but the distinction it tries to draw makes no difference. Br. of Resp. at 9. In *Goble*, the knowledge instruction misled the jury to believe it could convict the defendant of third-degree assault without finding he knew the victim was a police officer as long as the assault was intentional. 131 Wn. App. at 200, 203–04. Here, the instruction misled the jury that it could convict Mr. Hassan of first-degree trespass without finding he knew his entry or remaining was unlawful. CP 48–49; RP 358–59. In both, the instruction relieved the State of its burden to prove the required knowledge, depriving Mr. Hassan of due process. *Goble*, 131 Wn. App. at 203–04; accord *Gallegos*, 2020 WL 3430075, at *7.

b. Because the jury heard conflicting evidence regarding Mr. Hassan’s knowledge, reversal is required.

The constitutionally deficient knowledge instruction requires reversal unless the State shows the error was

harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *Neder v. United States*, 527 U.S. 1, 4, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The State is unable to meet this burden where the jury heard “conflicting evidence” on the missing element. *Goble*, 131 Wn. App. at 203–04; *State v. Israel*, 113 Wn. App. 243, 277, 54 P.3d 1218 (2002); *see Neder*, 527 U.S. at 18 (“omitted element” harmless where “supported by uncontroverted evidence”). Even facing “reams” of “evidence of guilt, yet some evidence could still show a dispute of facts as to an element of the crime.” *Gallegos*, 2020 WL 3430075, at *7. That is so here, as Ms. Hammed, her daughter S.H., and Mr. Hassan differed sharply on whether he knew he did not have permission to be in the apartment. Br. of App. at 12–13.

The State argues that the evidence was “conflicting” only due to Mr. Hassan’s testimony, which the jury was free to disbelieve. Br. of Resp. at 10–11. This is false, as Ms. Hammed and S.H. testified that Mr. Hassan had been allowed to stay there at least twice, and Ms. Hammed knew

that Mr. Hassan had access to a spare key. RP 161, 219–20. But even if it were true, this is not a sufficiency challenge and the Court is not required to view the evidence favorably to the State. *See Israel*, 113 Wn. App. at 277 (instructional error prejudicial though sufficient evidence supported conviction); *Gallegos*, 2020 WL 3430075, at *8 (defendant’s “confusing and rambling” testimony sufficient “contravening evidence” even in the face of the State’s “compelling” evidence).

Because of the misleading knowledge instruction, it is impossible to know whether the jury resolved the conflict in the evidence and found Mr. Hassan knew he was not allowed in the apartment, or whether the jury did not believe it had to find such knowledge at all. The State has not eliminated the second possibility beyond a reasonable doubt, and reversal is required. *See Goble*, 131 Wn. App. at 203–04; *Israel*, 113 Wn. App. at 277; *Gallegos*, 2020 WL 3430075, at *7–8.

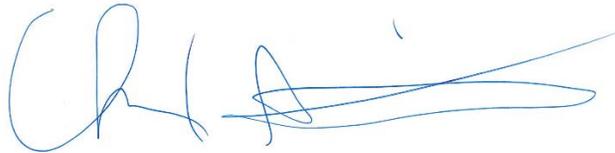
2. The trial court erred in imposing a discretionary legal financial obligation despite finding Mr. Hassan indigent.

This Court should accept the State's concession that the trial court erred in imposing community custody supervision fees. Br. of Resp. at 11. Should this Court conclude that Instruction No. 16 was not prejudicially misleading, this court should remand with instructions to strike this requirement from the judgment and sentence. Remand is the clear remedy for the trial court's error—there is no reason to direct the State to wait until the mandate issues and file a motion, as the State suggests. *State v. Dillon*, 12 Wn. App. 2d 133, 152–53, 456 P.3d 1199 (2020); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 & n.3, 429 P.3d 1116 (2018); Br. of Resp. at 11–12.

B. CONCLUSION

This Court should reverse Mr. Hassan's conviction of first-degree trespass. Alternatively, this Court should remand with instructions that the trial court strike the requirement to pay community custody supervision fees.

DATED this 25th day of June, 2020.



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 37090-9-III
)	
IBRAHIM HASSAN,)	
)	
APPELLANT.)	

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