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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

BRIEF OF APPELLANT

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A. INTRODUCTION

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 instructions to the jury included this essential element of first-degree criminal trespass. The very next instruction, however, told the jury that it need not find Mr. Hassan knew his conduct was unlawful. This contradiction could have led the jury to believe it could convict Mr. Hassan of trespass without finding an essential element of the offense, relieving the State of its burden of proof.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in providing the jury Instruction No. 16, relieving the State of its burden to prove an essential element beyond a reasonable doubt.

2. The trial court erred in imposing community custody supervision fees despite finding Mr. Hassan indigent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the to-convict instruction correctly recites the elements of the offense but another instruction incorrectly defines one of those elements, the resulting confusion may effectively relieve the State of its burden of proof. Here, the trial court erroneously instructed the jury that it could find Mr. Hassan met the knowledge element of first-degree trespass without finding he knew his conduct was unlawful. Did this confusing misstatement of the law relieve the State of its burden to prove an essential element of first-degree trespass?

2. Washington courts may not impose discretionary legal financial obligations on indigent defendants. The trial court here found Mr. Hassan indigent. Did the court err in imposing community custody supervision fees despite this finding?

D. STATEMENT OF THE CASE

Ibrahim Hassan encountered Terrell Simmons at a grocery store, and a heated exchange ensued. RP 225, 248.

Soon afterward, Mr. Hassan and Mr. Simmons confronted each other near an apartment where Mr. Hassan's wife, Sayeda Hammed, and daughter, S.H., reside. RP 212–13, 229–30, 253–55. A police officer responding to the incident later found a knife blade without a handle on the sidewalk near groceries Mr. Simmons had purchased. RP 270. The State's theory was that Mr. Hassan ran into the apartment after encountering Mr. Simmons, took one of Ms. Hammed's kitchen knives, and attacked Mr. Simmons with it, at which time the blade broke off. RP 145–46, 371, 373–74.[1] The State charged Mr. Hassan with second-degree assault with a deadly weapon allegation. CP 29.

The State also charged Mr. Hassan with residential burglary with a domestic violence allegation based on his entry into Ms. Hammed's apartment. CP 28. Ms. Hammed testified that she and Mr. Hassan are separated. RP 158–59. Both Ms. Hammed and S.H. testified that Mr. Hassan is not

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[1] Both Ms. Hammed and S.H. testified that they were aware of no knives missing from the apartment. RP 163, 215–16.

permitted in the apartment except for pre-arranged visits with S.H. and the couple's other daughter. RP 161, 213. But Ms. Hammed allowed Mr. Hassan to stay in the apartment overnight on two occasions, once as long as two weeks. RP 161, 164, 219–20. And Ms. Hammed continued to keep a spare key hidden in a grill outside the apartment despite knowing that Mr. Hassan knew where the key was. 161, 309–10. Mr. Hassan testified that he regularly stays in the apartment when not in Seattle for work and that no one has ever told him he does not have permission to be there. RP 307–08, 323–24.

Mr. Hassan requested an instruction on first-degree criminal trespass as a lesser-included offense of residential burglary. CP 27; RP 91. The court provided the instruction, informing the jury that an essential element of the offense is that Mr. Hassan "knew that the entry or remaining was unlawful." CP 48; RP 358. The court also instructed the jury that, to find knowledge, "[i]t is not necessary" that Mr.

Hassan knew any fact in issue "is defined by law as being unlawful." CP 49; RP 359.

The jury acquitted Mr. Hassan of residential burglary, but found him guilty of the lesser-included offense of first-degree criminal trespass and found the domestic violence allegation true. CP 71, 73–74. The jury also convicted Mr. Hassan of second-degree assault and found the deadly weapon allegation true. CP 75–76.

At sentencing, the trial court found Mr. Hassan indigent for purposes of legal financial obligations. CP 80; 9/27/19 RP 21. On the record, the court imposed only mandatory costs. 9/27/19 RP 24–25. Nonetheless, the court ordered Mr. Hassan to pay supervision fees as a condition of community custody. CP 82.

E. ARGUMENT

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.

To satisfy due process, jury instructions must convey the law accurately when "read as a whole." *State v. O'Hara*,

167 Wn.2d 91, 105, 217 P.3d 756 (2009); *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). An erroneous instruction that relieves the State of its burden of proving an essential element beyond a reasonable doubt deprives the accused of due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); *State v. Smith*, 174 Wn. App. 359, 365, 298 P.3d 785 (2013). Because such an instruction is a manifest error affecting a constitutional right, it may be raised for the first time on appeal. *Stein*, 144 Wn.2d at 240–41; *Smith*, 174 Wn. App. at 365; RAP 2.5(a)(3).

Review of instructional error is de novo, "in the context of the instructions as a whole." *Smith*, 174 Wn. App. at 366 (citing *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010)). Instructional error requires reversal where it is not harmless. *State v. Hayward*, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (citing *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)). An instruction that relieves the State of its burden of proof "is presumed to be

prejudicial." *Id.* (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). In such a case, "the State bears the burden of proving that the error was harmless" beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425.

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.

Contradictory jury instructions, one correct and one incorrect, may "confuse[]" the jury into applying "an incorrect standard." *Kyllo*, 166 Wn.2d at 864–65. Reviewing courts presume the jury read the instructions "as a whole" with the idea that "each instruction has meaning." *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997) (citing *State v. Alford*, 25 Wn. App. 661, 670, 611 P.2d 1268 (1980)), *aff'd sub nom. State v. Studd*, 127 Wn.2d 533, 973 1049 (1999)); *see Stein*, 144 Wn.2d at 247 ("We presume that juries follow all instructions given."). "[T]he reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation" of the contrary instructions.

McLoyd, Wn. App. at 71 (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

Even where the to-convict instruction properly recites the essential elements, an instruction that incorrectly defines an element may effectively relieve the State of its burden of proof. *See State v. Goble*, 131 Wn. App. 194, 203–04, 126 P.3d 821 (2005). In *Goble*, the trial court's to-convict instruction on third-degree assault required the State to prove the defendant knew the victim was a police officer. *Id.* at 200. The court further instructed that knowledge "also is established if a person acts intentionally." *Id.* at 202 (quoting 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 [hereinafter WPIC 10.02]). When read alongside the to-convict instruction, this Court found the knowledge instruction "confusing" in that it permitted the jury to presume knowledge that the victim was a police officer if it found intent to assault, relieving the State of its burden of proof. *Id.* at 203–04.

The trial court's knowledge instruction here was also incorrect and confusing, relieving the State of its burden. The

to-convict instruction correctly recited the essential elements of first-degree trespass, including that Mr. Hassan "knew that the entry or remaining was unlawful." CP 48; RP 358; *see* RCW 9.52.070(1). The next instruction, however, stated that "[i]t is not necessary" that Mr. Hassan knew any "fact, circumstance, or result" at issue "is defined by law as being unlawful." CP 49; RP 359. In other words, the court instructed the jury it must find Mr. Hassan knew that entering or remaining in the apartment was unlawful, and immediately announced to the contrary that the jury need not find Mr. Hassan knew his entry or remaining was unlawful. The jury could have concluded that proof of Mr. Hassan's knowledge was not necessary, relieving the State of its burden to prove that element beyond a reasonable doubt.

It is no help to the State that the instruction was based on the model instruction defining knowledge. The passage that knowledge of unlawfulness is not required is in brackets in the model, with a note that it be used "as applicable." WPIC 10.02 (note on use). The passage is likely "applicable"

in the majority of cases, as it states the black-letter principle that "ignorance of the law is no excuse." WPIC 10.02 (cmt.) (citing, *e.g.*, *State v. Spence*, 81 Wn.2d 788, 792, 506 P.2d 293 (1973)). But that principle has no application to first-degree trespass, which, unlike most crimes, requires that the defendant knew that their conduct was unlawful. RCW 9A.52.070(1); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.16 (4th ed. 2016) [hereinafter WPIC 60.16].

In any event, pattern instructions are merely persuasive authority—"they are not the law." *Smith*, 174 Wn. App. at 366; *accord Hayward*, 152 Wn. App. at 645. Where a WPIC contradicts an "applicable statute, the jury instruction must follow the statutory language." *Hayward*, 152 Wn. App. at 646. Here, WPIC 10.02's optional provision that a defendant need not know his conduct was unlawful contradicts RCW 9A.52.070, which makes knowledge of the unlawful nature of the entry or remaining an element of the offense. Including the bracketed language in the instruction was error.

Though Mr. Hassan's trial counsel proposed the to-convict instruction for first-degree trespass, that instruction accurately recited the elements of the offense. CP 27; RP 91; *see* WPIC 60.16; RCW 9A.52.070(1). The error arose from the court's inclusion of WPIC 10.02's optional bracketed language. Accordingly, Mr. Hassan is not raising an error in an instruction he proposed himself. *See State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999).

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

An instruction that relieves the State of its burden of proving an essential element requires reversal unless "that element is supported by uncontroverted evidence." *Hayward*, 152 Wn. App. at 646–47 (quoting *Thomas*, 150 Wn.2d at 845). Where uncontroverted testimony before the jury "is insufficient to support a finding" on that element, on the other hand, the State cannot show that the error is harmless. *Id.* at 648. Where the jury heard "conflicting evidence" on the element in question, a reviewing court will not "weigh the

evidence on appeal." *State v. Israel*, 113 Wn. App. 243, 277, 54 P.3d 1218 (2002); *see also Goble*, 131 Wn. App. at 203–04 (error was prejudicial "given the conflicting evidence").

The evidence that Mr. Hassan knew he did not have permission to enter or remain in the apartment was far from uncontroverted. Mr. Hassan stayed overnight with Ms. Hammed and their daughters on at least two recent occasions, including for over two weeks when Ms. Hammed was recovering from surgery. RP 161, 219–20. Mr. Hassan himself described the apartment as his "usual residence" where he lived when not working in Seattle. RP 307, 323–24. Though Ms. Hammed testified that she did not give Mr. Hassan permission to be in the apartment when he was not visiting their daughters, Mr. Hassan denied ever having been told he could not enter or remain there. RP 161, 213, 308. And because Ms. Hammed and Mr. Hassan agreed that he knew where to find a spare key, RP 161, 309–10, a jury could conclude that, had Ms. Hammed truly intended to exclude Mr.

Hassan, she would have withdrawn the key or moved it to a hiding place Mr. Hassan did not know about.

Given the "conflicting evidence," the State cannot show beyond a reasonable doubt that the jury, if properly instructed, would have found Mr. Hassan knew he did not have permission to enter or remain in the apartment. *See Israel*, 113 Wn. App. at 277; *Goble*, 131 Wn. App. at 203–04. The error is prejudicial and reversal is required.

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

Courts may not impose discretionary legal financial obligations on indigent defendants. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees as a condition of community custody are a discretionary legal financial obligation because they "are waivable by the trial court." *State v. Dillon*, --- Wn. App. 2d ---, 456 P.3d 1199, 1209 (Feb. 3, 2020); *accord State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Imposing supervision fees on an indigent defendant is an

error requiring remand. *State v. Branch*, No. 78379-3-I, 2020 WL 790830, at *5 (Wash. App. Feb. 18, 2020); *State v. Lilly*, No. 78709-8-I, 2019 WL 6134572, at *1 (Wash. App. Nov. 18, 2019).[2] Here, despite finding Mr. Hassan indigent, the trial court imposed supervision fees. CP 80, 82; 9/29/19 RP 21.

Even if the trial court did not act outside its sentencing authority, the court clearly indicated its intent to waive all discretionary legal financial obligations, such that imposing supervision fees was a clerical error. *See Dillon*, 456 P.3d at 1209. In *Dillon*, the trial court stated on the record that it would waive discretionary fees and order only the mandatory $500 victim penalty assessment and any restitution later found owing. *Id.* The court "did not mention supervision fees," but the requirement to pay them was "buried in a lengthy paragraph" in the form judgment and sentence. *Id.* This Court concluded that the supervision fees were "inadvertently imposed" and remanded for the trial court to

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[2] Unpublished opinions of the Court of Appeals issued after March 1, 2013 are citable for their persuasive value. GR 14.1(a).

strike them. *Id.*; *accord Lundstrom*, 6 Wn. App. 2d at 396 n.3; *State v. Wilson*, No. 78353-0-I, 2019 WL 6318160, at *5 (Wash. App. Nov. 25, 2019).[3]

Here, the trial court found Mr. Hassan "indigent for purposes of paying legal financial obligations" and imposed only "a $500 victim assessment and a $100 DNA collection fee for a total of $600." 9/27/19 RP 21, 24–25. The court also waived all costs claimed by the State in its cost bill. CP 88. These rulings clearly demonstrated the trial court's intent to waive all but mandatory legal financial obligations. Nonetheless, the form judgment and sentence included the obligation to "pay supervision fees" as a condition of community custody. CP 82. This Court should remand for the trial court to strike the supervision fees in line with its stated intent. *See Dillon*, 456 P.3d at 1209; *Lundstrom*, 6 Wn. App. 2d at 396 n.3.

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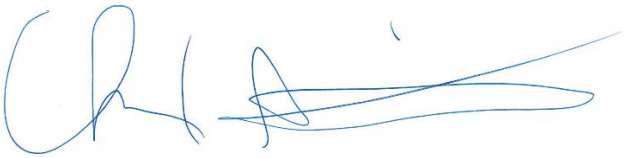
[3] *See supra* note 2.

F. CONCLUSION

This Court should reverse the trial court's first-degree trespass conviction and domestic violence finding and remand for a new trial. Independently, this Court should remand with instructions that the trial court strike the obligation to pay community custody supervision fees.

DATED this 25th day of March, 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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