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Court of Appeals
Division III
State of Washington
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No. 37090-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

IBRAHIM HASSAN,

Appellant

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

NO. 19-1-00308-03

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court's instruction on "knowledge," which included the sentence "it is not necessary that the person know that the fact, circumstance, or result is defined by the law as unlawful or is an element of a crime," was proper and that sentence did not shift the burden of proof.
- B. The defendant is correct that the boilerplate provision in the Judgment and Sentence that the defendant is required to pay supervision fees should be stricken.

II. STATEMENT OF FACTS

The defendant was charged with Assault in the Second Degree, with a Deadly Weapon allegation, and Residential Burglary. CP 28-29. The defendant requested a lesser included instruction of Criminal Trespass for the Residential Burglary charge. CP 26-27. The defendant was found guilty of Assault in the Second Degree, with a Deadly Weapon finding, and Criminal Trespass in the First Degree. CP 73, 75-76.

Comments on the defendant's statements regarding Assault charge:

The defendant is appealing only the Criminal Trespass conviction. However, the State would like comment about some statements in the defendant's brief about the Assault conviction.

“Ibrahim Hassan encountered Terrell Simmons at a grocery store, and a heated exchange ensued.” Br. of Appellant at 2. This makes the defendant and victim equally at fault for “encounter” and “exchange,” but the assault victim, Terrell Simmons, and his significant other, Laura Villapando-Lara, testified the defendant approached them at the grocery store, used abusive language, and said he wanted to fight Simmons. RP at 225, 247. Both told the defendant to leave them alone, tried to ignore him, but the defendant persisted both in the store and when they left. RP at 225-26, 263. Even the defendant’s friend, Hunway Deng, who accompanied the defendant to the grocery store, said the defendant in the store kept talking to a woman and would not move away from her. RP at 167, 169. Only the defendant claimed that Mr. Simmons used foul language to him in the grocery store. RP at 315.

“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.” Br. of Appellant at 3. This makes the “confrontation” seem mutual, but the defendant told Mr. Deng, “I want to kill this guy,” and grabbed a knife from his wife’s apartment. RP at 169. Another friend of the defendant, Simon Guich, who was at the defendant’s wife’s apartment, saw Mr. Simmons and Ms. Villapando-Lara walking on

the street and heard the defendant say, “I’m going to kill him,” before the defendant went back outside. RP at 199-200.

Mr. Simmons and Ms. Villapando-Lara were walking from the grocery store to their apartment when the defendant came at them with a knife. RP at 229-30. The defendant swung the knife at Mr. Simmons’s neck and leg. RP at 230, 232. When Ms. Villapano-Lara said, “Leave him alone,” the defendant swung the knife at her. RP at 254.

Evidence regarding Criminal Trespass or Residential Burglary:

The defendant testified that his usual residence was 425 S. Olympia, #G-106, Kennewick, WA, which was the address he was accused of burglarizing. CP 1; RP at 307. He testified that he had his own key to the apartment, and he was never notified that he was not allowed in the residence. RP at 308-09. He further claimed that he did not take anything from the apartment. RP at 321. Regarding the testimony from Mr. Deng that he grabbed a knife out of the apartment, the defendant stated he was not armed with a knife. RP at 318.

On the other hand, his wife testified that they have been separated for about five years, and that he does not have permission to go into her apartment if she is not there. RP at 159, 161. On March 4, 2019, she did not give the defendant permission to be in the apartment. RP at 162. She previously called the police for the defendant showing up at her door. RP

at 155. The defendant's daughter confirmed that he has permission to be in the apartment when her mother gives him permission and that he knows he is not allowed to come to the apartment without permission. RP at 213. The defendant was never on the lease and never received mail at the apartment. RP at 163, 333.

Concerning the knife, the defendant's wife testified that no knives were missing from the apartment. RP at 163. His daughter testified that she was not sure if the blade the police recovered was from the apartment. RP at 217.

The defendant did not object to the court's instructions, which included the court's instruction on "knowledge," instruction number 16. CP 49; RP at 296.

III. ARGUMENT

A. The defendant's argument regarding the "knowledge" instruction fails.

1. This court need not consider the argument because the defendant did not object to the "knowledge" instruction in the trial court.

Under RAP 2.5(a)(3), an "appellate court may refuse to review any claim of error which was not raised in the trial court," but there are exceptions to this general rule. One exception is that "a party may raise . . . manifest error affecting a constitutional right" for the first time on appellate review. *Id.* This exception recognizes that "constitutional errors

are treated specially because they often result in serious injustice to the accused.” *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014).

However, the exception is not intended as a method of securing a new trial whenever there is a constitutional issue that was not raised at trial. Rather, a defendant must make a showing that satisfies requirements under RAP 2.5(a)(3). For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred. *Id.* at 582–84.

Both the defendant and the State will make circular arguments. The defendant argues that the “knowledge” instruction is reviewable

because it shifts the burden of proof and is therefore a manifest error affecting a constitutional right. The State argues that the instruction is not reviewable because it is not a manifest error affecting a constitutional right. However, in addition to the argument below, note that there is not a plausible showing that any error caused practical and identifiable consequences in the trial.

2. If this court reviews the issue, the standard on review for instructional error is de novo and the instructions are reviewed as a whole.

In addition to holding that the adequacy of the jury instructions is reviewed de novo and evaluated as a whole, *State v. Soper*, 135 Wn. App. 89, 101, 143 P.3d 335 (2006) held that instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law.

3. There was no ambiguity in the “knowledge” instruction when taken in context with the “to-convict” instruction.

The defendant’s argument concerns the second sentence in Instruction 16, CP 49: “A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. *It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.*” (Emphasis added.) Specifically,

the defendant argues this sentence could lead the jury to think that the defendant's entry into his wife's apartment did not have to be unlawful. Br. of Appellant at 9.

The instructions as a whole are clear that the jury had to find the defendant knowingly entered or remained in a building, his estranged wife's apartment, and knew that his entry or remaining in that apartment was unlawful. The "to-convict" instruction for Criminal Trespass, Instruction No. 15, CP 48, makes this clear in stating the elements:

- 1) "That on or about March 4, 2019, the defendant knowingly entered or remained in a building;
- 2) That the defendant knew that the entry or remaining was unlawful; and
- 3) That this act occurred in the County of Benton, Washington."

Instruction No. 10, CP 43, states "unlawful entry" is when "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."

Putting Instructions 10 and 15 together, the jury was told they could convict the defendant if:

- 1) On or about March 4, 2019, he knowingly entered his estranged wife's apartment at 425 S. Olympia, G-106, Kennewick, WA.

2) He knew he was not licensed, invited, or privileged to enter that apartment.

3) This occurred in Benton County, Washington.

Adding the knowledge instruction to Instructions 10 and 15 would result in the following elements:

1) That on or about March 4, 2019, the defendant was aware of the fact that he entered his estranged wife's apartment at 425 S. Olympia, G-106, Kennewick, WA.

2) That he was aware of the fact that he was not licensed, invited or privileged to do so.

3) That this occurred in Benton County, Washington.

Adding the second sentence in the "knowledge" instruction would not be confusing:

1) That on or about March 4, 2019, the defendant was aware of the fact that he entered his estranged wife's apartment at 425 S. Olympia, G-106, Kennewick, WA.

2) That he was aware of the fact that he was not licensed, invited or privileged to do so, although he was not aware of any law defining his entry as a crime.

3) That this occurred in Benton County, Washington.

The defendant correctly states that the “ignorance of the law” provision of the knowledge instruction is optional. In this case, it was appropriate because the defendant pointed out in his testimony that there was no court order barring him from his wife’s apartment, and the defendant repeated in closing argument that there was no Restraining Order prohibiting him from the premises. RP at 308, 385.

The defendant’s citation to *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005) is not on point. In *Goble*, the problem was that the “knowledge” instruction included, “acting knowingly or with knowledge is also proven if the defendant acted intentionally.” *Goble* was charged with Third Degree Assault of a police officer. The court held that the instruction could have allowed the jury to conflate whether the elements of an intentional assault with knowledge that the victim was a police officer. *Id.* at 203.

The instructions allowed the defendant to argue his theory of the case, they were supported by the evidence, and properly informed the jury of the law. RP at 384-86. The instructions were appropriate and more than adequate.

- 4. The conflicting evidence about the defendant not having permission to enter his estranged wife’s residence was from the defendant and the jury did not believe him.**

This Court should not get to a harmless error analysis. The instructions did not shift the burden of proof and the defendant should have objected at trial if he thought there was some error. Even if the Court considers the merits of the argument, the instructions as a whole were proper, not misleading, and allowed the defendant to argue his theory of the case.

In any case, the defendant's argument that there was conflicting evidence is correct, but that evidence came from the defendant. The defendant stayed at the apartment for two weeks in August 2018 when his estranged wife had a surgery, seven months before the date of the crimes herein. RP at 161. The defendant refers to that as a "recent occasion" Br. of Appellant at 12. The defendant also refers to a second "recent occasion" when he stayed overnight at the apartment. That was in February 2019 and the evidence for this is from the defendant's daughter who responded:

Q: "And he was allowed to visit in February?"

A: I don't think he was, but he came and like knocked on our door, and that's when the snow had hit deep, and we had let him like come in." RP at 219.

Otherwise, both mother and daughter were steadfast that the defendant was not allowed to be in the apartment without permission. RP at 161, 213. He was never on the lease, never received mail there, and did

not have his own key. RP at 161, 333. It may have helped the defendant if he had admitted *anything*, but he denied having a knife, denied attacking Mr. Simmons, and contradicted his daughter and wife about living at the apartment. RP at 307, 317-18. His cause was not helped when he told four different versions about the whether he had a knife, from, “Yes, I had a knife,” to “No, I did not have a knife,” to “I always carry a knife,” and back to “Yes, I had a knife.” RP at 341.

The jury found him not credible beyond a reasonable doubt and the outcome would have been the same if the “ignorance of the law is no excuse” line had been struck from the “knowledge” instruction.

B. The State will file a motion to strike the boilerplate language about supervision fees.

The defendant is correct that the supervision fees should be stricken. When a mandate is received the State will file a motion striking the follow provision in Section 4.2 of the Judgment and Sentence:

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701, RCW 10.95.030(3))

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant’s address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; ~~(7) pay supervision fees as determined by DOC;~~ (8) perform

affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

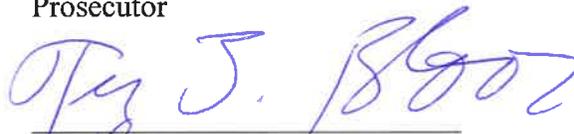
IV. CONCLUSION

The convictions should be affirmed. The boilerplate language requiring supervision fees should be stricken.

RESPECTFULLY SUBMITTED on May 26, 2020.

ANDY MILLER

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on May 26, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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