

FILED
Court of Appeals
Division III
State of Washington
6/26/2020 1:21 PM

NO. 37229-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

EDUARD LASHKEY,

Appellant.

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

The Honorable Toney D. Hazel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The evidence was insufficient to convict Appellant of first degree criminal trespass.

2. The trial court violated Appellant due process rights by failing to adequately instruction the jury.

3. Appellant was deprived of his right to effective assistance of counsel.

4. The trial court erred by imposing a \$200 criminal filing fee as part of Appellant's judgment and sentence. CP 60.

Issues Pertaining to Assignment of Error

A jury acquitted Appellant of residential burglary, which requires proof of unlawful entry into a dwelling with intent to commit a crime, but convicted him of first degree criminal trespass, which requires proof of unlawful entry into a building.

1. Was the evidence insufficient to convict Appellant of first degree criminal trespass when there was no evidence Appellant ever entered a building?

2. Was Appellant deprived of his due process rights when a jury question revealed an ambiguity in the instructions regarding an essential element, and the trial court simply referring the jury back to those instructions without further clarification?

3. Was Appellant deprived of his right to effective assistance of counsel when his counsel acquiesced to the trial court's decision to respond to the jury question by referring them back to the instruction when that allowed the jury to convict him on less than proof beyond a reasonable doubt as to all element of the offense?

4. The \$200 criminal filing fee is a discretionary Legal Financial Obligations (LFOs). Appellant was represented by appointed counsel at trial and was found indigent for purposes of appeal after sentencing.

(a) Under these circumstances should this Court strike the \$200 criminal filing fee from Appellant's judgment and sentence?

(b) In the alternative, is remand necessary to determine if Appellant "at the time of sentencing [was] indigent as defined in RCW 10.101.010(3)(a) through (c)," and if not, for the court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" before ordering any discretionary LFOs?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 2, 2018, the Spokane County Prosecutor charged Appellant Eduard Lashkey with residential burglary. CP 1.¹ The prosecution alleged that on May 4, 2018, Lashkey unlawfully entered the dwelling of Taylor Rydeen and stole property. CP 2-3. Lashkey was identified as the perpetrator base only on his fingerprint found on the exterior portion of the deadbolt on the backdoor of Rydeen's dwelling. Id.

A jury trial was held November 5-8, 2019, before the Honorable Judge Tony D. Hazel. RP² 7-364. The jury acquitted Lashkey of residential burglary but found him guilty of first degree criminal trespass. CP 53-54; RP 359.

Lashkey was sentenced to 364 days of incarceration with 258 days suspended, 24 months of unsupervised probation and \$700 in legal financial obligations, which includes a \$200 criminal filing fee. CP 58-61; RP 377-78. Lashkey filed a timely notice of appeal and was found indigent for purposes of the appeal. CP 68-71.

¹ An amended information was filed during trial to correct the spelling of Lashkey's first name. CP 15.

² There is a single volume of verbatim report of proceeding for the dated November 5-8 & 19, 2019, cited herein as "RP."

2. Substantive Facts

At Lashkey's trial the jury heard from five witnesses and were presented with eighteen exhibits consisted of 16 photographs, a thumb print lifted from a deadbolt and a "Latent Print Comparison Bench Note." Exs. 1-17 & 19. The five witnesses were the complaining witness, Taylor Rydeen, Spokane Police Detective Derek Bishop, who photographed the scene at Rydeen's home and collected the latent thumb print off the deadbolt on her backdoor, Spokane Police Detective Jeffrey Harvey, who was assigned to the case after the latent thumb print was linked to Lashkey, Spokane Police Department Forensic Specialist Trayce Boniecki, who linked the latent thumbprint to Lashkey, and Lashkey, who admitted being at Rydeen's house by mistake on May 4, 2018, but denied ever entering the home. RP 131-279.

According to Taylor Rydeen, as of May 4, 2018, she had lived in a home at 211 E. Princeton, Spokane, Washington for about two years. RP 132. She had a puppy she kept "crated" while at work, but otherwise lived alone. RP 132, 136, 141.

Rydeen, who lived close to her work, would come home for lunch at about noon each day and go back to work at about 12:40 p.m., and then return for the evening at about 5:20 p.m. RP 133-34. Nothing was amiss when she came home for lunch on May 4, 2018. RP 149. But when she

returned home at the end of the day, she noticed her shed door was open, as was the gate to her fenced-in backyard and the backdoor to the home, which was also noticeably damaged. RP 134, 136. She had not given anyone permission to enter her home that day. RP 133. She immediately called her mother and then police. RP 134. While waiting for police to arrive, Rydeen entered the home to retrieve her puppy, who she heard whining inside. RP 136.

Rydeen agreed that exhibits 1-16 were pictures of her house as it looked on the evening of May 4th. RP 137. Exhibits 7-13 are pictures of the backdoor to the house and the deadbolt used to keep it locked after the break-in. RP 141-43.

Rydeen claimed some of her property was missing from inside the home, including a TV, an LED mirror, jewelry, and her makeup and perfume. RP 145. She estimate the value of the missing property was about \$2,000. RP 147.

Rydeen denied knowing Lashkey. RP 146.

According to Detective Derek Bishop, he responded to Rydeen's home at about 6 p.m. on May 4, 2018. RP 159. He was a corporal at the time, not a detective. RP 155. Part of his duties as a corporal was to assist in collecting evidence at crime scenes, including taking photographs and

documenting latent fingerprints. RP 156. It was Bishop who took the photographs depicted in admitted exhibits 1-16. RP 161.

Bishop recalled that when he got to the home, he noticed the backdoor had significant damage from being pried open with some sort of tool. RP 160, 163, 173. Bishop eventually collected a single latent fingerprint off the exterior part of the deadbolt of the backdoor. RP 175. The latent print is depicted in Ex. 17. RP 176. Bishop could not recall if he tried to collect latent fingerprints anywhere else at the scene. RP 177, 183-85. He was certain however, that he collected no evidence from inside the home. RP 188. Bishop submitted the one latent fingerprint he did collect as evidence in the case. RP 176-77.

According to Forensic Specialist Trayce Binniecki, the latent print collected by Bishop came from Lashkey's right thumb. RP 236. She could not, however, determine when it was made. RP 241.

According to Detective Jeffrey Harvey, in June 2018 he was assigned to investigate the break-in at Rydeen's home the prior month. He was assigned only after the latent fingerprint was linked to Lashkey. RP 199. Harvey considered Lashkey as the prime suspect based on the print, although he conceded there were no eyewitnesses to the break-in. RP 200, 207.

Lashkey was the final witness. He admitted going to Rydeen's house on May 4, 2018 at about 3:00 to 3:15 pm. RP 271, 274. He explained he was drunk at the time and went to the house with the mistaken belief it was the home of a friend he had not seen in several years. RP 271-72, 275-76. Lashkey recalled going to the backdoor because his friend never used the front door as it was blocked with a couch, and therefore always went in and out through the backdoor. RP 271, 276. On the way to the backdoor, Lashkey was able to enter the backyard by simply pushing on the gate. It did not need to be unlatched. RP 276. He denied climbing over the fence to get into the backyard. RP 276-77.

As Lashkey knocked on the backdoor he thinks he may have lost his balance a bit because he was drunk, and likely reached out and grabbed the deadbolt to steady himself. RP 272, 277. When his friend failed to respond to his repeated knocking, Lashkey left. RP 272, 278. He said he did not realize it was not his friend's house until he got arrested for residential burglary. RP 272.

During deliberation, the jury submitted an inquiry asking, "Is criminal trespass unlawfully getting into the backyard without permission?" CP 32. By agreement of the parties, the court responded, "Please refer to your jury instructions." Id.; RP 356.

At sentencing, the trial court noted that when it spoke to Lashkey's jurors after they rendered their verdict, several jurors commented that they did not think the prosecution had proved beyond a reasonable doubt that Lashkey ever entered the residence. RP 368-69. The prosecutor confirmed he recalled jurors mentioning the same to him after the verdict. RP 369.

C. ARGUMENTS

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT LASHKEY OF FIRST DEGREE CRIMINAL TRESPASS.

To convict Lashkey of first degree criminal trespass it had to find beyond a reasonable doubt:

- 1) That on or about May 4, 2018 the defendant knowingly entered or remained in a building;
- 2) That the defendant knew the entry or remaining was unlawful; and
- 3) That the acts occurred in the State of Washington.

CP 50 (Instruction 15). The jury was also instructed that "For purposes of the crime of criminal trespass first degree, the term building means a building in its ordinary sense." CP 48 (Instruction 13.)

As Lashkey's jurors opined to the judge and prosecutor after their verdict, the prosecution failed to prove beyond a reasonable doubt that Lashkey ever entered Rydeen's home on May 4, 2018. RP 368-69. The jurors were right as a matter of law because the prosecution failed to

present any evidence that Lashkey entered Rydeen’s home or any building on her property on May 4, 2018. Because there is no evidence to support finding Lashkey entered a “building” as defined for purposes of the first degree criminal trespass, this Court should reverse Lashkey’s conviction and dismiss with the charge with prejudice.

Due process demands the prosecution prove all the elements of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In reviewing whether the prosecution has met this burden, the appellate court analyzes “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). While inferences are drawn in the prosecution’s favor, these inferences must be reasonable and cannot be based on speculation or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

It is well settled that a “building” for purpose of the charge of first degree criminal trespass is limited to “ordinary ‘buildings[.]’” State v. Joseph, 189 Wn.2d 645, 653, 405 P.3d 993 (2017); State v. Brown, 50 Wn. App. 873, 751 P.2d 331 (1988), abrogated in part by In re Pers. Restraint of Heidari, 174 Wash.2d 288, 274 P.3d 366 (2012). It does not

include a “fenced areas” around the building.³ Joseph, 189 Wn.2d at 650; Brown 50 Wn. App. at 878. There is evidence Lashkey entered the fenced area of Rydeen’s backyard, but no evidence he entered her home or any other building. RP 276-77.

The jury nonetheless convicted Lashkey of first degree criminal trespass. CP 54. This was likely the result of the trial court’s response to the jury’s inquiry about whether unlawful entry into Rydeen’s fenced backyard was sufficient to convict Lashkey of first degree criminal trespass. The jury was merely instructed to refer to the existing jury instructions, which provided only that “the term building means a building in its ordinary sense.” CP 32, 48. In other word, the court gave the jury no further assistance on what constitutes “building” for purposes of first degree criminal trespass. It essentially told the jury, “building” means “building.”

³ A different definition applies to second degree criminal trespass. For that offense, the following definition applies:

“Building,” in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

RCW 9A.04.110(5) (emphasis added).

Given the nature of the jury's inquiry, they must have concluded that "building in its ordinary sense" includes the "fenced areas" around Rydeen's home, which is in direct conflict with Joseph and Brown, but comports with the definition of "building" for purposes of second degree criminal trespass, but not first degree criminal trespass. See note 3, supra.

Regardless of how jurors interpreted "building" for purposes of the criminal trespass charge, there was no evidence presented to support a finding Lashkey entered Rydeen's' home or any other building on May 4, 2018. The only evidence presented at trial bearing on Lashkey's location while at Rydeen's residence was the single thumbprint found on the exterior part of the deadbolt on the backdoor and Lashkey's testimony in which he admitted going to the backdoor through the fenced in backyard. Neither the latent fingerprint nor Lashkey's admissions provide a basis to conclude he ever entered the home or any building whatsoever. The evidence is therefore insufficient to convict and this Court should reverse the conviction and dismiss the prosecution.

2. FAILURE TO PROPERLY RESPOND TO THE JURY INQUIRY DEPRIVED LASHKEY OF HIS RIGHT TO DUE PROCESS.

"Jury instructions 'must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.'" State v. Porter, 186 Wn.2d 85, 93, 375 P.3d 664

(2016) (quoting State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (alteration omitted). Read as a whole, the instructions ““must make the relevant legal standard manifestly apparent to the average juror.”” State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785 (2013) (quoting State v. Kyлло, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)). An instruction that fails in either respect violates the defendant’s right to due process. Id. at 365-66.

If the trial court’s original instructions accurately state the law, it generally has no duty to provide additional instructions after the jury begins deliberations. State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011), reversed on reconsideration on other grounds in 172 Wn. App. 1009, 2012 WL 5897625 (citing State v. Ng, 110 Wn.2d 32, 42-44, 750 P.2d 632 (1988), State v. Langdon, 42 Wn. App. 715, 718, 713 P.2d 120 (1986), and State v. Sublett, 156 Wn. App. 160, 184, 231 P.3d 231 (2010)). But where a jury’s question indicates a misunderstanding of the applicable law, the trial court must correct that misunderstanding. Id. (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). Merely referring the jury back to the original instructions does not satisfy this obligation, at least where those instructions do not unambiguously clarify the issue. Id. (“even if the ambiguity of the instructions given was not apparent at the time they were issued, the jury’s question identified

their deficiency”). See also 11A Wash. Practice: Wash. Pattern Jury Instructions: Criminal Appendix H, Recommendation 38 (4th ed. 2016) (judges should not merely refer the jury to the instructions without further comment, as this is a “primary source of juror confusion”).

The trial court could have provided a more informative answer to the jury’s question had it understood the true nature of the jury’s confusion. Nor, apparently, did defense counsel, who simply acquiesced to the court’s planned response. RP 356. The prosecutor seemed to better recognize the nature of the jury’s confusion, noting it likely involved the issue of a “fenced-in area.” RP 357. This is unfortunate, but it does not preclude relief for Lashkey now.

A jury instruction that eases the prosecution’s burden “affect[s] such fundamental aspects of due process as the presumption of innocence and the right to have the State prove every element of the charge beyond a reasonable doubt.” State v. Johnson, 100 Wn.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). Accordingly, such an instruction is a manifest constitutional error, which may be raised for the first time on appeal under RAP 2.5(a)(3). State v. O’Hara, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009) (collecting cases).

Conviction on insufficient evidence is a profound injustice, the correction of which should not be barred on purely procedural grounds. See RAP 1.2; State v. Garcia, noted at 4 Wn. App. 2d 1067, 2018 WL 3689506 (even though defense counsel acquiesced in court’s decision to refer jury back to original instructions, defendant was entitled to new trial where jury’s question indicated it may have relied on legally insufficient theory to convict).⁴ Even if this court concludes the instructional error is unpreserved, it should address it under RAP 2.5(a)(3).

Alternatively, Lashkey is entitled to relief because he received ineffective assistance of counsel. Both the federal and state constitution guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney’s conduct “falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Both requirements are met here.

⁴ Under GR 14.1(a), Lashkey cites this unpublished decision for whatever persuasive authority this court deems appropriate.

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” Kyllo, 166 Wn.2d at 862 (citing Strickland, 466 U.S. at 690-691). Counsel’s failure to notice and object to a faulty jury instruction is constitutionally deficient performance. State v. Townsend, 142 Wn.2d 838, 843-847, 15 P.3d 145 (2001); State v. Wilson, 117 Wn. App. 1, 17, 75 P.3d 573, review denied, 150 Wn.2d 1016, 79 P.3d 447 (2003).

As explained, the instructions at Lashkey’s trial were faulty in the context of the jury’s question because they did not preclude conviction for conduct that did not constitute the crime. Competent counsel would have requested a supplementary instruction based on Joseph and Brown, clarifying that “building” for purposes of first degree criminal trespass does not include the fenced area around the building. In light of the undisputed evidence that Lashkey was in Rydeen’s backyard on May 4, 2018, there is a reasonable probability that this corrective instruction would have resulted in complete acquittal.

The error at issue here is serious and can be addressed on the existing record, even if it was imperfectly preserved. Under the rubric of manifest constitutional error, ineffective assistance, or a combination thereof, this court should reach the issue and reverse Lashkey’s conviction. State v. Hawkins, 157 Wn. App. 739, 747, 238 P.3d 1226

(2010) (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)) (appellate court will exercise RAP 2.5(a)(3) discretion to reach unpreserved claim that “essentially raises a legal question with a sufficiently developed factual record, and does so in the context of the constitutional guaranty of effective assistance of counsel”).

3. THE CRIMINAL FILING FEE MUST BE STRICKEN BECAUSE LASHKEY IS INDIGENT.

RCW 10.01.160(3) prohibits the imposition of discretionary costs on indigent defendants. Lashkey is indigent. CP 68-69. The \$200 Criminal filing fee is a discretionary cost and is statutorily prohibited here under the circumstance. It must be stricken.

(a) Lashkey is indigent.

The trial court found Lashkey was indigent for purposes of appeal based on Lashkey’s affidavit that he has no assets. RP 64-69. Lashkey was also represented by appointed counsel at trial. RP 1 (noting both defense counsel are “Assistant Public Defenders”).

This Court should find the record supports finding Lashkey was indigent at the time of sentencing, and that the trial court was aware of this fact and made a finding of indigency.

In the alternative, this Court should remand for determination of whether Lashkey meets the indigency requirements set forth under RCW

10.01.160(3). See State v. Ueltzen, No. 52098-2-II, 2020 WL 200856 (Wash. Ct. App. Jan. 13, 2020) (unpublished opinion remanding for determination of the “category of Ueltzen’s indigency” for purposes of applying RCW 10.01.160); see note 4, supra.

(b) Imposition of discretionary LFOs against the indigent is prohibited.

In Ramirez,⁵ the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 749.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010**Error! Reference source not found.**(3)(a) through (c).” Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

⁵ State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

HB 1783 “also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.” Ramirez, 191 Wn.2d at 748. Thus, HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Id.

(c) The Criminal filing fee should be struck

Because Lashkey is indigent, this Court should strike the \$200 Criminal filing fee from his judgment and sentence. HB 1783 and Ramirez prohibit it in this instance.

D. CONCLUSION

This Court should reverse and dismiss with prejudice Lashkey’s first degree criminal trespass conviction based on insufficient evidence. In the alternative, this Court should reverse his conviction based on the trial court’s failure to effectively respond to the jury inquiry, which violated Lashkey’s due process rights, or in the alternative that he was deprived of his right to effective assistance of counsel at the jury inquiry hearing. In the event this Court concludes Lashkey’s conviction should stand, remand is still necessary to strike the \$200 criminal filing fee from his judgment and sentences, or at least hold a hearing to establish his level of indigency.

DATED this 26th day of June, 2020.

Respectfully submitted,
NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

CHRISTOPHER H. GIBSON, WSBA No. 25097
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June 26, 2020 - 1:21 PM

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