

No. 71159-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TAMAS HIBSZKI,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to produce sufficient evidence to establish that the mooring vessel was a “building,” an essential element of burglary in the second degree.

2. The jury instructions did not make manifestly apparent the applicable law and the burden of proof on accomplice liability, when the court gave confusing instructions on accomplice liability and did not instruct the jury that the State bore the burden of proving accomplice liability beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process provisions of the Fourteenth Amendment and of Article I, section 3 require the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of burglary in the second is an unlawful entering or remaining in a “building,” defined as “any dwelling, fenced area, railway car, or cargo container,” or “any other structure used for lodging of persons or for carrying on business therein or the use, sale or deposit of goods.” Here, the structure was a large, uninhabited vessel without a propulsion system that was permanently attached to pilings, and used exclusively as a moorage for barges. In the absence of proof beyond a reasonable doubt

that the vessel was a “building,” was Mr. Hibszi’s right to due process violated when he was convicted of burglary in the second degree?

2. The Sixth Amendment right to jury trial and the due process provisions of the Fourteenth Amendment and of Article I, section 3 require the court’s jury instructions make the applicable law and burden of proof manifestly apparent. Where the court gave confusing instructions on the law of accomplice liability and failed to instruct the jury that the State bore the burden of proving accomplice liability beyond a reasonable doubt, was Mr. Hibszi’s right to jury trial and to due process violated?

C. STATEMENT OF THE CASE

On July 26, 2010, around 2:30 a.m., Washington Fish and Wildlife Sergeant Erik Olson¹ encountered Tamas Hibszi and Justin Stoltman as they landed a small outboard motor boat at a dirt launch underneath the West Seattle Bridge. RP 217-19. Sergeant Olson saw a large quantity of coiled cabling in the bottom of the boat and two open duffle bags with visible tools such as bolt and wire cutters. RP 219-20. Mr. Hibszi indicated he owned the boat and that they were recycling cabling from abandoned pilings. RP 220-21. Based on the description of the pilings, Sergeant Olson believed the cabling came from Port of Seattle property.

¹ Washington Fish and Wildlife officers are authorized to exercise “such police powers and duties as are vested in sheriffs and peace officers generally. Fish and wildlife officers are general authority Washington peace officers.” RCW 77.15.075.

RP 222. Accordingly, he called Port of Seattle police who arrived within fifteen minutes, confiscated the cabling, and left without citing either Mr. Hibszi or Mr. Stoltman. RP 222, 223-24. Sergeant Olson gave a verbal warning about several boat safety violations and let them go. RP 224.

In the early hours of the following night, July 27, 2010, Sergeant Olson was in a patrol boat on the Duwamish River when he again saw Mr. Hibszi and Mr. Stoltman in the motor boat. RP 225, 227. He steered his patrol boat next to Mr. Hibszi's boat and observed the same duffle bags and a very large metal valve in the bottom of the boat. RP 228-29.

Sergeant Olson obtained permission to search the duffle bags and he found seven small metal valve handles in Mr. Stoltman's bag and copper and brass fittings in Mr. Hibszi's bag. RP 225, 227, 228-29, 232-33. Mr. Stoltman said the valve was in the boat when they launched, whereas Mr. Hibszi said the valve was given to him by a friend. RP 230-31. Based on the inconsistent stories, Sergeant Olson confiscated the valve and the duffle bags and released the two men while he continued his investigation. RP 234-35.

Approximately 100 yards down the river, Sergeant Olson located a large "freighter-type vessel" that was welded to pilings and had the same color paint as the large valve. RP 235-36. He boarded the vessel through an open hatch and noticed seven valve stems that matched the valve

handles found in Mr. Stoltman's duffle bag, panels that appeared as if copper tubing had been recently removed, and cabling that matched the cabling he saw the previous night. RP 237, 239, 241, 246. He lifted one palm print which was later determined to belong to David Roberts. RP 239, 243, 442.

Mr. Hibszi and Mr. Stoltman were charged with burglary in the second degree, theft in the second degree, and malicious mischief in the second degree, and their cases were joined for trial.² CP 29-30. Mr. Hibszi moved to dismiss the burglary charge on the grounds the vessel was not a "building" for purpose of the burglary statute. RP 492-94. The motion was denied. RP 497.

Mr. Roberts was not charged with any offense related to the vessel and he was given immunity for his testimony against Mr. Hibszi and Mr. Stoltman. RP 449. He testified that he was currently clean and sober, but he had been on the vessel three different times to remove metals to sell to scrap yards to support his former methamphetamine habit. RP 447-48, 475. Even though he was using methamphetamines daily at the time, Mr. Roberts testified that he remembered being on the vessel with Mr. Hibszi and Mr. Stoltman, and he "thought" he helped Mr. Hibszi remove the large valve. RP 452-53, 455, 459.

² Mr. Stoltman was additionally charged with unlawful possession of heroin that was found on his person when he was arrested for these charges. CP 30.

Although neither Mr. Hibszi nor Mr. Stoltman was charged as accomplices, the jury was provided a jury instruction that defined accomplice liability. CP 48. The instructions did not inform the jury that the State bore the burden of proving accomplice liability beyond a reasonable doubt. In addition, although an accomplice was defined as a person who is legally accountable for the conduct of another and Mr. Roberts was given immunity, the jury was instructed that it could find he was an accomplice. CP 49.

Mr. Hibszi was convicted of burglary in the second degree and theft in the second degree and acquitted of malicious mischief in the second degree. CP 94, 97, 99.

D. ARGUMENT

1. Insufficient evidence was presented to support Mr. Hibszi's conviction for burglary in the second degree.

- a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of burglary in the second degree.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). A criminal defendant's fundamental right to due process is violated when a

conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. VI, XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, “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, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *accord State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

- b. The State presented insufficient evidence to establish Mr. Hibscki entered or remained in a “building,” an essential element of burglary in the second degree.

The vessel here was not a “building” for purposes of the burglary statute. RCW 9A.52.030(1) provides:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

For purpose of the burglary statute, “building” is defined as:

“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 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). Accordingly, the jury was instructed:

Building, in addition to its ordinary meaning, includes any dwelling, fenced area, railway car, or cargo container. Building also includes any other structure used for lodging of persons or for carrying on business therein or the use, sale or deposit of goods.

CP 51 (Instruction No. 10).

The vessel was owned by Island Tug and Barge, a freight forwarding company that transports customers' products on barges from one location to another. RP 357-58. Jonathan Anderson, vice president of Island Tug and Barge, testified the company acquired the vessel by a seizure from a delinquent customer, removed the vessel's propulsion system, affixed it to semi-permanent pilings called spuds, and used it exclusively for mooring the company's barges. RP 359-363, 384. "[W]e took the propulsion system out and we used it for mooring." RP 361. The company's employees were specifically instructed not to enter the vessel. "There was no entering the equipment unless it was a shipyard comp."³ RP 385. "Our employees know not to go into that vessel without a shipyard com[p]." RP 368. "Not even the owner can walk into this vessel without a shipyard comp clearing the vessel to go inside." RP 395. Mr. Anderson repeatedly testified that the vessel was no more than a mooring ball. "[O]ur employees stepped on this to tie equipment up and that was it." RP 385. "We use it to secure vessels. We have guys who step on the

³ A "shipyard comp" is a marine chemist who tests the quantity and quality of air inside a vessel that has been tied up for an extended period to time. RP 394-95.

vessel, tie up their lines and jump back on the vessels and go about their business.” RP 394. “Our guys just go up and they – they grab a hold the mooring lines and they tie off the cleats and they go about their business.” RP 396. “Our guys just – our guys just use this to tie up. They’re – they’re it’s cleats and bits [sic], and our guys are stepping on the boat to tie up. That’s all they’re doing.” RP 396. “They were stepping on the boat, dropping a mooring line on it, and then tightening up the lines on their piece of equipment and then they’re going about their business.” RP 396.

After the State rested, Mr. Hibszi moved to dismiss the burglary charge on the grounds the vessel was not a “building,” for purposes of the burglary statute. RP 492-94. The court disagreed and ruled, “Mr. Anderson referred to it as a pier. ... The Court obviously took note of his testimony that there’s a confined area and this is still being used as a vessel. So, appreciating this guidance, I think one may fairly, using the expansive definition given in other cases and consistent with the *Wentz*⁴ case, one may refer to this particular structure as a building.” RP 498.

The court’s ruling misstates Mr. Anderson’s testimony. As set out above, Mr. Anderson specifically testified that the vessel’s propulsion system was removed, it had been retired for seven years, and it was used

⁴ *State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003).

exclusively for moorage and not as a vessel. RP 360, 361, 362-63, 382, 394, 396. He also specifically testified that the vessel was neither a pier nor a dock.⁵

A. Yeah, we have piers and we have docks that we tie up to.

Q. Okay. Nothing else like this?

A. No.

RP 384.

Moreover, the court's ruling is contrary to rules of statutory interpretation. Statutory interpretation is a question of law that is reviewed *de novo*. *Wentz*, 149 Wn.2d at 346. When interpreting a statute, "the court's objective is to determine the legislature's intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 1115 P.3d 281 (2005). Courts first look to the "plain meaning" of the statutory language. *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10. "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs*, 154 Wn.2d at 600. If the statute is nonetheless ambiguous and susceptible to

⁵ According to Mr. Anderson, a "pier" is a structure that juts out from the shore into water, whereas a "dock" goes along the shore. RP 384.

more than one reasonable interpretation, courts may look to rules of statutory construction, legislative history, and relevant case law. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). The rule of lenity requires an ambiguous statute be interpreted in favor of the defendant. *State v. Sweat*, ___ Wn.2d ___, 322 P.3d 1213, 1215 (2014).

In the present context, the term “building” is unambiguous. The vessel here was used exclusively as a mooring ball, a floating hitching post, and was not a “structure used for lodging of persons or for carrying business therein, or for the use, sale, or deposit of goods.” At trial, the State argued the vessel was used for the “deposit of goods” because the barges that moored to it often were carrying materials such as sand or gravel. RP 495. This argument focuses on the use to which the barges are put, rather than the use of this vessel itself, as required by the statutory definition. Under the State’s argument, the vessel would be a “building” only when the barges moored to it were loaded with goods, but it would not be a “building” when the barges were empty or vessels such as personal pleasure boats were moored to it. This is an absurd result that is to be avoided. *See In re Pers. Restraint of Pierce*, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (“We will not construe a statute in a manner that creates an absurd result.”). The State’s argument is too attenuated and should be rejected.

By analogy, Division Two of this Court ruled a locomotive is a “railroad car,” because it is “designed to travel on railroad tracks and it carries many ‘things’ including but not limited to an engine, fuel to propel the locomotive and other railway cars, and a conductor....” *State v. Johnson*, 159 Wn. App. 766, 771, 247 P.3d 11 (2011). Significantly, the Court did not find the locomotive fell within the definition of building simply because other railroad cars carrying freight or passengers could be attached to it.

Assuming “building” is ambiguous in this context, courts may presume a change in legislative intent when a statute is materially amended. *State v. Dubois*, 58 Wn. App. 299, 303, 793 P.2d 439 (1990). Prior to 1975, “building” was defined as:

The word “building” shall include every house, shed, boat, watercraft, railway car, tent or booth, whether completed or not, suitable for affording shelter for any human being, or as a place where any property is or shall be kept for use, sale, or deposit.

Former RCW 9.01.010(18). By contrast, the current definition, enacted in 1975,⁶ significantly altered the definition and, notably here, eliminated the terms “boat” and “watercraft.” Therefore, the Legislature presumably did not intend to automatically include all boats and watercraft within the meaning of “building.” Rather, for structures that are not specifically

⁶ Laws of 1975, 1st Ex.Sess., ch. 260.

listed, the current definition focuses on the use to which the structure is put. The court's ruling to the contrary was in error.

Further, the court's reliance on *Wentz* was misplaced. In *Wentz*, the defendant was convicted of burglary after he was discovered hiding in a boat parked on a trailer in a backyard that was surrounded by a six-foot padlocked fence. 149 Wn.2d at 346-47. On appeal, the defendant challenged the sufficiency of the evidence to establish he entered a building, and argued (1) the term "fenced area," as used in the definition of "building," was limited to a fenced area where the main purpose of the fence was to protect property within its confines, and (2) the term "fenced area" was modified by the qualifying words, "used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods." *Id.* at 347. The Court disagreed. First, the Court rejected the "main purpose" test as obsolete because it arose in cases interpreting an earlier definition of "building" that did not specifically include the term "fenced area." *Id.* at 348-50. Second, under the last antecedent rule, the Court ruled the qualifying words modify the term "other structure" only, and not the specifically identified antecedent structures. *Id.* at 351-52. The instant case, however, raises neither of these issues. Therefore, *Wentz* is not instructive.

Because the vessel was not a “building,” for purposes of the burglary statute, the State did not establish every element of the offense. The proper remedy is reversal of Mr. Hibszi’s conviction for burglary in the second degree and dismissal of the charge. *See State v. Engel*, 166 Wn.2d 572, 581, 210 P.3d 1007 (2009).

2. Mr. Hibszi was deprived of his Sixth and Fourteenth Amendment rights to jury trial and to instructions that made the applicable law and the burden of proof manifestly apparent.

a. Jury instructions must make the applicable law and the burden of proof manifestly apparent.

A criminal defendant has the due process right to jury instructions that clearly and accurately charge the jury with the applicable law. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); U.S. Const. amend. VI, XIV; Const. art. I, § 3. The standard for clarity in jury instructions is higher than for statutes, because a court can resolve an ambiguously worded statute through statutory construction whereas “a jury lacks such interpretive skills and thus requires manifestly clear instructions.” *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996).

In addition, instructions that reduce the State’s burden of proof violate a defendant’s due process right. *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007). When read as a whole, instructions must

clearly inform the jury of the allocation of the burden of proof. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). “[T]he test is whether the jury is informed of the State’s burden in an understandable way.” *State v. Teal*, 117 Wn. App. 831, 839, 73 P.3d 402 (2003), *aff’d*, 152 Wn.2d 333, 96 P.3d 974 (2004) (citing *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988)). A challenge to jury instructions is reviewed *de novo*. *State v. Yates*, 161 Wn.2d 714, 749, 168 P.3d 359 (2007).

Further, the Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *State v. Siers*, 174 Wn.2d 269, 273, 274 P.3d 358 (2012). This right includes the right to a jury determination of every fact necessary for a conviction. *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 504-05, 220 P.3d 489 (2009).

b. The jury instructions did not make the applicable law of accomplice liability manifestly apparent.

The pattern instruction on the definition of “accomplice” provides:

[A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.]

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

[A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51, at 257 (3d ed. 2008) (WPIC). The jury here was provided this pattern instruction in its entirety, including the bracketed first and final paragraphs. CP 48 (Instruction No. 7).

The “Note on Use” for this instruction provides in relevant part:

Use the first bracketed paragraph in any case in which the defendant is charged as an accomplice. Use the final bracketed paragraph in such cases if it would be helpful to the jury. Do not use the bracketed paragraphs if an accomplice is being defined for the purpose of evaluating the testimony of a witness who may be an accomplice, WPIC 6.05, Testimony of Accomplice....

Id. Nonetheless, immediately following this definitional instruction, the jury was provided an instruction based on WPIC 6.05:

If you believe Mr. Roberts to have been an accomplice, such testimony given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 49 (Instruction No. 8).

Taken together, these instructions were unduly confusing. First Mr. Hibscki was not charged as an accomplice and the term “accomplice” does not appear in the “to convict” or any other instructions relating to him, even though accomplice liability was argued by all parties during closing and rebuttal arguments. RP 564-65, 578-79, 608-09, 618. Second, Mr. Roberts was given immunity and, therefore, was not “legally accountable” for the conduct of another.

The jury clearly struggled with these confusing instructions.

During deliberations, the jury inquired:

Can one be convicted of 2nd degree Burglary without entering the building but acting as an accomplice to the other individual committing [sic] 2nd degree Burglary?

CP __, sub. no. 41B, p. 1 (Stoltman). The court responded, “Please refer to the Court’s Instructions.” CP __, sub. no. 41B, p. 2 (Stoltman). Given that the physical evidence of Mr. Robert’s palm print placed him inside the vessel, but there was no similar physical evidence to place either Mr. Hibscki or Mr. Stoltman inside the vessel, the jury inquiry demonstrates that the jury did not understand the theory of accomplice liability.

A jury instruction may be both misleading and an accurate statement of the law. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27

P.3d 1160 (2001). Here, the instructions accurately stated the law of accomplice liability. However, under the facts of the case, the erroneous inclusion of the first paragraph of the pattern instruction, immediately followed by the instruction that allowed the jury to find Mr. Roberts was legally responsible for the conduct of others, and the jury inquiry, the instructions failed to make the applicable law manifestly apparent.

- c. The jury was not instructed that the State bore the burden of proving accomplice liability beyond a reasonable doubt.

The State must prove accomplice liability beyond a reasonable doubt. *State v. Cronin*, 142 Wn.2d 568, 579-82, 14 P.3d 752 (2000); *Teal*, 117 Wn. App. at 839. Therefore, the jury must be clearly instructed that the State bears the burden of proving accomplice liability beyond a reasonable doubt.

Nonetheless, the jury was instructed, in relevant part, on the State's burden of proof:

Each defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 43 (Instruction No. 2).

As stated above, the jury was provided “to convict” instructions for burglary in the second degree, theft in the second degree, and malicious mischief in the second degree, none of which make any reference to accomplice liability. CP 56, 70, 79 (Instruction No. 15, 29, 38). For example, the “to convict” instruction for burglary in the second degree provided:

To convict the defendant Tamas Hibszi of the crime of Burglary in the Second Degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of between on or about July 25, 2010 to on or about July 28, 2010, defendant Hibszi unlawfully entered a building;
- (2) That the entering was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return of verdict of guilty for defendant Hibszi as to Count I.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty for defendant Hibszi as to Count I.

CP 56 (Instruction No. 15).

The “reasonable doubt” instruction and the “to convict” instruction clearly set forth the State’s burden as to the elements of the offenses. In stark contrast, however, the accomplice liability instruction

was completely silent as to the State's burden of proof. Because accomplice liability was not incorporated into the "to convict" instructions, it was untethered from the State's burden of proof as set forth in those instructions. Accordingly, the instructions improperly relieved the State of its burden as to accomplice liability, in violation of Mr. Hibszi's right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt.

d. The instructional error requires reversal.

Instructional error that fails to make the applicable law manifestly apparent or that relieves the State of its burden of proof is an issue of constitutional magnitude that may be raised for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a). Instructions that relieve the State of its burden of proof are a structural error that is not subject to a harmless error analysis. "[W]here the instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis in original); *accord State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013) (defective reasonable doubt instruction is structural error, is presumed prejudicial, and is not subject to harmless error analysis). Here, because the

instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt, reversal is automatically required.

Even under a harmless error analysis, reversal is required. A constitutional error is presumed prejudicial unless the State can show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instructional error on accomplice liability is not harmless beyond a reasonable doubt, unless uncontroverted evidence established the defendant acted as a principal. *State v. Williams-Walker*, 167 Wn.2d 889, 917-18, 225 P.3d 913 (2010); *State v. Brown*, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). The State cannot meet that burden here.

The confusing instructions on accomplice liability, taken together with the jury inquiry that indicated the jury was considering Mr. Hibszi to have been an accomplice only, and not a principle, establish that the evidence did not convince the jury Mr. Hibszi acted as a principle. In the absence of instructions that made the applicable law and the State’s burden of proof manifestly apparent, the proper remedy is reversal of Mr. Hibszi’s convictions and remand for a new trial. *See Smith*, 174 Wn. App. at 369; *Walden*, 131 Wn.2d at 475.

E. CONCLUSION

The vessel was not a “building” for purposes of the burglary statute. The jury instructions of accomplice liability failed to make the applicable law and standard of proof manifestly apparent. For the foregoing reasons, Mr. Hibszi requests this Court reverse his convictions, dismiss the charge of burglary in the second degree, and remand for retrial the charge of theft in the second degree.

DATED this 13th day of June 2014.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71159-8-I
v.)	
)	
TAMAS HIBSZKI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> TAMAS HIBSZKI (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JUNE, 2014.

X _____ 

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