NO. 73443-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD MYERS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Because the to-convict instruction improperly told the jury it could find Mr. Myers guilty if the accident occurred on one day and the mens rea was formed at a later date and the trial court failed to correct the error, reversal is required.**

    a. The to-convict instruction erroneously misstated the law by allowing the jury to convict if Mr. Myers' mens rea was formed days after the accident underlying the hit-and-run charge.

Mr. Myers' jury was instructed it could convict him for conduct occurring "on or about" August 12, 2012. CP 144. As the trial court remarked, 'about' is even more than – it's not just that day." 2/18/15 RP 68-69. "'About' is an all-embracing word, and covers a great extent of time." *State v. Wolpers*, 121 Wash. 193, 195, 208 P. 1094 (1922).

As argued in the opening brief, and as conceded by the State, the only date on which Mr. Myers' knowledge (the mens rea for the offense) was relevant is August 12, the date of the accident. Op. Br. at 7-10; Resp. Br. at 15-16.

The State claims the to-convict instruction "was clear." Resp. Br. at 16. But the State leaves out the essential "or about" language from its argument. *See id*. The instruction did not hold the State to its burden to show "that the defendant was driving on August 12; had an

accident on August 12; knew he had an accident on August 12; failed to immediately stop and fulfill his duties on August 12." *Id*. Rather, the to-convict instruction required the State to prove that Mr. Myers (1) on or about August 12 was the driver of a vehicle; (2) on or about August 12 was involved in an accident resulting in an injury; (3) on or about August 12 knew that he had been involved in an accident; and (4) on or about August 12 failed to satisfy his obligations. CP 144.

"The vice of the 'on or about' instruction is that the Jury may be misled into rejecting an otherwise valid defense." *State v. Danley*, 9 Wn. App. 354, 357, 513 P.2d 96 (1973). By providing an "on or about" instruction where the date was essential to Mr. Myers' defense, the court committed prejudicial error. *Id*. at 356. The jury was "hung up" on the instruction. 2/18/15 RP 67 (trial court's statement). Reversal is required. *See id*.; *State v. Brown*, 147 Wn.2d 330, 340, 344, 58 P.3d 889 (2002); *State v. Morden*, 87 Wash. 465, 474, 477, 151 P. 832 (1915).

The State argues that the error should be excused because "no other date was introduced in the trial." Resp. Br. at 12-13. This statement does not match the facts. While it is clear the accident occurred on August 12, evidence from the week following the accident

was presented. *Compare* 2/17/15 RP 32, 79, 97-98; 2/18/15 RP 5; Exhibit 19 (August 12 date of accident) *with* 2/18/15 RP 10-11, 27-30 (police and Myers' contacts from August 12 to August 17). The post-accident evidence regarded Mr. Myers' interaction with the police as much as five days later. The jury was "hung up" on whether the "on or about August 12" language made these other dates relevant to the element of knowledge. 2/18/15 RP 67; CP 51-52 (jury asks whether knowledge is for the day of the accident or for the full week after), 149-50 (jury asks for definition of "about"). As the trial court recognized, the presence of "about" in the instruction indeed extended the relevant time period to beyond August 12. 2/18/15 RP 68-69. The instruction erroneously expanded the criminal statute.

The State further argues that while it "is possible" the jury was asking whether it could convict even if Mr. Myers did not know of the accident when he walked away on August 12, the jury also might have "wondered if it would be fair to convict someone who could no longer remember his crime and thus could not contradict the evidence of the two other eyewitnesses." Resp. Br. at 13-14. The State's argument ignores the jury's actual questions. The jury asked whether the knowledge element in instruction six applied "for the day of the

accident or for the full week after." CP 51-52. This question relates precisely to the evidence, argument and instructions provided. It does not suggest concern for the defendant's ability to present a defense at trial. Likewise, the jury's second question asked the court to define the term "about." CP 149-50. "On or about August 12, 2012" could undoubtedly be read to include the days or week surrounding August 12, but the jury's question cannot fairly be read to mean someone wondered whether it included the time of trial two-and-a-half years later.

The State relies heavily on *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988), but that case is inapposite. In *Ng*, the trial court's initial instructions to the jury on the issue contested on appeal did not expand or misstate the law. Mr. Ng was charged with several counts of felony murder based on robbery and assault, and the jury was instructed also on lesser-included offenses of robbery and second-degree assault. 110 Wn.2d at 34-36. The court instructed the jury that duress was a defense to robbery. *Id*. at 35-36.[1] During deliberations, the jury asked whether the term duress applied to all the lesser charges. *Id*. at 36. The court

[1] The court considered the error because the State did not challenge the provision of a duress defense to felony murder. *Ng*, 110 Wn.2d at 39-40.

responded by advising the jury to refer to the instructions already provided. *Id*.

On appeal, Mr. Ng argued that the trial court erred by not explicitly informing the jury, in response to a question, that duress applied to the lesser-included robbery charges. 110 Wn.2d at 42. The trial court refused, however, because "the instructions answered the [question] that was being asked of the court." *Id*. at 43 (alteration in original). The instructions correlated duress with the "robbery" charges. *Id*. at 35-36.

Here, however, reference back to the instructions allowed for a misinterpretation of the law rather than resolved it. The trial court recognized that "on or about August 12, 2012" means "not just that day" but additional days. 2/18/15 RP 68-69. The State agrees that the hit and run statute does not extend that far. Resp. Br. at 15-16. Nonetheless, the court allowed the jury to follow this erroneous instruction. CP 149-50; 2/18/15 RP 68-70. This case is therefore not like *Ng*.

The fact that the State based its proposed instruction upon the WPIC does not insulate the conviction. Resp. Br. at 7, 11. The pattern instructions are advisory only. *State v. Bennett*, 161 Wn.2d 303, 307-

08, 165 P.3d 1241 (2007). They are not approved by our appellate courts. *Id*. at 307. They are intended to provide guidance, but must be tailored to specific cases. While the "on or about" language in WPIC 97.02 might be appropriate in some cases,[2] it was an erroneous statement of the law as applied to this case.

As set forth in the opening brief, the instructional error requires reversal. Op. Br. at 14-15 (setting forth proper standard and argument in support). The State's argument in response is insufficient. It is the State's burden to show the error was harmless beyond a reasonable doubt. Op. Br. at 14-15 (citing cases and discussing standard).

In arguing the error was harmless, moreover, the State ignores evidence key to Mr. Myers' defense. First, both Mr. Myers and his passenger hit their heads when the truck flipped and skidded across the road on its roof. Second, the injuries caused his passenger to black out and suffer short term memory loss. Additionally, Mr. Myers' conduct walking away from the scene and leaving his wallet and vehicle behind suggests clouded judgment. 2/17/15 RP 51, 54, 58-59, 70-71; 2/18/15

[2] For example, the "on or about" language likely would not be erroneous where there is uncertainty about the date the accident occurred or if there is no evidence of any other date. The Court need not decide that here, however, because the facts do not fit either scenario.

RP 9, 50, 51-52. This evidence all supports Mr. Myers' defense that he was unaware of the accident when it occurred and, therefore, could not immediately comply with the obligations of the statute. Because the to-convict instruction hampered this defense, the conviction should be reversed.

b. Mr. Myers adequately apprised the trial court of the issue, preserving it for review on appeal.

The State misses the mark when it argues Mr. Myers' waived "any issue with the to-convict instruction." Resp. Br. at 6-8. Mr. Myers had no obligation to propose instructions on the elements of the offense. The State proposed the to-convict instruction that was ultimately provided by the court. CP 179; 2/18/15 RP 35-37. Mr. Myers objected generally to the State's instructions: "defense would object to the State's instructions as given." 2/18/15 RP 37. Defense counsel reiterated, "we would object to the others as given by the State." *Id*. Defense counsel also objected when the jury returned twice with questions on the State's instructional language. 2/18/15 RP 65-66. 67-70. The court found defense counsel adequately "made [his] record." 2/18/15 RP 69. The court was on notice to correct the error and ruled that it would not do so. *State v. O'Hara*, 167 Wn.2d 91, 98,

217 P.3d 756 (2009) (purpose of contemporaneous objection is so that trial court has opportunity to correct the error and avoid an appeal and consequent new trial); 2/18/15 RP 68-70.

"[W]hen an exception is taken in such a fashion that the purpose of the rule requiring specificity is satisfied, I.e., so that the trial court is informed of the alleged error, thereby affording it the opportunity to rectify any possible mistakes without the necessity and expense of an appeal, then this court has consistently held the exception to be sufficient." *State v. Gosby*, 85 Wn.2d 758, 763, 539 P.2d 680 (1975). Mr. Myers' objections were sufficient under this standard.

The State implies that Mr. Myers was obligated to propose his own instructions. Resp. Br. at 6. This argument relies on a misreading of the Criminal Rules. Criminal Rule 6.15 states that "Proposed jury instructions shall be served and filed when a case is called for trial" and then continues by setting forth the procedure for proper service and filing. The rule does not impose any obligation on the defense to propose instructions.

In its discussion of Mr. Myers' objection to the State's instructions, the State ignores Mr. Myers' objections during discussion of the jury's questions. *See* Resp. Br. at 6-8. Defense counsel clearly

stated that "instruction No. 6 [the to-convict should] refer[] to the date of the charged incident." 2/18/15 RP 67. Even if Mr. Myers' general objection was insufficient, his argument in response to the jury's questions preserved the issue. *See* 2/18/15 RP 37, 65-70; *State v. Brown*, 35 Wn.2d 379, 382-83, 213 P.2d 305 (1949) (reviewing "on or about" language where counsel objected after deliberations commenced). The court had adequate opportunity to correct the error before the verdict was returned. Mr. Myers' objections were sufficient for this court to review the issue.

Even if the error was not sufficiently preserved by Mr. Myers' objections below, the error affects Mr. Myers' constitutional right to present a defense. *E.g.*, *Brown*, 35 Wn.2d at 381-83; *Morden*, 87 Wash. at 472-74; *Danley*, 9 Wn. App. at 356 ("on or about" language may prevent defendant's ability to present a defense); Const. art. I, § 22; U.S. Const. amend. VI. The error had practical and identifiable consequences because it led to the juror's questions, Mr. Myers' defense of lack of knowledge was supported by the evidence, and although the evidence was plain the accident occurred on August 12, there was supporting knowledge at a later date (up until August 17). CP 51-52, 149-50; Op. Br. at 14-15 (discussing evidence supporting

defense); 2/18/15 RP 10-11, 27-30 (police and Myers' contacts from August 12 to August 17). Thus even absent objection, review is proper pursuant to RAP 2.5(a)(3).

2. The State has neither requested costs nor shown that costs should be awarded on appeal.

Mr. Myers included a statement about costs in the opening brief out of an abundance of caution. Op. Br. at 15-16. Mr. Myers expects the State will not be the substantially prevailing party. *See* RAP 14.2 (costs only to be awarded to party that substantially prevails). However, even if the State is the substantially prevailing party on appeal, this Court should exercise its discretion not to award costs if the State substantially prevails. *State v. Sinclair*, __ P.3d __, 2016 WL 393719, *2-7 (Jan. 27, 2016); RAP 14.1; RAP 14.2 (court may direct whether costs should be awarded); RCW 10.73.160(1) (award of appellate costs is discretionary).

Mr. Myers was found indigent for purposes of trial and appeal. CP __ (Sub # 66, 67);[3] *Sinclair*, 2016 WL 393719, at * 6-7; *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). There has been no change in his status since that time. *See Sinclair*, 2016 WL 393719, at

[3] A supplemental designation of clerk's papers has been filed requesting the Superior Court number these documents as clerk's papers and transmit them to this Court.

* 7 (noting RAP 15.2(f) provides for continuing presumption of indigence on appeal). The State does not argue otherwise or that Mr. Sass has developed the ability to pay while incarcerated. No costs should be imposed.

B. CONCLUSION

"[A] conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir.1971) (citing *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 (1946)). In the face of questions from the jury and Mr. Myers' objection, the court instructed the jury to convict if Mr. Myers formed the mens rea "on or about" the date of the accident. Because the State had to show Mr. Myers knew of the accident immediately, the instruction was erroneous and the conviction must be reversed for a new trial.

DATED this 22nd day of February, 2016.

Respectfully submitted,

_s/ Marla L. Zink_____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, CHAD MYERS, Appellant.	)))))))))	NO. 73443-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF FEBRUARY, 2016.

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