Supreme Court No. 99041-7
(Court of Appeals No. 51734-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMMY WEAVER,

Appellant.

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

PETITION FOR REVIEW

DEVON KNOWLES
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
devon@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Sammy Weaver, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Weaver*, No. 51734-5-II (filed August 18, 2020). A copy of the opinion is attached as an Appendix.[1]

B. ISSUE PRESENTED FOR REVIEW

Due process demands that jury instructions, when read as a whole, correctly state the law and make the applicable legal standard "manifestly apparent to the average juror." Instructions that relieve the State of its burden to prove an element of the offense beyond a reasonable doubt are presumed prejudicial, warranting reversal. In a case involving criminal trespass, is a significant question of law under the state and federal constitutions involved where the jury instruction defining "knowledge" conflicted with the to-convict instruction and relieved the State of its burden to prove Mr. Weaver knew his entry was unlawful?

C. STATEMENT OF THE CASE

In the early hours of August 19, 2017, Mr. Weaver left his friend's home near Byerly Drive to go to a neighboring house party. 98, 102. Mr. Weaver's motorcycle was recently stolen, and he heard that the person

[1] The original opinion was filed on November 5, 2019. Counsel moved for reconsideration, and the order on reconsideration was filed on August 18, 2020. The Appendix includes both the order on reconsideration and the opinion.

who took it was at the party. RP 98. When Mr. Weaver retrieved his motorcycle, the individual pursued him with a firearm. RP 99. Mr. Weaver attempted to call law enforcement for aid, but realized his phone was dead. RP 99. He was familiar with several people in the neighborhood and ran to the home of his friends, Phillip Sr. and Phillip Jr., not knowing they no longer lived there. RP 99. When he got there, he saw that the home was being remodeled, but believed that his friends still lived there and would return soon. RP 102. Mr. Weaver entered the residence and plugged in his phone. RP 101-02. He eventually fell asleep and awoke to law enforcement knocking and entering the home. RP 102.

The State charged Mr. Weaver with residential burglary. CP 6. At trial, Mr. Weaver acknowledged that he did not receive permission before entering the home and that he had not spoken with his friends in nine months to a year. RP 106-07, 109. Law enforcement opined that Mr. Weaver entered through an open window in the back of the residence. RP 86. However, Mr. Weaver testified the door was open, and he locked it after entering. RP 101-02.

Mr. Weaver was emphatic that, at the time he entered, he believed his friends still lived there, he previously spent time in the home, and his friends would have allowed him to enter. RP 101, 106-07. He stated that

he would not have gone in if he knew they no longer resided in the home. RP 104.

By agreement of the parties, the jury was instructed on the lesser-included offense of criminal trespass in the first degree. RP 6-7. Specifically, Jury Instruction No. 13 provided that,

> To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 19, 2017, 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 State of Washington.

CP 47 (emphasis added). Instruction No. 14 supplemented the to-convict instruction, defining "knowledge" as,

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or, result when he 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**.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 48 (emphasis added). The jury later acquitted Mr. Weaver of the residential burglary but convicted him of first-degree criminal trespass. CP 51-52.

The Court of Appeals affirmed.[2] Opinion at 1. In its initial opinion, the Court declined to consider Mr. Weaver's argument regarding the jury instructions, finding appellate counsel did not argue the issue was reviewable for the first time on appeal. Opinion at 6-7. The Court additionally found that Mr. Weaver was precluded from raising the instructional issue on appeal as trial counsel invited the error by proposing the to-convict instruction for the lesser-included offense of criminal trespass. Opinion at 7.

Mr. Weaver filed a Motion for Reconsideration, requesting the Court reconsider both bases for declining to review the erroneous jury instructions. The Court granted the motion in part, deleting the portion of the opinion stating that Mr. Weaver failed to RAP 2.5(3)(a) in his briefing. The order on reconsideration did not address Mr. Weaver's argument on the invited error doctrine.

[2] The Court of Appeals also affirmed the imposition of the victim penalty assessment. This petition does not address that portion of the ruling.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Conflicting jury instructions on knowledge relieved the State of its burden to prove Mr. Weaver knew his entry was unlawful, warranting review under RAP 13.4(b)(3).

a. Due process requires that jury instruction be clear and correctly state the relevant law.

Due process demands that jury instructions, read as a whole, correctly state the relevant law. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instructions that do not correctly inform the jury of the applicable law, mislead the jury, or do not permit the defendant to present his theory of the case fail to satisfy the constitutional demands of a fair trial. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). Moreover, 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 *Kyllo*, 166 Wn.2d at 864).

Clarity is critical, as jurors are not presumed to be legal experts and rely entirely on the plain language in the instructions to apply the law. Jury instructions must be read as a whole, and the jury is to presume that each instruction has meaning. *State v. McLoyd*, 87 Wn. App. 66, 71, 87 P.2d 1255 (1997) (internal citations omitted). "If the jury instructions read as a whole are [] ambiguous, the reviewing court cannot conclude that the

jury followed the constitutional rather than the unconstitutional interpretation." *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

Jury instructions that can be construed as relieving the State of its burden to prove each element beyond a reasonable doubt violate due process. U.S. Const. amend. XIV; Const. art. I, § 3. A challenge to such instructions presents an issue of manifest error of constitutional magnitude and may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Israel*, 113 Wn. App. 243, 265 n. 2, 54 P.3d 1218 (2002) (citing *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001)).

b. <u>The jury instructions on trespass and knowledge contradicted each other and cannot be harmonized.</u>

Read as a whole, the jury instructions in this case are contradictory, utterly confusing, and relieved the State of its burden to prove beyond a reasonable doubt that Mr. Weaver knew his entry was unlawful. Jury Instruction No. 13 – the "to convict" instruction – requires the jury to find beyond a reasonable doubt that "**the defendant knew that the entry or remaining was unlawful**." CP 47. This is followed immediately by Instruction No. 14, defining "knowledge" and informing the jury that "**[i]t is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful[.]**" CP 48.

There is no way to reconcile these two instructions. The State was required to prove beyond a reasonable doubt that Mr. Weaver knew his entry was unlawful; Instruction No. 14 clearly told the jury this knowledge wasn't necessary.

That both instructions in this case were adopted verbatim from the Washington Patter Jury Instructions does not render them immune from challenge. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 60.16 (4th Ed. 2016) (WPIC 60.16) (Criminal Trespass – First Degree – Elements); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (4th Ed. 2016) (WPIC 10.02) (Knowledge – Knowingly – Definition). The pattern jury instructions "are not the law; they are merely persuasive authority." *State v. Hayward*, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009) (citing *State v. Mills*, 116 Wn. App. 106, 116 n. 24, 64 P.3d 1253 (2003), *rev'd on other grounds*, 154 Wn.2d 1, 109 P.3d 415 (2005)). "Where a WPIC is in conflict with the applicable statute, the jury instruction must follow the statutory language." *Hayward*, 152 Wn. App. at 646.

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 831 (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 WPIC 10.02). When read alongside the to-convict instruction, the 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.

Notably, the language at issue in this case is not within the main definition of "knowledge," but is instead in the bracketed language of WPIC 10.02. The note on use states that bracketed material only should be used as applicable. The comment to the WPIC further explains the purpose of the bracketed language to state the rule that ignorance of the law is no excuse:

> The committee believes that this sentence will assist the jury in understanding that the defendant must have knowledge of the facts, circumstances, or results that constitute a crime, rather than knowledge that the facts, circumstances, and results are a crime.

(citations omitted). Criminal trespass, however, is unique inasmuch as it *does* require an individual to know that the fact of their presence is unlawful, i.e. a crime. Therefore, the bracketed portion of the instruction is

not only inapplicable to criminal trespass, but also explicitly relieves the State of its burden to prove knowledge.

The Court of Appeals erred in refusing to review the argument because it was not raised under RAP 2.5(a)(3). Opinion at 6-7. It is unclear whether the Court's opinion on reconsideration – deleting the statement that Mr. Weaver failed to cite RAP 2.5(a)(3) – is actually a finding that the error was properly raised. However, beyond citing RAP 2.5(a)(3) in both the opening and reply briefs, counsel cited *State v. Israel*[3] and *State v. Ridgley*[4] in support of the argument that such errors may be raised for the first time on appeal. Supp. Br. of Appellant at 5 n. 1; Supp. Reply Br. of Appellant at 3-4. As RAP 2.5(a)(3) requires, Mr. Weaver "identif[ied] the constitutional error" – an instruction that relieved the State of its burden – as well as its "practical and identifiable consequences" – the jury may have convicted Mr. Weaver without finding one of the essential elements. *State v Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); *see* Supp. Br. of App. at 1-8. The issue was properly before the Court of Appeals and is properly in front of this Court.

[3] 113 Wn. App. at 265 n. 2, 54 P.3d 1218 (2002).

[4] 141 Wn. App. 771, 779, 174 P.3d 105 (2007) (citing *Stein*, 144 Wn.2d at 241).

Contrary to the Court of Appeals' opinion, the invited error doctrine does not preclude review. As an initial matter, the record does not establish that defense counsel proposed the specific language in the to-convict instruction (Instruction No. 13). Both parties agreed that a lesser-included instruction was appropriate and, it was the State, and not defense counsel, that included the to-convict instruction in its proposed instructions to the court. RP 6-8.

More importantly, the to-convict instruction accurately recited the elements of the offense of criminal trespass. CP 47; RCW 9A.52.070(1). The source of the error was not the to-convict instruction, but the inclusion of WPIC 10.02's optional language in the definition of "knowledge" (Instruction No. 14), which was proposed by the State. *See* CP 48; RP 8. The invited error doctrine does not apply.

c. <u>The jury instructions relieved the State of its burden to prove knowledge of the unlawfulness, raising a significant question of law warranting review.</u>

Proper consideration of the merits of Mr. Weaver's case requires reversal. Significantly, Division Three of this Court recently found reversible error in nearly identical circumstances. *State v. Gallegos*, No. 36387-2-III, 2020 WL 3430075, at *7 (Wash. App. June 23, 2020)

(unpublished).[5] The jury instructions in *Gallegos* – a criminal trespass case – were the same as those given in Mr. Weaver's case. *Id*. Although Mr. Gallegos did not challenge the jury instructions at trial, the court acknowledged it was an issue of manifest constitutional error that may be raised for the first time on appeal pursuant to RAP 2.5(a)(3). *Id.* at *6. The State conceded that the jury instructions could not be reconciled as a defendant must have actual knowledge that the entry is unlawful. *Id.* at *7. The court accepted the concession, concluding the jury instruction defining "knowingly" "relieved the State from the duty to prove an element." *Id*.

Here, although not explicitly conceding the issue, the State did not address Mr. Weaver's argument that the jury instructions relieved the State of its burden to prove the element. Suppl. Br. of Resp't. 6-8. This is telling. At no point has Mr. Weaver's argument been challenged, much less rejected.

As in *Gallegos*, this constitutional error was prejudicial in Mr. Weaver's case. Constitutional errors are presumed prejudicial, and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Hayward*, 152 Wn. App. at 647; *see also Chapman v.*

[5] Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as persuasive authority pursuant to GR 14.1(a).

California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). Where an error involves "omissions or misstatements of elements in jury instructions, 'the error is harmless if that element is supported by uncontroverted evidence.'" *Hayward*, 152 Wn. App. at 646-47 (quoting *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004)). If the jury heard "conflicting evidence" on the element in question, a reviewing court will not "weigh the evidence on appeal." *Israel*, 113 Wn. App. at 277; *see also Goble*, 131 Wn. App. at 203-04 (error was prejudicial "given the conflicting evidence.").

Here, Mr. Weaver put forth evidence that he believed his friends still resided in the home and would have allowed him to enter. He was able to provide the names of his friends and testified that he visited the home in the past. RP 101, 110. The jury acquitted Mr. Weaver of the residential burglary, suggesting they found him credible, at least in part. While some of Mr. Weaver's testimony conflicted with that of other witnesses, other portions were corroborated. The only contested issue for the jury was whether Mr. Weaver believed he was there lawfully. Given the conflicting evidence, the State cannot show that the instructional error

as to that very issue was harmless. The violation of Mr. Weaver's constitutional rights warrants review under RAP 13.4(b)(3).

E. CONCLUSION

For the reasons set forth above, Sammy Weaver respectfully requests that this Court grant review.

DATED this 17th day of September, 2020.

s/Devon Knowles
WSBA No. 39153
Washington Appellate Project (91052)
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
Email: devon@washapp.org

Filed
Washington State
Court of Appeals
Division Two

August 18, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SAMMY BURRIS WEAVER, Appellant.	No. 51734-5-II ORDER GRANTING IN PART MOTION FOR RECONSIDERATION, AND ORDER AMENDING UNPUBLISHED OPINION

Appellant, Sammy B. Weaver, filed a motion for reconsideration of this court's unpublished opinion filed on November 5, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is granted in part and denied in part. In granting the motion in part, we amend our opinion as stated below.

The court amends the opinion only as follows:

On page 7, the second sentence of the first paragraph which reads, "He fails to even cite to RAP 2.5(a)(3) in his opening brief." shall be deleted.

IT IS SO ORDERED

FOR THE COURT: Jj. Worswick, Lee, Cruser

J., C.J.
Lee, Chief Judge

We concur:

Worswick J.
Worswick, J.

Cruser, J.
Cruser, J.

Filed
Washington State
Court of Appeals
Division Two

November 5, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SAMMY BURRIS WEAVER, Appellant.	No. 51734-5-II UNPUBLISHED OPINION

LEE, A.C.J. — Sammy B. Weaver appeals his conviction and sentence for one count of criminal trespass in the first degree. Weaver argues that (1) the trial court erred in providing contradictory jury instructions, relieving the State of its burden to prove that Weaver knew his entry was unlawful; (2) the crime victim penalty assessment (CVPA) violated his constitutional right to equal protection; and (3) the criminal filing fee imposed as a legal financial obligation (LFO) should be stricken.

We hold that Weaver is precluded from challenging the jury instructions, the crime victim penalty assessment fee did not violate Weaver's constitutional right to equal protection, and the criminal filing fee should be stricken. Accordingly, we affirm Weaver's conviction and the imposition of the crime victim penalty assessment fee, but we reverse the imposed criminal filing fee and remand to the trial court with instructions to strike the criminal filing fee.

FACTS

A. INCIDENT

Someone allegedly shot at Weaver when he was retrieving his stolen motorcycle. Because his phone had died, Weaver knocked on the door of an apartment that he thought belonged to his friends to ask for help. When no one answered, he went inside the apartment and fell asleep.

Kyle Ulrich, the true tenant of the apartment, was outside the apartment and called the police when he heard the sound of broken glass. The police arrested Weaver inside the apartment. The State charged Weaver with one count of residential burglary under RCW 9A.52.025.[1]

B. TRIAL

At trial, Ulrich testified that he had come to the apartment to move in his belongings with the permission of the landlord. Ulrich was the only tenant in the apartment. When he arrived, he heard the sound of breaking glass and thought someone was inside. He called 911 and waited for law enforcement. Deputy Ellis arrived, went inside, and handcuffed Weaver.

Ulrich walked into the apartment with Deputy Ellis. He saw in the living room a pillow, a bag, a bottle, and a window that had been smashed.

George Early, the manager of the property, testified that he had only once previously rented out the apartment to someone who stayed for one night. That tenant had a mental breakdown and moved. Early did not remember the name of that person. This was three weeks prior to his rental

[1] RCW 9A.52.025 states, "(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."

agreement with Ulrich. Early also testified that he had never given Weaver permission to enter the property.

Deputy Ellis of the Mason County Sheriff's Office responded to Ulrich's 911 call. He testified that upon reaching the apartment, he knocked on the door and identified himself as being from the sheriff's office. When no one answered, he went inside.

Inside, Deputy Ellis observed a backpack and a cell phone plugged into an outlet, which belonged to Weaver. He then saw Weaver lying on the floor. Deputy Ellis placed Weaver in handcuffs while he was still lying on the floor.

After being placed under arrest, Weaver told Deputy Ellis that

> he arrived there during the night and he was tired, didn't have anywhere to sleep and he knocked on the door and didn't get any response. Then he looked inside and he didn't see any furniture inside and he said he walked to the back and found an open door and walked inside the residence.

Verbatim Report of Proceedings (VRP) at 85. Deputy Ellis testified that it was impossible to get in through the back door but saw an open window. Deputy Ellis did not see a broken window or broken glass but opined that Weaver entered through the window. Additionally, the front door was locked when he entered.

Weaver testified that he had been visiting friends on the same street as the apartment. Another friend was "harboring the guy that stole [his] motor bike." VRP at 98. When Weaver took the bike back, someone shot a bullet at him. Weaver tried to call the police, but his phone was dead, so he went to the apartment of another friend to see if he could use that friend's phone.

Weaver knocked on the door of his friend's apartment where he was eventually arrested. The door to the apartment was not latched and opened. He entered and locked the door behind him.

Once inside, Weaver

> noticed that it was empty in the process of being remodeled or something and uh upon no answer from my calling out, I thought my friends may have been at the store or just out for a minute and be right back. So, I thought well, I'll just go in, lock the door behind me so in case this guy comes back down the street after me and wait and see if they show up and I realized the power was on.

VRP at 102. He plugged his phone into an outlet so he could call for help. He then fell asleep and was woken up by a knock at the door.

Weaver also testified that after he was arrested, he told Deputy Ellis, "my bike was stolen and I just retrieved it um I was here to try to call for help and uh I did not break in. The door was not secured when I knocked on it." VRP at 103. Weaver stated that he did not steal anything or have any intention of stealing anything inside. Weaver did not know that his friends no longer lived there. The last time he had spoken to his friends was nine months to a year earlier. Weaver's friends were a father and a son (Phillip Sr. and Phillip Jr.), and the father had had a mental breakdown. Weaver admitted that he did not have permission to be in the apartment. Weaver also said that he would not have entered any other house and only went inside out of fear.

C. JURY INSTRUCTIONS

The parties agreed to include the lesser included offense of criminal trespass in the first degree[2] in the jury instructions. Therefore, the trial court instructed the jury on residential burglary and the lesser included offense of criminal trespass in the first degree. The court also instructed the jury that

> [a] person enters or remains unlawfully in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

Clerk's Papers (CP) at 42. The court further instructed the jury that

> [t]o convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 19, 2017, 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 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 a verdict of guilty.
>
> On the other hand, if, after weighing all of 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.

CP at 47 (emphasis added). The court's definitional instruction for "knowingly" stated:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or, result when he is aware of that fact, circumstance, or result. **It is**

[2] RCW 9A.52.070 states, "(1) A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. (2) Criminal trespass in the first degree is a gross misdemeanor."

> **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.**
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP at 48 (emphasis added). Neither party objected to the court's instructions.

D. VERDICT AND SENTENCE

The jury found Weaver not guilty of residential burglary and guilty of criminal trespass. The trial court sentenced Weaver to 364 days of jail with 15 days converted to 120 hours of community service. The court also imposed a $250 criminal filing fee and a $500 CVPA.

ANALYSIS

A. JURY INSTRUCTIONS

Weaver argues that the to-convict instruction for first degree criminal trespass contradicts the definition of knowledge instruction, resulting in the State being relieved of its burden to prove Weaver knew his entry into the apartment was unlawful beyond a reasonable doubt. Weaver acknowledges that he did not object to the jury instructions but argues that this court should address this issue because it is an error of constitutional magnitude. We disagree.

Generally, a defendant cannot challenge a jury instruction on appeal if he did not object to the instruction in the trial court. *State v. Salas*, 127 Wn.2d 173, 181–82, 897 P.2d 1246 (1995). However, a defendant can raise such an error for the first time on appeal if the instruction involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Salas*, 127 Wn.2d at 182.

Here, Weaver neither argues nor shows that the instructional error was a manifest error. He fails to even cite to RAP 2.5(a)(3) in his opening brief. Therefore, we do not address Weaver's challenge. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (when an appellant fails to provide argument or authority, this court is not "required to construct an argument on behalf of appellants").

Additionally, because Weaver proposed the jury instruction, he is precluded from challenging it on appeal. The invited error doctrine "prohibits a party from 'setting up error in the trial court and then complaining of it on appeal.'" *State v. Armstrong*, 69 Wn. App. 430, 434, 848 P.2d 1322 (quoting *State v. Young*, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991)), *review denied*, 122 Wn.2d 1005 (1993). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

Here, Weaver proposed the instruction on the lesser included offense of first degree criminal trespass; therefore, any error in the instruction was invited, and we do not review his challenge.

B. CRIME VICTIM PENALTY ASSESSMENT FEE

Weaver argues that the CVPA authorized by RCW 7.68.035(1)(a) violated his constitutional right to equal protection. We disagree.

1. Legal Principles

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. "Equal protection requires that similarly situated individuals receive similar treatment under the law." *Harris v. Charles*, 171

Wn.2d 455, 462, 256 P.3d 328 (2011). The threshold requirement of an equal protection challenge is that a defendant "must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006).

The appropriate level of review in equal protection claim depends on the nature of the classification or the rights involved. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). We apply a rational basis review unless the State action involves suspect classifications, fundamental rights, semi-suspect classifications, or important rights. *Id*.

Here, Weaver concedes that he is not a member of a suspect or semi-suspect class and that the payment of a CVPA does not involve a fundamental or important right. Therefore, we apply rational basis review.

Rational basis review is a highly deferential standard, and we will uphold a statute under this standard unless its provisions are wholly irrelevant to the achievement of legitimate State objectives. *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). Rational basis requires only that the statute's means be rationally related to a legitimate State goal, and not that the means be the best way of achieving that goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997).

2. No Equal Protection Violation

Weaver argues that his right to equal protection was violated because there is no reasonable ground for distinguishing between those who are convicted of a gross misdemeanor in superior court versus those who are convicted of the same charge in a court of limited jurisdiction. We disagree.

Superior courts have original jurisdiction "in all criminal cases amounting to felony" and "in all cases of misdemeanor not otherwise provided for by law." Wash. Const., art. IV § 6; RCW 2.08.010. District courts, on the other hand, have "[c]oncurrent [jurisdiction] with the superior court of all misdemeanors and gross misdemeanors." RCW 3.66.060.

In determining constitutionality, the relevant class depends on the relevant statute. "The first task in determining whether [a statute] is constitutional is defining the class affected by the statute. The Legislature has broad discretion in defining classes in social and economic statutes. . . . Classes defined by the Legislature are presumed constitutional." *State v. Sigler*, 85 Wn. App. 329, 334, 932 P.2d 710 (1997) (citation omitted); *see also Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 565, 800 P.2d 367 (1990); *Conklin v. Shinpoch*, 107 Wn.2d 410, 417, 730 P.2d 643 (1986)).

We look to the statute's plain language in order to give effect to legislative intent, giving statutory terms their plain and ordinary meaning. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). We do not engage in judicial interpretation of an unambiguous statute. *State v. Thorne*, 129 Wn.2d 736, 762–63, 921 P.2d 514 (1996). A statute is ambiguous when the language is susceptible to more than one reasonable interpretation. *State v. Jacobs*, 154 Wn.2d 596, 600–01, 115 P.3d 281 (2005).

Here, the statute authorizing the superior court to impose a CVPA provides:

> When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). The purpose of the CVPA is to "provide comprehensive services to victims and witnesses of all types of crime with particular emphasis on serious crimes against persons and property." RCW 7.68.035(4)(a).

The plain language of the statute unambiguously makes clear that the legislature intended the relevant class to be those convicted of crimes in superior court, not a class of those convicted of gross misdemeanors as Weaver argues. And there is a rational basis for imposing a CVPA on those convicted in superior court because the legislature could rationally have believed that since superior court convictions are generally more serious (felonies) than convictions in a court of limited jurisdiction (gross misdemeanors and misdemeanors), a class consisting of those convicted in a court dealing with more convictions for more serious crimes should fund a victim's compensation program that places particular emphasis on serious crimes.[3] Therefore, because there is a rational basis for the legislature to impose a CVPA on those convicted of a crime in superior court, we hold that RCW 7.68.035 does not create disparate treatment between those convicted in superior court and those tried in courts of limited jurisdiction.

Moreover, in order to prevail on an equal protection claim, Weaver must also provide evidence of intentional or purposeful discrimination. *Osman,* 157 Wn.2d at 484. Weaver has failed to even address that issue. Thus, we affirm the imposition of the CVPA.

[3] Weaver argues that the only distinction between the "class" of those convicted of misdemeanors in superior court and those convicted of misdemeanors in a court of limited jurisdiction is the prosecutor's decision to file a charge in a court of limited jurisdiction as opposed to the superior court. However, Weaver ignores the jurisdictional authority of the two levels of courts and the fact that he was charged with residential burglary, a felony, which required the prosecutor to file Weaver's criminal charge in superior court. *See* Wash. Const, art. IV § 6.

C. CRIMINAL FILING FEE

Weaver argues that the imposed criminal filing fee should be stricken because he is indigent.[4] The State concedes that the imposed criminal filing fee should be stricken.

Legislative amendments to the LFO statues in 2018 prohibit sentencing courts from imposing on indigent defendants a criminal filing fee. RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.2d 714 (2018). Our Supreme Court has held that the amendments apply prospectively and are applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 747.

Here, there is no dispute that Weaver is indigent. Therefore, we reverse the imposed criminal filing fee and remand to the trial court with instructions to strike the criminal filing fee.

CONCLUSION

We affirm Weaver's conviction and the imposition of the crime victim penalty assessment fee, but reverse the imposed criminal filing fee and remand to the trial court with instructions to strike the criminal filing fee.

[4] Weaver initially argued that the trial court erred in acting without statutory authority when it imposed a $250 criminal filing fee, instead of a $200 filing fee under RCW 36.18.020(2)(h). In its response, the State agreed with Weaver that the amount should be reduced to $200. It argued in the alternative that the filing fee should be stricken all together because Weaver is statutorily indigent. In his reply brief, Weaver agreed that the filing fee should be stricken because Weaver is statutorily indigent.

No. 51734-5-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, A.C.J.

Lee, A.C.J.

We concur:

Worswick, J.

Cruser, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 51734-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Timothy Higgs
[timh@co.mason.wa.us]
Mason County Prosecuting Attorne

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 17, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

September 17, 2020 - 4:38 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51734-5
Appellate Court Case Title:	State of Washington, Respondent v. Sammy B. Weaver, Appellant
Superior Court Case Number:	17-1-00298-4

The following documents have been uploaded:

- 517345_Petition_for_Review_20200917163754D2197218_5891.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.091720-08.pdf

A copy of the uploaded files will be sent to:

- timh@co.mason.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Devon Carroll Knowles - Email: devon@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200917163754D2197218