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COURT OF APPEALS
STATE OF WASHINGTON

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NO. 69614-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MYLES LAWRENCE HILLS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. After the jury began deliberations, the trial court, in response to a jury question, re-instructed the jury on the law. The State agrees with the defendant that the trial court improperly instructed the jury on the law while the jury was deliberating. The State disagrees with the defendant that the remedy is dismissal of counts V and VI, with prejudice. Rather, the remedy is remand for a retrial on those counts.

2. The State agrees with the defendant that the trial court improperly imposed a 12-month term of community custody because his felony convictions are not “crimes against persons.” Remand for the term of community custody to be struck from the judgment and sentence is the appropriate remedy.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with four counts of Tampering with a Witness (Counts I, II, III and IV) and two counts of Misdemeanor Violation of a Court Order (Counts V and VI). CP 9-12. A jury found the defendant guilty on all counts. CP 19-20. On the four felony witness tampering charges, the defendant received concurrent 51-month standard range sentences.

CP 53-61. The court also imposed 12 months of community custody. Id. On the two misdemeanor counts, the defendant received concurrent terms of 364 days, concurrent with counts I, II, III and IV. CP 50-52.

2. SUBSTANTIVE FACTS¹

Due to the nature of issues raised, only a very limited recitation of the facts is necessary for this appeal.

Phone calls made by inmates from the King County Jail are recorded and saved. 3RP 116. Trial exhibit 3 is a call log of phone calls made by the defendant from jail while he was in custody on a pending domestic violence criminal charge. 3RP 117-18. Trial exhibit 4 is a CD containing the calls made by the defendant and referenced in exhibit number 3. 3RP 118-19. Trial exhibits 5 and 6 are redacted versions of trial exhibits 3 and 4, respectively. 3RP 119-20. The redacted versions contain evidence of six specific calls that relate to the six charged counts. 3RP 120.

After the victim, Dori Castleberry, identified that it was her and the defendant heard on the CD in the six calls, the CD was played for the jury. 3RP 128-29, 146-47, 160-61. In addition, two prior no-contact orders were admitted into evidence, orders that

¹ The verbatim report of proceedings is cited as follows: 1RP 8/21/12, 2RP—9/10/12, 3RP—9/11/12, 4RP—9/12/12, and 5RP—11/16/12.

prevented the defendant from having any contact with Castleberry.
3RP 126.

The defendant did not testify. Additional facts are contained
in the sections below they pertain.

C. ARGUMENT

**1. THE TRIAL COURT IMPROPERLY INSTRUCTED
THE JURY ON THE LAW WHILE THE JURY WAS
DELIBERATING. THE REMEDY IS REMAND FOR
A NEW TRIAL ON THE AFFECTED COUNTS.**

The defendant contends that, in regards to counts V and VI,
the trial court improperly instructed the jury on the law, while the
jury was deliberating, and therefore those counts should be
dismissed with prejudice. The State agrees the trial court
improperly instructed the jury on the law during deliberations. The
remedy, however, is remand for a new trial on counts V and VI.

a. Facts Relevant To Issue.

As to counts V and VI, the elements the jurors were required
to find proven beyond a reasonable doubt were properly listed in
the "to convict" instructions as follows:

To convict the defendant of the crime of violation of a
court order as charged in Count V, each of the
following elements of the crime must be proved
beyond a reasonable doubt:

(1) That on or about May 20, 2012, **there existed a no-contact order** which had been issued by the King County District Court, South Division, on March 13, 2012, and it was applicable to the defendant;

(2) That the defendant **knew of the existence** of this order;

(3) That on or about May 20, 2012, the defendant knowingly violated a provision of this order which was a restraint provision prohibiting contact with a protected party; and

(4) That the defendant's act occurred in the State of Washington.

CP 43; WPIC 36.51; RCW 26.50.110.²

To prove counts V and VI, the State introduced into evidence certified copies of two prior no-contact orders (trial exhibits 1 and 2). At the court's suggestion, the parties discussed whether a limiting instruction should be given in regards to the admission of the prior no-contact orders. 3RP 163-72.

In discussing whether to give the limiting instruction, the court specifically, but mistakenly, stated that it was the court's intent to limit the jury's consideration of the prior no-contact orders to a single element of count V and count VI, the two no-contact order charges.

² CP 44 is the "to convict" instruction pertaining to count VI. It is identical in all pertinent respects to CP 43 with the exception of the date of offense and the listing of the underlying no-contact order.

Court: So, [the no-contact orders] may be considered by you only for the purpose of, and then should we take a look at [charges] 5 and 6, and see what element it relates to, whether there was a no contact order in place or something like that?
I mean—

Defense counsel: Yeah. In order to determine whether or not a no contact order has been issued.”

....

Court: Do we need to say and or I mean they're the same language, virtually, **whether there existed a no contact** –

Defense counsel: Order

Court: --order

Defense counsel: Yeah.

Court: Do you agree with me, that that's the only purpose they can be used for?

Defense counsel: Whether they existed, right?

Court: So, I'm not going to say **element 1 of 5 and 6**, but I think we do need to relate it to the language.

3RP 165 (emphasis added). The court then drafted a limiting instruction, provided it to the parties, and with no objection from either party, the court provided the limiting instruction to the jury.

3RP 172; 4RP 177-79.

The limiting instruction at issue provides as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of two no contact orders which may be considered by you only for the purpose of determining whether **there existed a no-contact order** in Count V or Count VI. **You may not consider it for any other purpose.** Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 45 (Instruction number 16).

In closing, defense counsel pointed out that the limiting instruction allowed the jury to consider the prior no-contact orders for a single purpose, whether there existed a no contact order. While the orders contained the defendant's signature, defense counsel noted that the State had provided no other evidence that the defendant knew of the existence of the prior no-contact orders - element number 2 of counts V and VI, and that the orders could not be used for that purpose.

[Y]ou must find that there was a valid no contact order and that Myles knew about the no contact order. And you must find that based on proof that has been given to you by the State. Contrary to what the Prosecutor told you, you did not hear any evidence about the court telling Mr. Myles about the no contact order. ...You don't know if Mr. Hills ever received the no contact order. And the State will probably argue to you, there's some sort of signature there on the signature line. We have no information, we have no evidence, we have no testimony that that's Mr. Hills' signature. And it is the State's obligation to provide

you with all the evidence. The State must provide you with evidence that Mr. Hills knew about the no contact order, actual evidence, actual proof, and we did not receive any testimony about that.

You have—you will also receive a **limiting instruction**, an instruction from the Judge, I think it's instruction number 16, that **tells you, you can only consider the no contact order for the limited purpose of whether or not a no contact order existed. You cannot consider the no contact order for whether or not he had notice of it, whether or not he knew about it, whether or not he knowingly violated it.**

4RP 196-97 (emphasis added). Counsel added, “[y]ou can consider the no contact order for that limited purpose of whether a no contact order existed for Counts V and VI.” 4RP 202.

The prosecutor argued that the defendant's signature on the certified no-contact orders showed that he had knowledge of the existence of the orders. 4RP 215.

During deliberations, the jury sent out the following inquiry:

May exhibit 1 and 2 [the no contact orders] be considered, in reference to instruction 16 [the limiting instruction], for answering question two (2) in instructions 14 and 15 [the “knowledge” element in the “to convict” instructions].

CP 24-25.

The court, realizing that the language the court had used in instruction 16 was improperly and mistakenly too limiting,³ proposed what would otherwise be an appropriate limiting instruction. 4RP 220-33. The court's proposed instruction read as follows: "Please read the instructions as a whole. Instruction 16 limits use of exhibits 1 and 2 to the elements of Counts V and VI." 4RP 233. Over defense counsel's objection, this was the answer provided to the jury to its inquiry. CP 25.

b. The Law – A Correct Limiting Instruction But Given At The Wrong Time.

Under criminal rule 6.15(f), the trial court can provide further instructions to the jury during deliberations. Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court. State v. Brown, 132 Wn.2d 529, 612, 940 P.2d 546 (1997). However, the court should not add a legal theory of criminal culpability during deliberations if the parties have not had a chance to argue that theory." State v. Becklin, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008) (citing State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990)).

³ The no-contact orders were admissible without testimony as certified self-authenticating public records under ER 902(d). A certified copy of a no-contact order containing the signature of the defendant is sufficient evidence to establish knowledge. State v. France, 129 Wn. App. 907, 911, 120 P.3d 654 (2005).

Here, defense counsel clearly relied on the law of the case as instructed by the court. Specifically, counsel picked up on the fact that the limiting instruction was drafted too narrowly and did not allow the jury to consider the fact that the defendant signed the orders to show he had knowledge of the existence of the order. This was the only evidence presented that showed the defendant had knowledge of the existence of the order. It is also clear that the jury picked up on this fact, as evidenced by its question to the court.

The trial court's answer to the jury question broadened the scope of the jury's consideration of the evidence in direct conflict to defense counsel's theory of the case. Thus, the court was in error in further instructing the jury as it did.

c. The Remedy.

While both parties are agreed that the trial court erred in instructing the jury, the parties disagree on the remedy. The defendant claims the remedy for the court's error is dismissal of counts V and VI—with prejudice. The State believes the remedy is remand for a new trial on counts V and VI—the two counts affected by the court's improper instruction to the jury.

The defendant appears to reach his purported remedy by applying two separate and distinct legal doctrines at the same time.

He refers to the law of the case doctrine, while at the same time he applies a sufficiency of the evidence analysis. This is not correct.

Under the law of the case doctrine, jury instructions not objected to become the law of the case. State v. Hickman 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The situation generally arises where additional language is included in the instructions that requires the State to prove additional elements or facts that the State is not otherwise required to prove. See e.g. State v. Hobbs, 71 Wn. App. 419, 423, 859 P.2d 73 (1993) (the State acquiesced to adding venue an added element in the “to convict” instruction and therefore, the State bore the burden of proving venue even though venue is not an element of the crime), accord State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994).

Under a sufficiency of the evidence analysis, a reviewing court will determine whether there was sufficient evidence admitted to support the charge. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). The standard of review is whether there was evidence sufficient to support a conviction if viewed in the light most favorable to the State. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the

evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review “does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced.” State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). Retrial following reversal for insufficient evidence is prohibited—dismissal with prejudice is required. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

The Supreme Court has held that a defendant may assign error to elements added under the law of the case doctrine. Hickman, 135 Wn.2d at 102-03. This includes arguing that the State has failed to present sufficient evidence supporting the added element. Id.

The defendant fails to explain how the doctrine applies here. First, there was no added element in the instructions to the jury, thus, the State was not required to prove any additional elements. Second, the defendant misapplies the two doctrines. The defendant argues that the limiting instruction given by the court was given in error—he is correct. However, he then says, if the court had not given the limiting instruction, he would not have been

convicted based on the evidence. While he may be correct factually, the defendant can cite to no case wherein the court applies a sufficiency of the evidence analysis to “what could have been” but for the trial court’s giving of an erroneous instruction.

State v. Ransom, is instructive. 56 Wn. App. 712, 785 P.2d 469 (1990). Ransom went to trial on a charge of possession with intent to deliver a controlled substance. After jury deliberations had begun, the jury sent out a question asking if it could find Ransom guilty as an accessory to the crime. Accomplice liability had not been charged by the State and the legal theory had not been argued by either party. Over a defense objection, the trial court instructed the jury that they could find Ransom guilty as an accomplice. Just as in this case, the further instruction of the jury after deliberations had begun was error. The remedy was a reversal with a “[n]ew trial granted.” Ransom, 56 Wn. App. at 714-15.

This case involves an instructional error. Instructional error is subject to harmless error review. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). When instruction error is not found harmless, the remedy is reversal for a new trial. Id. at 344. The

error here was not harmless. The remedy is reversal for a new trial.

2. THE COURT IMPROPERLY IMPOSED A TERM OF COMMUNITY CUSTODY.

The State agrees with the defendant that the trial court improperly imposed a 12-month term of community custody. Tampering with a witness is not an offense for which community custody can be ordered.

Under RCW 9.94A.701, the court shall “sentence an offender to community custody for one year when the court sentences the person to the custody of the department for...[a]ny **crime against persons** under RCW 9.94A.411(2).” RCW 9.94A.701(3)(a) (emphasis added). Tampering with a witness is not categorized as a “crime against persons.” Rather, under RCW 9.94A.411(2), tampering with a witness is categorized as a “**crime against property.**” Therefore, the trial court did not have the authority to impose a term of community custody. This Court should order that the term of community custody should be struck from the defendant’s judgment and sentence.

D. CONCLUSION

For the reasons cited above, this Court should reverse Counts V and VI, two counts of misdemeanor violation of a no contact order, and remand for trial on those two counts. The Court should also remand for term of community custody imposed as part of the remaining four counts (counts I, II, III and IV) be struck from the judgment and sentence.

DATED this 27 day of June, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HILLS, Cause No. 69614-9 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of June, 2013

W Brame

Name

Done in Seattle, Washington