

No. 71159-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TAMAS HIBSZKI,

Appellant.

2019 OCT 10 PM 2:27
COURT OF APPEALS
STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The vessel was not a “building” for purposes of the burglary statute.

As used in 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). For those structures not specifically listed, the definition focuses on the use to which the structure is put. The vessel here was neither a specifically listed structure nor was it used for a specified purpose, that is, “the use, sale, or deposit of goods.” Instead, the vessel was used exclusively as a mooring ball. The vice president of the company that owned the vessel testified: “[W]e took the propulsion system out and we used it for mooring,” RP 361, “[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 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. Accordingly, the vessel did not fall within the definition of a "building" for purpose of the burglary statute.

The State relies on *State v. Johnson*, in which the Court determined a locomotive qualified as a "building" on the grounds it was 1) enclosed, 2) large enough to enter, and 3) able to accommodate a person. 159 Wn. App. 766, 722, 247 P.3d 11 (2011). Significantly, the Legislature did not include these criteria in the statutory definition of "building." The Court gleaned the criteria from *State v. Miller*, 91 Wn. App. 869, 960 P.2d 464 (1998) and *State v. Deitchler*, 75 Wn. App. 134, 876 P.2d 970 (1994). However, both *Miller* and *Deitchler* involved application of the concluding section of the definition of "building" that is not at issue here, to wit: "each unit of a building consisting of two or more units separately secured or occupied is a separate building." In *Miller*, the court determined a locked storage locker within an apartment building was a "building" both because it was large enough to accommodate a person and because it was a unit within a building that was separately secured and occupied. 91 Wn. App. at 873. In *Deitchler*,

the court determined an evidence locker in a police station was not a “building” because the police station was occupied by a single tenant and the locker was not a separate unit within the police station. Accordingly, *Johnson* and the cases upon which it relies, is not controlling.

In 1975, the Legislature amended the definition of “building” and eliminated the terms “boat” and “watercraft.” Laws of 1975, 1st Ex.Sess., ch. 260. At the same time, the Legislature enacted the crime of vehicle prowl in the first degree, which penalizes entering or remaining unlawfully in “a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.” RCW 9A.52.095; Laws of 1975, 1st Ex.Sess., ch. 260. The State contends the crime of vehicle prowl in the first degree “encompass[es] the crime of unlawful entry of a boat or a vehicle” and indicates the Legislature’s intent to continue criminalization of burglary of vessels under a different statutory scheme. Br. of Resp. at 14. But the ordinary meaning of “boat” and “watercraft,” terms which were eliminated from the definition of building, is much broader than the meaning of “vessel,” as defined in the vehicle prowl statute. The State’s contention is unsupported by the statutory language.

Although the State arguably established theft, it did not establish every essential element of burglary in the second degree because the

vessel did not fall within the definition of “building.” In the absence of proof beyond a reasonable doubt of every element of burglary, Mr. Hibszi’s conviction for burglary in the second degree must be reversed. *See State v. Engel*, 166 Wn.2d 572, 581, 210 P.3d 1007 (2009).

2. The jury instructions did not make manifestly apparent the State’s burden of proof regarding accomplice liability.

The jury instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt. “Accomplice liability, though not an ‘element,’ must still be proved by the State beyond a reasonable doubt in order for a jury to convict.” *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. Cronin*, 142 Wn.2d 568, 579-82, 14 P.3d 752 (2000)). Here, the jury was instructed the State bore the burden of proving every “element” of the crime beyond a reasonable doubt. CP 43 (Instruction No. 2). The “to convict” instruction, without any reference to accomplice liability, instructed the jury that the State bore the burden of proving beyond a reasonable doubt “the following elements of the crime.” CP 56 (Instruction No. 15). The jury was also provided an instruction that defined accomplice liability, but neither the definitional instruction or any other instruction informed the jury that the State also bore the burden of proving accomplice liability beyond a reasonable

doubt. Therefore, the instructions, read as a whole, failed to inform the jury of the State's burden as to accomplice liability, in violation of Mr. Hibszi's right to trial by jury and to proof beyond a reasonable doubt.

In *State v. Spencer*, the defendant was convicted of drive-by shooting and witness tampering. 111 Wn. App. 401, 403, 45 P.3d 209 (2002). As here, the jury was provided a pattern instruction defining accomplice liability but it was not instructed it could convict the defendant based on accomplice liability. 111 Wn. App. at 406-07. The court reversed the convictions on other grounds, but addressed the accomplice liability instructions as an issue that might arise on remand, and stated:

Spencer also contends that the prosecutor improperly argued accomplice liability because the court did not instruct the jury that a person who is an accomplice in the commission of a crime is guilty of that crime.

...

We agree that the prosecutor made an improper argument. The trial court gave a definitional instruction regarding accomplice liability, but it did not instruct the jury that it could convict Spencer of the crime if it found that he was an accomplice.

Id. at 411-12. Similarly here, the jury was given a definition of accomplice liability, but it was not given any context for that theory of liability or guidance on the significance of the definition. By contrast, the

jury was given definitional instructions for the terms “building,” “enter,” “intent,” “premises,” “theft,” “wrongfully,” “value,” and “malice,” but those terms had context because they were used elsewhere in the instructions. CP 51, 54, 55, 64, 67, 68, 69, 77 (Instructions No. 10, 13, 14, 23, 26, 27, 28, 36.

Contrary to the State’s argument, this issue is not controlled by *Teal*. In fact, this issue was not even raised in *Teal*.

Teal’s argument can be summarized as follows: the purpose of the “to convict” instruction is to set forth the elements of the charge which the State must prove beyond a reasonable doubt. When the State employs a theory of accomplice liability, the “to convict” instruction must communicate that the elements can be established by the conduct of the defendant *or an accomplice*. If the “to convict” instruction refers only to the conduct of the defendant, accomplice liability is beyond the scope of the instruction, and the State assumes the burden of proving that the defendant’s conduct established all the elements of the crime without reference to the conduct of an accomplice.

117 Wn. App. at 837 (emphasis in original). However, Mr. Hibszi does not argue that accomplice liability is an element of the substantive offense or that it must be included in the “to convict” instruction. Rather, he argues that the jury instructions must, in some manner, make clear the State’s burden of proving accomplice liability beyond a reasonable doubt, in addition to its burden to prove the elements of the substantive

offense beyond a reasonable doubt. The State's reliance on the *Teal* is misplaced.

The State notes that the instructions were based on pattern instructions and that the definitional instruction on accomplice liability was an accurate statement of the law. Br. of Resp. at 20, 21, 22. Mr. Hibscki does not challenge the accuracy of the instructions given. Instead, he challenges the failure to additionally inform the jury on the State's burden of proving accomplice liability beyond a reasonable doubt. *See Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160 (2001) (an instruction may be both an accurate statement of the law and misleading).

The State asserts the instructions "correctly instructed the jury ... on the burden of proof," "informed the jury of the State's burden to prove the charges beyond a reasonable doubt," and "informed the jury of the State's burden of proof." Br. of Resp. at 18, 20, 21. These conclusory assertions are incorrect. The instructions informed the jury only that the State bore the burden of proving the *elements* of the substantive offense beyond a reasonable doubt. CP 43, 56 (Instructions No. 2, 15). The instructions never informed the jury that the also State bore the additional burden of proving accomplice liability, which is not an element, beyond a reasonable doubt. Accordingly, the instructions improperly relieved the

State of its burden of proof, in violation of Mr. Hibszi's right to a jury finding of every fact necessary for a conviction beyond a reasonable doubt.

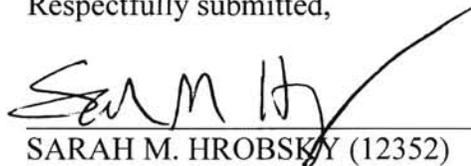
The State contends the challenge to the instructions may not be raised for the first time on appeal. Br. of Resp. at 17-18. This, too, is incorrect. Instructional error that fails to make the applicable law manifestly apparent or that relieves the State of its burden of proof is an issue of constitutional magnitude that may be raised for the first time on appeal, and is not subject to a harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013); *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a).

B. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Hibszi respectfully requests this Court reverse his conviction for burglary in the second degree.

DATED this 5th day of October 2014.

Respectfully submitted,


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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF OCTOBER, 2014, 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:

<p>[X] STEPHANIE KNIGHTLINGER, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) U.S. MAIL () HAND DELIVERY () E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] TAMAS HIBSZKI (NO VALID ADDRESS ON FILE) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT</p>	<p>() U.S. MAIL () HAND DELIVERY (X) RETAINED FOR MAILING ONCE ADDRESS OBTAINED</p>

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF OCTOBER, 2014.

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