

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87787
	)	
TYRONE COOPER,	)	
	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
21<sup>ST</sup> JUDICIAL CIRCUIT, DIVISION 6  
THE HONORABLE GARY M. GAERTNER, JUDGE

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APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Appellant, Tyrone Cooper, was tried by a St. Louis County jury on the charges of first degree burglary, §569.160, first degree assault, §565.050, and armed criminal action, §571.015.<sup>1</sup> He was convicted of first degree burglary and acquitted of the other two charges. The Hon. Gary M. Gaertner sentenced Appellant as a prior and persistent felony offender to life imprisonment. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, §3, Mo. Const. (as amended 1982); §477.050. This Court granted Appellant's application for transfer after a memorandum opinion and now has jurisdiction. Article V, §10, Mo. Const. (as amended 1976) and Rule 83.04, Missouri Court Rules (2006).

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri, 2000.

## STATEMENT OF FACTS

Appellant, Tyrone Cooper, was charged in St. Louis County with first degree burglary, §569.160, first degree assault, §565.050, and armed criminal action, §571.015 (L.F. 9-12).<sup>2</sup> The Information alleged that on or about October 26, 2003, at approximately 1:30 a.m., Tyrone knowing entered unlawfully the residence of Joel Busby at 9245 Argyle for the purpose of committing assault (L.F. 9). It also alleged that Tyrone shot at Joel with a deadly weapon (L.F. 10). His case was tried by a jury that found him guilty of burglary and acquitted him of the assault and related armed criminal action (L.F. 37-39).

Tyrone testified at his trial and told the jury that on October 25, 2003, he was called by his older sister's son, Marcus Porter (Tr. 306-07). Marcus told Tyrone that he had bought some drugs from Joel Busby, but they were fake (Tr. 308). He asked Tyrone to come with him to talk to Joel and ask that he give Marcus his money back or give him real drugs (Tr. 308).

Tyrone and Marcus went to Joel's house and waited for him in a car across the street (Tr. 309). When Joel arrived home, Tyrone got out of his car and called to Joel from the street, saying, "I want to talk to you" (Tr.

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<sup>2</sup> The record on appeal consists of a legal file (L.F.), transcript (Tr.) and sentencing transcript (S. Tr.).

310). Tyrone walked toward Joel, explaining that he was Marcus's uncle, and told Joel that he wanted to ask about the drugs Joel sold Marcus (Tr. 311). Tyrone told Joel, "the Ecstasy you sold him wasn't any good" (Tr. 311).

Tyrone testified that he and Joel were talking at the front door, and Joel gestured for him to go inside (Tr. 311). As Tyrone was walking inside, he had a "gut feeling" to turn around because Joel was not saying anything (Tr. 311). When he turned around, Joel was pointing a gun at him (Tr. 311).

Tyrone grabbed the gun and it went off (Tr. 312-13). He fell back into the house, and he and Joel wrestled for the gun (Tr. 313). The gun went off two or three times, and Tyrone was shot in the upper left arm (Tr. 313-15). Tyrone testified that everything happened quickly and his memory was fuzzy as to how it all took place (Tr. 315-16). He testified that Joel choked him by putting his arm around his neck, and that Joel was hitting him in the head with the gun (Tr. 318). Joel's dog, a pit bull, was biting Tyrone on the legs and face (Tr. 231, 318-20). Once Tyrone got the gun, he tried to pull the trigger, but the gun was stuck (Tr. 323).

After the incident, Tyrone was taken to the hospital (Tr. 323-24). He had several gashes in his head that required staples and stitches (Tr. 324).

He required stitches in his lip, mouth, and jaw, and had staples and stitches in the back of his leg where the dog had bit him (Tr. 324). His gunshot wound was rinsed out and his arm put in a sling (Tr. 324).

Joel Busby testified that he came home from a bar at about 1:15 a.m. that night (Tr. 144). When he pulled up to his house, he knew something was wrong because his dog was barking and “going crazy” (Tr. 145). Joel ran to his door and saw a man coming from the side of the house with a pistol (Tr. 145). The man was masked, wearing gloves, and had glasses (Tr. 145).

Joel was in a hurry to get into the house, and broke his key off in the door handle (Tr. 146). Once inside, he hurried to shut the door, but turned the deadbolt too soon, and it prevented the door from closing (Tr. 146). An arm came through the door; the man was trying to push his way into the house (Tr. 148). The gun went off, and Joel saw a big flame shoot into his house (Tr. 148-49). The man kicked the door in, knocking Joel behind the door (Tr. 150). The man entered the house and fired at Joel’s head (Tr. 150). The bullet skipped off Joel’s head and went through the wall (Tr. 150). Joel thought that the back of his head was blown off and that he was dead (Tr. 153). He saw God and had an after-life experience; when he woke back up, the gun was in his face (Tr. 153).

He grabbed the gun and it jammed (Tr. 153). The man asked him if he wanted to die, kept pulling the gun's trigger, and told Joel to give him his keys (Tr. 154).

Joel testified at length about the details of his fight with the man (Tr. 155-168). He said that during the fight, the man's mask fell off, and he identified Tyrone as the man (Tr. 160-61). Joel's dog, a pit bull, bit Tyrone's leg and pulled him off Joel (Tr. 157-58). Joel grabbed the gun and tried to fire it, but it was still jammed, so he beat Tyrone with it 40 or 50 times until he was out of breath (Tr. 163-64). Joel tried to drag Tyrone out of the house, and the police arrived just as Joel and Tyrone were falling out of the house in their struggle (Tr. 168).

Joel testified that he had never had any contact with Tyrone before that night (Tr. 190), but he did know Marcus (Tr. 195). He testified that he went to the hospital after the fight, but did not receive any stitches and had a normal chest x-ray and CAT scan (Tr. 211).

Officer Samer Madi of the Overland Police Department testified that he responded to a disturbance at 9245 Argyle on October 26, 2003 (Tr. 229). As he pulled up to the house, he saw Joel with his arm around Tyrone pulling him out of the front door, and a pit bull was biting on Tyrone's leg (Tr. 230-31). Joel screamed that Tyrone tried to kill him (Tr. 231-32).

Officer Madi yelled that he was a police officer, and Joel let go of Tyrone (Tr. 233). The officer told Joel to put the dog in the house and throw down the gun, and Joel complied (Tr. 233-35). Other officers arrived, and both men were taken to the hospital (Tr. 236-37).

Officer Michael Tegeler testified that he secured the scene before Tyrone was taken to the hospital (Tr. 256). He found cash, a cell phone, a pager, a walkie-talkie, handcuffs, duct tape, personal papers, and identification on Tyrone (Tr. 256). He also testified that Tyrone was unconscious (Tr. 260).

Timothy Eudaley testified that he lives up an alley from 9245 Argyle, and on the afternoon October 26, 2003, he saw a man throw a bag into a dumpster across the street (Tr. 282-85). After the man drove away, Mr. Eudaley got the bag out of the dumpster and saw that it contained handcuffs, gloves, bandanas and a walkie-talkie (Tr. 285-87, 293). The police were called, and Mr. Eudaley turned the bag over to them (Tr. 287). The police showed him a photo lineup, and he recognized one of the photographs as the person who put the bag in the dumpster (Tr. 288). The person in the photograph was Marcus Porter (Tr. 296).

During the instruction conference, Tyrone's attorney objected to all of the instructions, stating that they were not supported by the evidence

(Tr. 279). The court went off the record, and then returned on the record, allowing Tyrone a continuing objection to all of the instructions based on, “what I have already lodged” (Tr. 279).

The jury found Tyrone guilty of burglary and not guilty of assault and armed criminal action (Tr. 417). In his motion for judgment of acquittal or new trial, Tyrone alleged that the verdict of guilty on the burglary charge was against the weight of the evidence and inconsistent with the other two verdicts (Tr. 43). The motion was denied (S. Tr. 2), and Tyrone was sentenced to life imprisonment as a prior and persistent offender (S. Tr. 10). This appeal follows.

POINT RELIED ON

The trial court plainly erred in submitting Instruction 5 to the jury, in violation of Rule 28.02 and Tyrone’s rights to due process, a fair trial, and a properly-instructed jury guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that Instruction 5 did not contain all of the essential elements of the offense charged, and the missing element-- that Tyrone entered Joel’s house “unlawfully”--was a disputed fact at trial. The court’s error resulted in a manifest injustice or a miscarriage of justice because the State was relieved of its burden to prove a contested element of the crime, and the jury may have been adversely influenced by the erroneous instruction.

*State v. Rodgers*, 641 S.W.2d 83 (Mo. banc 1982);

*State v. Doolittle*, 896 S.W.2d 27 (Mo. banc 1995);

*State v. Harney*, 51 S.W.3d 519 (Mo. App. W.D. 2001);

*In re Winship*, 397 U.S. 358 (1970);

U.S. Constitution, Amendments 6 & 14;

Mo. Constitution, Art. I, §§10 & 18(a);

§569.160;

Rules 28.02 & 30.20

MAI-CR3d 323.52.

## ARGUMENT

The trial court plainly erred in submitting Instruction 5 to the jury, in violation of Rule 28.02 and Tyrone's rights to due process, a fair trial, and a properly-instructed jury guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that Instruction 5 did not contain all of the essential elements of the offense charged, and the missing element-- that Tyrone entered Joel's house "unlawfully"--was a disputed fact at trial. The court's error resulted in a manifest injustice or a miscarriage of justice because the State was relieved of its burden to prove a contested element of the crime, and the jury may have been adversely influenced by the erroneous instruction.

A criminal charge must be established by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 361-62 (1970). An instruction's failure to hypothesize all of a crime's elements is error. *State v. Kilmartin*, 904 S.W.2d 370, 374 -375 (Mo. App. W.D. 1995), citing *State v. Rodgers*, 641 S.W.2d 83, 84-85 (Mo. banc 1982). Verdict-directing instructions must contain each element of the offense charged, and require a finding of all

the facts necessary to constitute an offense in order to support a conviction. *Rodgers*, 641 S.W.2d at 85.

An essential element of the crime of burglary in the first degree is that the defendant *unlawfully* enters an inhabitable structure. §569.160; *MAI-CR3d 323.52*; *State v. Butler*, 665 S.W.2d 41, 44 (Mo. App. W.D. 1984). The term “unlawfully” is a required term in the verdict-directing instruction for first-degree burglary. *MAI-CR3d 323.52*. Whether an instruction contains all of the necessary elements of the offense charged must be determined by the language used in the instruction. *Rodgers*, 641 S.W.2d at 85. In Tyrone’s case, the first-degree burglary instruction did not contain the element of *unlawful* entry:

Instruction. No. 5

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about October 26, 2003, in the County of St. Louis, State of Missouri, the defendant knowingly entered in an inhabitable structure located at 9245 Argyle and possessed by Joel Busby, and

Second, that defendant did so for the purpose of committing the crime of assault therein, and

Third, that while the defendant was in the inhabitable structure he was armed with a deadly weapon,

Then you will find the defendant guilty under Count I of burglary in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, assault means purposely or knowingly placing or attempting to place another in fear of physical harm.

(L.F. 25).<sup>3</sup> “Unlawful” entry is a necessary element of burglary, and its exclusion from the first paragraph of Instruction 5 casts serious doubt on the validity of the jury’s finding of guilt. §569.160; MAI-CR3d 323.52; *State v. Butler*, 665 S.W.2d at 44. The omission of the word “unlawfully” was a critical error because whether Tyrone entered the house uninvited was a disputed fact at trial.

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<sup>3</sup> MAI-CR3d 323.52 and its Notes on Use are in the Appendix.

### *Standard of Review*

Tyrone objected to the jury instructions generally at trial, but no specific objection was made to Instruction 5 (Tr. 279-80).<sup>4</sup> Because this issue is raised for the first time on appeal, review is for plain error under Rule 30.20. *State v. Ervin*, 835 S.W.2d 905, 921 (Mo. banc 1992); **Rule 30.20, Missouri Court Rules (2006)**.

"For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." *State v. Cline*, 808 S.W.2d 822, 824 (Mo. banc 1991). The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. *Id.* Plain error results when it is apparent to the appellate court that the instructional error affected the jury's verdict. *State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994). Prejudicial error will occur where the jury may have been adversely influenced by an erroneous instruction. *State v.*

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<sup>4</sup> Trial counsel did not raise instructional error in the motion for a new trial (L.F. 43). In his *pro se* new trial motion, Tyrone alleged that "the instruction in this case did not define burglary in the manner prescribed in MAI-CR 3d" (L.F. 41).

*Rodgers*, 641 S.W.2d at 85, citing *State v. Aitkens*, 179 S.W.2d 84, 94 (Mo. 1944).

### *Discussion*

Tyrone was charged with knowingly and unlawfully entering Joel's house for the purpose of committing assault (L.F. 9). He was also charged with shooting Joel with a deadly weapon and attempting to kill him (L.F. 9-10). But the jury acquitted Tyrone of both the first-degree assault and armed criminal action charges (L.F. 38-39). Had they been properly instructed that Tyrone's entry into the house had to be an *unlawful* one, the jury would have very likely found him not guilty of first-degree burglary as well. But the jury was not properly instructed, and was permitted to find Tyrone guilty of first-degree burglary upon the mere showing that he knowingly entered Joel's house, without a finding that he did so *unlawfully* (L.F. 25).

A verdict-directing instruction must contain each element of the offense charged, and must require the jury to find every fact necessary to constitute the essential elements of the offense charged. *State v. Doolittle*, 896 S.W.2d 27, 30 (Mo. banc 1995), quoting *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988). As a general rule, an instructional error that results in the State being relieved of proving a disputed element of its case is plain

error, requiring reversal. *Id.*; *State v. White*, 92 S.W.3d 183, 193 (Mo. App. W.D. 2002). Otherwise, in violation of due process, the State could obtain a conviction without the jury deliberating on and determining a contested proof element. *State v. January*, 176 S.W.3d 187, 198 (Mo. App. W.D. 2005).

An appellate court will be more inclined to reverse in cases where the erroneous instruction excused the State from its burden of proof on a contested element of the crime. *Id.* If the verdict director omits an essential element of the offense, and the evidence in the case fails to establish the existence of the omitted element beyond serious dispute, the giving of that verdict director is plain error. *State v. Harney*, 51 S.W.3d 519, 533-34 (Mo. App. W.D. 2001).

Whether Tyrone entered Joel's house "unlawfully" was in serious dispute. Tyrone testified that he and Joel were talking at the front door, and Joel gestured for him to go inside (Tr. 311). Joel testified that Tyrone forced his way in (Tr. 148-50).

The jury acquitted Tyrone of first-degree assault and the related armed criminal action charge. The "not guilty" verdicts show that the jury did not completely believe Joel's version of events, and are also consistent with Tyrone's defense and testimony. It is impossible to know whether

the jury reached its verdicts because not all of the elements of those crimes were proven beyond a reasonable doubt, or if it found that Tyrone acted in self-defense (L.F. 29-30). Either way, the jury could have still found Tyrone guilty of first-degree burglary because it was instructed that it only had to find that he “knowingly entered” Joel’s house—it did not have to find that he did so “unlawfully” (L.F. 25). In other words, the jury could have found Tyrone guilty of first-degree burglary even if it believed that he was invited into Joel’s house.

Entry of a residence upon consent of a resident in charge of the home is lawful. *State v. Johnston*, 957 S.W.2d 734, 742 (Mo. banc 1997), citing *State v. Ferguson*, 624 S.W.2d 840 (Mo. 1981). When a person is privileged to enter a home, he is not guilty of burglary, regardless of what other crimes he may have committed therein. *State v. Chandler*, 635 S.W.2d 338, 341 (Mo. banc 1982). The element of *unlawful* entry is an important one; it is an important enough modifier that it is repeated in the statute:

A person commits the crime of burglary in the first degree if he knowingly **enters unlawfully** or knowingly **remains unlawfully** in a building or inhabitable structure for the purpose of committing a crime therein...

§569.160. Under the circumstances in this case, the verdict was very likely affected by the omission of this element from the instruction.

In its memorandum affirming Tyrone's conviction, the Eastern District Court of Appeals commented that "the jury was not wholly unaware of this essential element" because the State mentioned the word "unlawfully" in its closing argument. *State v. Cooper*, No. ED85722, mem. op. at 7 (Mo. App. E.D. May 2, 2006). But closing arguments are not evidence, and the jury was instructed that its duty was to be governed in its deliberations by the evidence as they remembered it, and by "the law as given in these instructions." (L.F. 34). *State v. Madison*, 997 S.W.2d 16, 20-21 (Mo. banc 1999). The jury was carefully reading the instructions. During nearly five hours of deliberation, the jury sent a note to the court asking, "In Count 1, how are we to interpret or define 'armed?' Is it the same as possessed?" (Tr. 416, L.F. 36). The court responded, "The jury is to be guided by the evidence and the instructions as given." (L.F. 36). Therefore, it is much more likely that the jury followed the instructions as written than what the prosecutor briefly mentioned during closing argument.

Rule 28.02(f) states that the failure to give an instruction in accordance with the MAI-CR is error, and the error's prejudicial effect

must be judicially determined. *Rule 28.02(f), Missouri Court Rules (2004)*.

The trial court's error in giving Instruction 5, which did not follow MAI-CR3d 323.52, was manifestly unjust in this case because it deprived Tyrone of his rights to due process, a fair trial, and a properly-instructed jury.<sup>5</sup>

The effect of that error was to mislead the jury into entering a guilty verdict on the charge of first-degree burglary when it might not have believed there was unlawful entry and, therefore, might not have convicted Tyrone had they been properly instructed. It also alleviated the State from its burden to prove a disputed element of the charged crime beyond a reasonable doubt. This Court should reverse Tyrone's conviction and remand his case for a new trial on the charge of first-degree burglary.

*White*, 92 S.W.3d at 193.

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<sup>5</sup> U.S. Constitution, Amendments 6 and 14; Mo. Constitution, Art. I, §§10 and 18(a).

## CONCLUSION

Appellant Tyrone Cooper was convicted of first-degree burglary under a verdict director that was missing a disputed element of the offense – whether his entry of Joel Busby’s home was “unlawful.” The omission of this element from the jury instruction excused the State of its burden of proof on that element and may have adversely influenced the jury’s verdict. Tyrone’s conviction should be reversed and his case remanded for a new trial.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,694 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, which was updated in September, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 8<sup>th</sup> day of September, 2006, to Shaun Mackleprang, Assistant Attorney General, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri 65102.

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Margaret M. Johnston

# *APPENDIX*

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