No. SC87787

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

TYRONE COOPER,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
Twenty-First Judicial Circuit
The Honorable Gary M. Gaertner, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for burglary in the first degree, § 569.160, RSMo 2000. Appellant was sentenced as a prior and persistent offender to life imprisonment. This appeal does not involve any of the categories reserved for exclusive appellate jurisdiction of the Supreme Court of Missouri. On August 22, 2006, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Tyrone Cooper, was charged with assault in the first degree, a related armed criminal action charge, and burglary in the first degree. (L.F. 9-10, 26). On December 6, 2004, this case went to trial by jury in the Circuit Court of St. Louis County, the Honorable Gary Gaertner, Jr. presiding. (L.F. 2; Tr. Cover).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the following evidence was presented at trial:

The victim, Joel Busby, arrived home late one night and found his dog barking and "going crazy." (Tr. 144-145). He knew something was amiss so he ran from his truck towards his apartment. (Tr. 145). As he approached the door, he saw Appellant, masked and gun drawn, coming towards him. (Tr. 145). He placed his key in the door, and in his haste, broke it off in the lock. (Tr. 146). When he scrambled inside, Busby turned the bolt too soon, blocking the door open. (Tr. 145-146).

Just then, Appellant reached the door and began trying to kick it open. (Tr. 146). He reached his arm in, and tried to force his way inside. (Tr 147-149). In his efforts to get the door open, Appellant accidentally discharged the gun, shooting himself in the arm. (Tr. 149-150). When Appellant was able to get the door open, he burst inside, aimed his gun, and fired a shot that grazed Busby's head. (Tr. 150). When the semi-automatic pistol engaged to chamber the next round, the action jammed. (Tr. 153, 252-253-254).

Busby grabbed for the gun, and a fight ensued. As they struggled, Appellant repeatedly tried to reengage the action on the pistol to chamber another round. (Tr. 154-155, 213). While doing so, Appellant demanded the keys to Busby's customized Yukon truck and repeatedly asked if Busby wanted to die. (Tr. 154).

Busby's neighbor heard the gunshots and called the police. (Tr. 138-139). When the police arrived, they discovered an exhausted Busby trying to pull Appellant out of his apartment. (Tr. 166, 168, 230-231). In Appellant's pockets, they found duct tape, handcuffs, and a walkie talkie. (Tr. 256). Later, police found a gun holster behind Busby's house in the area from which Appellant had come. (Tr. 191).

At trial, Appellant testified in his defense and offered a different version of the encounter. (Tr. 308-323). He claimed that Busby had sold his nephew some fake drugs. (Tr. 308). He and his nephew went to Busby's house seeking good drugs or a refund. (Tr. 308). Appellant waited at Busby's house (allegedly unarmed). (Tr. 309-310). When the victim arrived, Appellant announced his name and said he wanted talk. (Tr. 310). According to Appellant, Busby motioned for him to enter the apartment. (Tr. 311). Just as he was in the doorway, Appellant turned and saw that Busby had a gun drawn. (Tr. 311-312). Appellant reached for the gun, and the struggle followed. (Tr. 313-318, 321-323).

After the close of the evidence, instructions, and argument by counsel, the jury found appellant guilty of first degree burglary and not guilty of the other charges. (L.F. Tr. 417). Appellant was sentenced as a persistent offender to life in prison. (L.F. 45-46).

Appellant filed a timely notice of appeal. (L.F. 50).

ARGUMENT

I

The trial court did not commit plain error by offering instruction number five, the verdict director on first degree burglary. While the instruction did not include the word "unlawfully," this error did not affect the verdict in that the jury found that Appellant entered the victim's house with the intent of committing assault.

Appellant argues that the burglary instruction created reversible error by omitting the word "unlawfully" because, he claims, the omission "very likely affected the jury's verdict." (App. Br. 12). Reversal, however, is not warranted because the jury's finding that Appellant entered with the purpose of assaulting the victim showed that Appellant entered the victim's home unlawfully and that omitting the element did not affect the verdict.

Standard of Review

The standard of review in this case is plain error. To preserve claims of instructional error, Supreme Court Rule 28.03 requires both a specific objection and inclusion of the claim in the motion for new trial. While Appellant made a general objection to all the instructions (as not supported by the evidence), when the instruction at issue was offered, he affirmatively stated that he had no objection. (Tr. 279-280). Giving of the disputed instruction was also not included as a grounds for his motion for new trial. (L.F. 43-44). Rather, he raises it for the first time here on appeal. Since Appellant's claim was not preserved, it should be reviewed, if at all, for plain error only. *See* Supreme Court Rule 30.20.

Reversal under plain error review requires "a plain error affecting a substantial right that results in manifest injustice or miscarriage of justice." *State v. Williams*, 145 S.W.3d 874, 877 (Mo.App., E.D. 2004). "On a claim of plain error in an instruction, the defendant is not entitled to any presumption of prejudice." *State v. Basile*, 942 S.W.2d 342, 360 (Mo. banc 1997). The appellant "bears the burden of demonstrating that the action of the trial court was not only erroneous, but that the error so substantially impacted upon his rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected." *State v. Hornbuckle*, 769 S.W.2d 89, 92-93 (Mo. banc 1989). "Mere allegations of error and prejudice will not suffice." *State v. Isa*, 850 S.W.2d 876, 884 (Mo. banc 1993).

The Instruction at Issue

The instruction at issue in this case is instruction number five, the verdict director on first degree burglary. (App. Br. 12-13). It read as follows:

INSTRUCTION NO. 5

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

First, that on our 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).[1]

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[1] Though it was not included in the instruction, the prosecutor argued that Appellant's entry was unlawful:

> As to Count I, if you find and believe the evidence beyond a

reasonable doubt . . . [t]he defendant knowingly entered unlawfully in an inhabited structure. . .

We know he entered at that location. We know it's unlawful because Mr. Busby was trying to slam the door on his arm to keep him out. And it was possessed by Joel Busby. He lived there.

(Tr. 370-371). Appellant did not respond to this argument, argue that he was invited in, or argue that the entry was lawful.

Analysis

Instruction number five, as submitted, was erroneous. Failure to instruct in accordance with MAI-CR and the Notes On Use is error ("the error's prejudicial effect to be judicially determined"). Supreme Court Rule 28.02(f); *See also State v. Kinder*, 942 S.W.2d 313, 333 (Mo.banc 1996). For a burglary conviction, MAI-CR3d 323.52 requires that the defendant entered a structure "unlawfully." Since instruction number five omitted the word "unlawfully," it did not comply with MAI-CR3d, and thus the instruction, as submitted, was erroneous.

Instructional error, however, seldom rises to the level of plain error, even if it is clear and obvious. *State v. Wright*, 30 S.W.3d 906, 912 (Mo.App., E.D. 2000). To show plain error, the "appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict." *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

Verdict directors are no exception. Verdict directing instructions must contain each element of the offense charged. *State v. Doolittle*, 896 S.W.2d 27, 30 (Mo. banc 1995). As a general rule, it is plain error if the instructions result in the State being relieved of its burden of proof on a disputed element. *State v. White*, 92 S.W.3d 183, 192-93 (Mo.App., W.D. 2002). There is, however, no plain error, even if the verdict director omits an element, if the evidence demonstrates that the mistake would not have affected the jury's verdict. *See, e.g., State v. Busch*, 920 S.W.2d 565, 569-570 (Mo.App., E.D. 1996)(finding no plain error in omitting deliberation from instruction because it was "extremely unlikely and unreasonable" that jury found the defendant did not deliberate); *State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994)(holding that failing to include an object crime in burglary instruction was not plain error because it was not apparent that the omission had an effect on the verdict);

The instruction at issue in this case was the verdict director related to Appellant's burglary conviction. (App. Br. 12-13, L.F. 25). A charge of burglary requires proof that the entry was unlawful. § 569.160, RSMo 2000. The verdict director on burglary in the present case did not specifically include a finding that Appellant entered "unlawfully." (L.F. 25). The jury did, however, find that Appellant entered Mr. Busby's home for the purpose of assaulting him. (L.F. 25). That finding shows that the State was not relieved of its burden of proof and that omitting the word "unlawfully" did not affect the verdict.

First, the jury's finding as to Appellant's purpose for entering shows that it did not believe Appellant's version of the attack and that including "unlawfully" in the instruction would not have affected the verdict. The victim described how Appellant, fully masked and gun drawn, came at him as he came home late one night. (Tr. 145-146). The victim testified that he made it inside but that Appellant kicked the front door, pushed his arm inside, and eventually forced his way in. (Tr. 146-149). Appellant, on the other hand, testified that he was only there to talk and that Busby invited him in before Appellant turned around and saw Busby holding a gun. (Tr. 310-311). The jury, by finding that Appellant entered for the purpose of assaulting Busby, necessarily rejected Appellant's

story that he was innocently visiting just to talk with the victim. Even if the jury did not believe the victim's entire account, since they found that Appellant went into Busby's home for the purpose of committing assault, it is very unlikely that they would have found that the entry was lawful. As such, the erroneous instruction did not have an apparent affect on the verdict, and there was no plain error.

Appellant argues that the verdict director was plainly erroneous because he claims it allowed the jury to convict him even if they believed that Busby invited him to enter. (App. Br. 19). Even if that were true, there was no manifest injustice or miscarriage of justice because the jury's finding about Appellant's purpose shows that the State was not relieved of its burden of proof. Since the jury found that Appellant's true purpose was to assault Busby, not just to talk, any permission he had to enter would have been obtained through artifice. Such fraud or artifice may prove that an entry was unlawful, even where the victim gave apparent consent. *See, e.g., State v. Rollins*, 882 S.W.2d 314, 317-318 (Mo.App., E.D. 1994); *State v. Thomas*, 70 S.W.3d 496, 509 (Mo.App., E.D. 2002).

In *Thomas*, for example, the defendant went to the victim's home to rob it. Before breaking in, he decided to try knocking. When the victim answered, the defendant asked to use the telephone. The victim agreed. When she went to get the phone, the defendant attacked and strangled her to death. After his conviction for burglary he appealed, claiming that there was no proof that he entered the victim's home unlawfully . Rather, he argued, he knocked and was admitted voluntarily. The court rejected this argument. *Id.* at 508. It held that the defendant never had a valid license to enter because he gained access through artifice (he claimed to want to use the phone when he really wanted to burglarize the home). *Id.* Thus, the unlawfulness element was proved. *Id.*

The *Rollins* court similarly found that permission to enter when obtained through artifice is unlawful. In *Rollins*, the defendant convinced a young girl to let him into an apartment by claiming he needed to search for his wallet. Once inside, however, he attacked and tried to rape the girl. After conviction for burglary, he appealed, claiming there was no proof that he remained in the apartment unlawfully. The court affirmed the conviction, finding that the defendant obtained the girl's permission to enter through artifice (that is, under the guise of searching for his wallet). *Rollins*, 882 S.W.2d at 317. Thus, the court held, the defendant remained in the apartment unlawfully because he never had a valid license to enter. *Id.*

In the present case, the jury's finding that Appellant entered for the purpose of assaulting the victim shows that the State met its burden of proving that Appellant's entry was unlawful. Under the State's theory, Appellant entered unlawfully because he attacked the victim with a gun and forced his way into the apartment. (Tr. 146-149). Appellant, however, claimed he told Busby that he wanted to talk (about some inefficacious ecstacy that Busby had sold Appellant's nephew). (Tr. 311). According to Appellant, following this introduction, Busby motioned for him to enter. (Tr. 311). After hearing these two versions of the story, the jury found that Appellant's true purpose was to assault Busby – not to talk with him. (Tr. 417, L.F. 25). Thus, even if the jury

somehow believed that Appellant told the victim he just wanted to talk (and that Appellant was "invited" in), the jury, in finding that Appellant entered the with the purpose to commit assault, necessarily determined that Appellant lied about his real purpose. Presumably Busby would not have allowed Appellant to enter if he had told Busby that he wanted to attack him (as the jury found was Appellant's actual plan). As in *Thomas* and *Rollins*, any invitation Appellant received was obtained through fraud, and it was therefore unlawful. Consequently, the jury's finding that Appellant entered with the purpose of assaulting Busby shows that the State proved that Appellant entered unlawfully.

Contrary to Appellant's claim, his acquittal of first degree assault and armed criminal action does not show that the jury would have found him not guilty of burglary if the word "unlawfully" had been included. To find Appellant guilty of assault as submitted, the jury had to find that Appellant intended to kill Busby. (L.F. 26). The jury did find that Appellant was armed with a deadly weapon when he was in the victim's home. (L.F. 25, Tr. 417). And it found that he entered with the purpose of committing an assault. (L.F. 25, Tr. 417). Its acquittal on *first degree* assault and the related armed criminal action charge only means that the jury did not believe beyond a reasonable doubt that Appellant intended to kill Busby. (L.F. 26-27, Tr. 417).

As Appellant points out, it is also possible that the jury's not-guilty verdict on the assault and armed criminal action was based on a finding of self-defense. (App. Br. 18-19; L.F. 29-30). That, however, is unlikely given the jury's finding that Appellant was armed and went into Busby's house with the purpose of assaulting him. At any rate, a finding that the jury believed Busby was acting in self-defense at the time when he tried to kill Appellant would not show that they believed he acted lawfully when he entered the victim's house. Indeed, the way to read the verdicts consistently is to find that the jury believed Appellant went into Busby's house intending to assault him but that he did not complete an assault with the attempt to kill. The acquittal of first degree assault simply does not show that the jury believed Appellant's version of the story or that his entry into the victim's home was lawful.

Appellant's argument seems to rest on an assumption that there will always be plain error if the jury is not instructed on an element where that element was not proved "beyond reasonable dispute." (App. Br. 18). His formulation of the rule has some support in the language of cases from the Western and Eastern Districts:

> . . . where a verdict director effectively omits an essential element of the offense, such an instruction rises to the level of plain error if the evidence in the case fails to establish the existence of the omitted element "beyond serious dispute."

State v. Roe, 6 S.W.3d 411, 415 (Mo.App., E.D. 1999)(quoting *State v. Brokus*, 858 S.W.2d 298, 303 (Mo.App., E.D. 1993)); *State v. Harney*, 51 S.W.3d 519, 533-534

(Mo.App., W.D. 2001).[2] This analysis, however, essentially converts the plain error standard into a harmless-beyond-a-reasonable-doubt standard. *See Neder v. U.S.*, 527 U.S. 1, 18, 119 S.Ct. 1827, 1838 (1999) (holding that instructions that omit an element of a crime can be affirmed as harmless beyond a reasonable doubt if they are "supported by uncontroverted evidence")*; State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994) (finding that when a substantial issue exists regarding an element, it is impossible to say that its omission in the instruction was harmless beyond a reasonable doubt). This Court has specifically declined to adopt a rule that would find plain error in every case where a contested element is omitted. *See Doolittle*, 896 S.W.2d at 30. Indeed, the better practice in cases of plain error is to follow the current rule – an instruction is not plainly erroneous unless its effect on the verdict was apparent. Otherwise, the defendant would be granted a new trial in cases such as the present one where the omitted element did not affect the verdict or where another factual finding necessarily showed that the element was proved.

Since the jury determined that Appellant entered the victim's apartment with the intent to assault him, Appellant necessarily entered unlawfully under the circumstances. It is improbable that omitting the word "unlawfully" in the instruction affected the verdict. Rather, the jury would have convicted Appellant of burglary with or without the omitted language. There was, therefore, no plain error, and Appellant's point should be denied.

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[2] *See also, State v. White*, 92 S.W.3d 183, 192 (Mo.App., W.D. 2002); *State v. Farris*, 125 S.W.3d 382, 394 (Mo.App., W.D. 2004); *State v. Smith*, 157 S.W.3d 687, 695 (Mo.App., W.D. 2004); *State v. January*, 176 S.W.3d 187, 198 (Mo.App., W.D. 2005) (all citing *Harney*, 51 S.W.3d at 533-534).

CONCLUSION

For all the foregoing reasons, Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 3,634 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of October, 2006, to:

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RESPONDENT'S APPENDIX

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