No. 23-CM-627

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DISTRICT OF COLUMBIA COURT OF APPEALS

_____

DEREK J. MORRIS

Appellant,

v.

UNITED STATES,

Appellee

_____

Appeal from the District of Columbia Superior Court
Criminal Division, Misdemeanor Branch

_____

REPLY BRIEF FOR DEREK J. MORRIS

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INTRODUCTION

Failure to instruct on the independent factor was error that harmed Mr. Morris. Defense counsel did not waive the error. Nor did he forfeit it. Instead, his efforts alerted the prosecutor and the trial court to the fact that Mr. Morris could not be prosecuted for Unlawful Entry on public grounds if the government did not prove the existence of the independent factor.

ARGUMENT

I. Need to Instruct

A. Review

i. *Hasty*, generally.

To whom must additional proof, required by the court to narrow a statute, be put? The jury, and it must be instructed accordingly. *Hasty v. United States*, 669 A.2d 127, 132 (D.C. 1995).

ii. *Nicholson*, Unlawful Entry on Public Grounds, Independent Factor.

The court in *United States v. Nicholson*, 97 Daily Wash. L. Rptr. 1213 (July 17, 1969) *aff'd*. 263 A.2d 56 (D.C. 1970) held that the application of the Unlawful Entry statute to public and private grounds could not be the same. The statute could only be constitutionally

applied to public grounds if an independent factor, separate from the order to quit, made the defendant's presence unlawful. This construction narrowed the Unlawful Entry statute. 97 daily was. L. Rptr. at 1216.

iii. Proof of Independent Factor put to Jury

Shiel v. United States, 515 A.2d 405 (D.C. 1986) provides an example of an independent factor proved to the jury. The independent factor in *Shiel* was a decision by the Sergeant at Arms to close the Capitol Rotunda before the normal closing time. 515 A.2d at 407. The Court ruled that the validity of the order to close was a legal issue for the trial court. *Id*. at 408-09. But "the trial court properly submitted to the jury . . . issues of fact, such as the existence of a separate reason (that the building was closed) for requiring the demonstrators to leave . . . ." *Id*. at 408.

iv. *Nicholson* and *Hasty*, enter Tourist Standard.

Shiel replicated the analysis in *Nicholson*. The proposed independent factor in *Nicholson* was a law prohibiting acts, such as parading, on Capitol Grounds during congressional events without official permission. 97 Daily Wash. L. Rptr. at 1216. This law ("Grounds statute") could only serve as the independent factor for

conviction under the Unlawful Entry statute if it was constitutional.[1] The Grounds statute, not the Unlawful Entry statute, was narrowed (at *id*. at 1218-1219) by what would become known as the tourist standard (*see Markowitz v. United States*, 598 A.2d 398, 409 (D.C. 1991)). So narrowed, the Capitol Grounds statute could be applied constitutionally. 97 Daily Wash. L. Rptr. at 1218-1219. It could therefore serve as the independent factor for prosecution under the Unlawful Entry statute.

Hasty accords. The law at issue there regulated demonstrations inside Capitol Buildings ("Buildings statute"). 669 A.2d at 130. The Buildings statute had also been narrowed by the tourist standard. *Id*. The jury was not properly instructed on the tourist standard. *Id*. at 134. A properly instructed jury could have found that the defendant had not in fact violated the Buildings statute. *Id*. at 133-134. The jury could have found that his behavior was not more disruptive than that of a

[1] "In other words, the order to these defendants to leave [for purposes of prosecution under the Unlawful Entry statute] was valid only if it was based on something other than and additional to the unlawful entry statute itself . . . And the only other source of authority cited by the prosecution is the [Grounds statute]. Thus, it is the meaning and the validity of the . . . Grounds statute which are really at issue here – and the unlawful entry law adds nothing." 97 Daily Wash. L. Rptr. at 1216.

normal tourist. *Id*. Therefore, the Buildings statute could not serve as the independent factor, and the Unlawful Entry conviction could not stand. *Id*. at 135.

B. Reply

The government does not explain why the jury needs to be instructed on the government's added burden of proof for the Buildings statute but not the Unlawful Entry statute. The tourist standard is not a "gloss" on the independent factor. Gov. Br. at 20. The tourist standard and the independent factor are distinct tools to narrow different statutes. Sometimes they interplay (*see, e.g.*, *Nicholson*, *Hasty*), sometimes they don't (*see, e.g.*, *Shiel*). There is no reason why the jury should be properly instructed when it comes to the tourist standard but not the independent factor. Both are creatures of narrowing constructions.

The government stands by its theory at trial that Red Book Instruction 4's allusion to "legal right to remain" "incorporate[s]" the independent factor. Gov. Br. at 13. But whatever incorporation occurs metaphysically, the jury needs a clear instruction from the judge on what the government must prove. Under the current instructions, a jury could conclude that a defendant lost his legal right to remain when told to leave. This is the opposite of the law.

The lawyers' discussion of the independent factor at trial does not save the instructions. Those discussions were not printed and sent back with the jury. The pitfalls of the incorporation theory buttressed by lawyers' discussions are unacceptable. For example, a jury may view the independent factor as part of the good faith defense. Under this view, the burden would be on the defendant to prove the existence of an independent factor to support his good faith belief. The danger is exacerbated if the trial court articulates the rational for the independent factor as a "defense theory." *Cf.* Tr. 4/20/23 at 145.

Another example: Suppose the jurors divided on *which* independent factor had been proved but convicted because they were unanimous that *an* independent factor was proved. A conviction under these circumstances could not be upheld. *See Scarborough v. United States*, 522 A.2d 869, 873 (D.C. 1987). Instruction 4 complimented by the incorporation/lawyer-discussion theory does not guard against this danger.

In any event, the instructions the government defends do not tell the jury what it means to prove the independent factor. Adequate instructions do.[2]

II Adequate Instructions and Harm

For the independent factor to be proved, the jury must find (1) that the rule invoked in fact exists (*see, e.g.*, *Shiel*, *supra* at 2), and (2) that the defendant in fact violated the rule. *See, e.g.*, *Hasty*, *supra* at 3-4.

Applying these principles, the instructions the jury should have received based on the government's proffered independent factors are provided below. Beneath each are reasonable findings the jury could[3] have made and evidence supporting them. The plausibility of these

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[2] It might not occur to the jury to consider who has the burden of proving the independent factor, whether unanimity is required for each factor, or what exactly must be proved for an independent factor to "exist." Uncertainty that might arise in answering these questions won't show itself. No clarification from the judge will be sought. The absence of a jury note indicates little about what the jury understood. *But see* Gov. Br. at 23-24. It is like making inferences about who can hear when a speaker in a crowd says, "Raise your hand if you cannot hear me." Someone may not raise her hand, but it is because she could not hear the question, not because she could.

[3] The government (at 29) faults Mr. Morris for "speculat[ion]" and "conjecture" but these are necessary tools when considering how evidence may have played with a reasonable jury.

findings demonstrates reasonable doubt that, had the jury been properly instructed, it would still have convicted. The error harmed Mr. Morris.

A. Business Purpose

i. Instruction

You must find that the Supreme Court had a rule or policy that the defendant's presence in the clerk's office could only be lawful if it was for business purposes only. You must also find that when Mr. Morris was told to leave, he was in violation of this rule or policy.

ii. Finding

Mr. Morris was not violating this policy when he was told to leave. He was there to file a petition (Tr. 4/20/23 at 36, 38, 84) and to speak to the Clerk of the Court (*id*. at 87).

B. Police Booth Procedure

i. Instruction

You must find that the Supreme Court had a rule or policy that the defendant's presence in the clerk's office could only be lawful if he was a lawyer filing a petition. You must also find that when Mr. Morris was told to leave, he was in violation of this rule or policy.

ii. Finding

No policy existed that a person could only be in the clerk's office if he was a lawyer filing a petition. The policy was in fact that a non-lawyer could also be in the office to "'[i]nquire'" about his case (Tr. 4/19/23 at 141, 161; Tr. 4/20/23 at 89). Indeed, no reasonable jury could find the existence of this policy. Because by the government's own evidence, a non-lawyer could be in the office for business reasons that did not include filing a petition. Incidentally, he might be able to submit his

petition in the Clerk's office, as Mr. Morris had done on a previous occasion (Tr. 4/20/23 at 38).

C. Disruptive behavior

i. Instruction

You must find that the Supreme Court had a rule or policy that the defendant's presence in the clerk's office could only be lawful if he was not behaving disruptively. You must also find that when Mr. Morris was told to leave, he was in violation of this rule or policy.

ii. Finding

Mr. Morris was not disruptive. There was testimony that Mr. Morris was calm. Tr. 4/19/23 at 6. If he was rude, he was not necessarily disruptive. A properly instructed jury may have been of the view that it was not Mr. Morris who was disruptive when, after not being helped initially (*id*. at 163), and after "just be[ing] there" (*id*. at 144), five officers came on the scene (*id*. at 150). The jury could have reasoned that Mr. Morris only became disruptive *after* he was told to leave. Alternatively, there was no policy about being disruptive.[4] This was in fact a post-hoc, officer-supplied rational bootstrapped to the Unlawful Entry statute. *Cf. Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988).

III. Standard of Review

A. Invited Error

Invited error does not apply. Pre-trial, counsel brought the law into the open. He named the independent factor as "the additional

[4] *Cf. Simon v. United States*, 570 A.2d 305, 306 n.3 (D.C. 1990) (citing regulation on personal conduct within Library of Congress).

element." Tr. 4/18/23 at 7, 8, 27. He cited case law establishing the government's additional burden when prosecuting Unlawful Entry on public grounds. *Id*. at 8. He handed the case to the trial court. *Id*. He attached cases to an email sent to the judge and prosecutor. Supp. R., Defense Counsel's 4/19/23 email. His emailed instructions added to the Red Book instructions in an attempt to account for the government's added burden. *Id*. The prosecutor put forward an incorrect view of the law. Supp. R., Government's 4/19/23 email. Defense counsel acceded. Tr. 4/20/23 at 68.[5] The trial court said nothing. It is a stretch of language, if not the doctrine, to say that in these circumstances, it was defense counsel who invited error.

Most of the cases relied upon by the government highlight why the invited-error doctrine does *not* apply. *See, e.g.*, *Harrison v. United States*, 76 A.3d 826, 839-40 (D.C. 2013) (claim that juror improperly reseated waived because trial counsel "urged" court to do so); *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) (claim of failure to instruct waived where trial counsel "specifically asked the court not to

[5] Mr. Morris's opening brief referenced defense counsel's statement, "I submitted my own, but theirs is fine." Op. Br. at 15. This statement should not have been included in the brief, as it referenced the trial court's preliminary instructions. Tr. 4/18/23 at 26.

instruct . . . ."). An accession is not an urging. Defense counsel's proposed instructions contained a "specific ask" for an added instruction to account for the independent factor. The trial court had an opportunity to instruct in conformity with the law as expressed in the cases defense counsel handed and emailed it.

The government's best case for invited error is *Masika v. United States*, 263 A.3d 1070 (D.C. 2021) because there, as here, defense counsel acceded to the government's proposed course of action. 263 A.3d at 1073, 1077. The *Masika* Court nevertheless found invited error. *Id*. at 1077. But Mr. Morris submits that the initiative shown by defense counsel in his case is an important distinction. It is unfair to characterize defense counsel as inviting an error when he was the one clamoring for attention to the element; when he brought the law to everyone's attention; and when he was attempting to have the element reflected in the instructions. Defense counsel was passive in *Masika*. There, the issue was raised by the trial court. 263 A.3d at 1073. The government put forth a suggestion. *Id*. Defense counsel agreed. *Id*. *Cf. Young v. United States*, 305 A.3d 402, 429 (D.C. 2023) (issue raised by jury note, trial court proposed response, parties agreed with court's proposal). Moreover, in *Masika*, the government's proposed course of

action resulted in instructions "in line" with the law that contained "every element" of the crime. 263 A.3d at 1077 n.7. The same cannot be said for the instructions submitted to the jury that convicted Mr. Morris. Mr. Morris acknowledges that the independent factor is not an element of Unlawful Entry. *Hasty*, 669 A.2d at 131. But it is an element necessary for conviction. Failure to instruct was not in line with the law set forth in *Hasty*.

Even if the invited error doctrine applied, the exception to the doctrine which protected the appellate claim in *White v. United States*, 729 A.2d 330 (D.C. 1999) (overruled on other grounds by *Berroa v. United States*, 763 A.2d 93, 95 (D.C. 2000)) should also protect Mr. Morris' appellate claim. In *White*, Mr. White and his co-defendant were indicted for possession of cocaine with intent to distribute while armed and other gun-related charges. 729 A.2d at 331. The trial court granted Mr. White's motion for judgment of acquittal on possession with intent to distribute while armed. *Id*. The lesser included offense, intent to distribute, remained along with the other gun-related charges. *Id*.

The prosecutor asked if the drug charge would be tried by the jury. *Id*. Mr. White's defense counsel "stated his preference to have

the jury decide, but opined that the law permitted the court to take the issue away from the jury." *Id.* The trial court subsequently withdrew the drug charge from the jury and convicted Mr. White of this charge. *Id*. at 331-32.

On appeal, Mr. White correctly argued that taking the charge from the jury was error. *Id*. at 332. The government claimed waiver, but the Court disagreed. *Id*. at 332-33. The Court noted that defense counsel had expressed a preference for a jury trial, but all parties were mistakenly of the mind that the course of action was lawful. *Id*. at 332-33. In these circumstances, counsel on appeal was allowed to seek correction of the error. *Id*. at 333. The Court stated that in "rare cases where a mistaken legal ruling by the trial court is precipitated by an erroneous concession by a party, the party is permitted to have the error corrected on appeal." *Id*. *See also District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 183, 185 (D.C. 1993) (noting that doctrine of invited error not "unbending" and reversing trial court's decision though it was "almost certainly precipitated" by appellant's "improvident concession").

Mr. Morris' trial counsel made an "improvident concession" after putting up more of a fight for the right outcome than did Mr.

White's trial counsel. If invited error applies, Mr. Morris' case is the perfect candidate for the exception.

B. Plain Error Not Apply

The government argues that Mr. Morris's claim was forfeited. For the reasons error was not invited, it was also preserved. In *Hasty*, defense counsel's proposed jury instruction did not adequately convey the tourist standard. 669 A.2d at 134. The Court nevertheless found the error preserved. Its reasons included trial counsel's imperfect, proposed instructions and his reference to *Nicholson*. These facts contributed to a "sufficient record to 'direct the judge's attention to the correct rule of law.'" *Id*. (quoting *Whitaker v. United States*, 617 A.2d 499, 508 (D.C. 1992). The same should be said of the record in this case. If the Court disagrees, Mr. Morris asks that plain error review be withheld, for the reasons stated in his opening brief (at 26 – 31). But if the Court does review for plain error, Mr. Morris still prevails. The error was plain.

C. Plain Error

i. Error and Plainness

The government conceded that the independent factor applied to Unlawful Entry cases in the Supreme Court clerk's office. *Cf. Hasty*,

669 A.2d at 135 (analyzing case based on government's concession that the Capitol Rotunda was a public forum). This concession,[6] plus *Hasty*, gets Mr. Morris past the first and second prong.

ii. Effect on Substantial Rights

Was there a "reasonable probability that but for the error the factfinder would have had a reasonable doubt respecting guilt"? *Malloy v. United States*, 186 A.3d 802, 816-17 (D.C. 2018). Mr. Morris submits that there was such a probability, for the same reasons stated in the discussion on harm in his opening brief (at 23-26) and *supra* at 7-8.

iii. Integrity of Judicial Proceedings

"'[W]here an essential element of the offense is ... contested and has not been found by the jury, [a] wrongful conviction necessarily affects the integrity of this proceeding and impugns the public

[6] The government's reference (at 27) to the availability of alternative means of expression is only relevant because it highlights the wisdom of its concession. On private property, anything goes. The First Amendment does not apply. There is no need to provide alternative means of communication. On public property classed as non-public forum, anything does not go. Regulations affecting speech must be reasonable and viewpoint neutral. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-679 (1992). For this reason, as the government conceded at trial, the Unlawful Entry statute cannot apply to the Supreme Clerk's office as it would on private grounds. The government must prove the independent factor for Unlawful Entry in the Supreme Court Clerk's office.

reputation of judicial proceedings in general.'" *Malloy*, 186 A.3d at 822 (quoting *Perry v. United States*, 36 A.3d 799, 822 (D.C. 2011). The same should be true where an essential element of conviction has been omitted from instructions. It reflects badly on the judiciary when some juries are instructed on an essential element of conviction and some are not. *See* Op. Br. at 30. The rules should be the same for everyone.

CONCLUSION

WHEREFORE, for the reasons set forth in Mr. Morris' opening brief and this reply brief, Mr. Morris asks that his conviction be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief for Appellant were served electronically on the office of counsel for Appellee, Chrisellen Kolb, Esquire, Appellate Division, U.S. Attorney's Office, this 23rd day of December, 2024.

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