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# State v. Craven Appellant's Reply Brief Dckt. 45215

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| **STATE OF IDAHO,** | ) | |
| | ) | |
| **Plaintiff-Respondent,** | ) | **NO. 45215** |
| | ) | |
| **v.** | ) | **ADA COUNTY** |
| | ) | **NO. CR-FE-2015-17301** |
| **JOHN ANDREW CRAVEN, SR.,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

**REPLY BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**HONORABLE NANCY A. BASKIN**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Mr. Craven appeals from his judgment of conviction for failure to register as a sex offender, challenging as fundamental error the district court's instruction to the jury on the elements of the offense, which omitted the knowledge requirement as set forth in Idaho Code § 18-8311. He submits this Reply Brief to respond to the State's legal argument.

### Statement of Facts and Course of Proceedings

Mr. Craven included a statement of facts and course of proceedings in his Appellant's Brief, which he relies on and incorporates herein. (Appellant's Br., pp.1-3.)

## ISSUE

Did the district court commit fundamental error when it failed to instruct the jury regarding the knowledge element of the offense?

## ARGUMENT

### The District Court Committed Fundamental Error When It Failed To Instruct The Jury Regarding The Knowledge Element Of The Offense

#### A. Introduction

In his Appellant's Brief, Mr. Craven argued the district court's elements instruction lowered the State's burden of proof, and violated Mr. Craven's constitutional right to due process, because the jury was not instructed regarding the knowledge element of the offense, as specifically set forth at Idaho Code § 18-8311(1). (Appellant's Br., pp.5-8.) In its Respondent's Brief, the State concedes "the instructions erroneously omitted the 'knowing' element" and "instructional errors relieving the state of its burden to prove an element present a constitutional issue." (Respondent's Br., p.9.) Despite these concessions, the State contends Mr. Craven cannot raise this issue on appeal because he invited the error by not objecting to the elements instruction in the district court. (Respondent's Br., pp.6-8.) In the same vein, the State argues the issue is procedurally barred because Mr. Craven did not object to the elements instruction during the jury instruction conference. (Respondent's Br., pp.8-9.) The State is incorrect on both fronts, and this Court can review the issue for fundamental error. As set forth in the Appellant's Brief, Mr. Craven has shown fundamental error in the elements instruction (Instruction No. 13). (Appellant's Br., pp.5-8.)

#### B. Mr. Craven Is Not Barred From Challenging The Elements Instruction On Appeal Under The Doctrine Of Invited Error

The State argues Mr. Craven invited the error in the elements instruction by not objecting to the instruction in the district court, and later requesting an additional instruction in response to a question from the jury reaffirming the elements instruction. (Respondent's Br., pp.6-8.) Mr. Craven did not invite the district court's error. As the Idaho Supreme Court explained in

*State v. Blake*, "[t]he purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal." 133 Idaho 237, 240 (1999). By contrast, "an appellant who did not encourage the district court to offer the specific instructions given, but merely failed to object, is not precluded by the invited error doctrine from raising an issue on appeal." *State v. Lankford*, 162 Idaho 477, 485 (2017) (citation omitted). Mr. Craven neither played an important role nor prompted the district court to give the elements instruction he now challenges on appeal. Instead, he merely failed to object to the instruction. He can thus challenge the instruction under fundamental error review. *See id.* (reviewing claim for fundamental error).

Mr. Craven submitted seven proposed jury instructions to the district court. (R., pp.113-14.) He requested that the district court give the pattern instructions on reasonable doubt, determining facts from the evidence and disregarding non-evidence, instructions and exhibits, evidence of other crimes, union of act and intent, out-of-court statements by the defendant, and willful defined. (R., p.113.) The State submitted proposed jury instructions to the district court, specifically requesting an elements instruction. (R., pp.117-21.) The elements instruction the State proposed was the same in all material respects as the elements instruction the district court gave to the jury. (R., pp.119, 167.) It is clear from the record that it was the State, not Mr. Craven, who proposed the elements instruction that was ultimately given.

The State faults Mr. Craven for failing to object to the elements instruction at the jury instruction conference, but a defendant's failure to object to a jury instruction does not mean he invited an instructional error. In *Lankford*, the Idaho Supreme Court held Mr. Lankford's claim was not barred by invited error where "there [was] no record of explicit suggestion, encouragement or acquiescence by Lankford," noting "failure to object is not enough to invoke

the invited error doctrine." 162 Idaho at 485; *see also State v. Adamcik*, 152 Idaho 445, 477 (2012) (holding a defendant is not precluded by the invited error doctrine from challenging a jury instruction on appeal where he did not encourage the trial court to offer the specific instruction given, but merely failed to object). Here, it is clear from the record that the district court was providing the district court's proposed jury instructions to the parties at the jury instruction conference when it said "[t]he Court is providing the court's proposed instructions." (Tr., p.358, Ls.16-18.) Defense counsel stated he had "no objections to the instructions as proposed," but did not encourage the district court to offer the elements instruction.

The State also asserts Mr. Craven somehow invited the error in the elements instruction when, in response to a question from the jury during deliberations, he "played an important role in prompting the court to give another instruction reaffirming the jury instructions previously given." (Respondent's Br., p.7 (quotation marks omitted).) The problem with the State's argument is that Mr. Craven is not objecting to the instruction the district court gave to the jury in response to the jury's question. Instead, he is objecting to an instruction given to the jury prior to its deliberations. The fact that the district court reaffirmed the elements instruction to the jury during deliberations in response to an unrelated question is irrelevant. Moreover, just as with the original instructions, Mr. Craven did not propose the district court's response to the jury's question, but simply failed to object to the district court's proposal.

The jury asked a question regarding the legal definition of residence and mailing address. (Tr., p.425, Ls.6-13.) The district court proposed a response to this question, stating:

> The court's proposed response to this question is: "For purposes of this case 'residence' means the offender's present place of abode. The term 'mailing address' is not defined by the statute. Terms which are of common usage and are sufficiently generally understood need not be further defined by the court. The elements you must find in this case are set forth by the jury instructions previously provided by the court.

(Tr., p.425, Ls.14-22.) Defense counsel concurred in the district court's proposed answer, but he did not encourage the district court to offer the specific instruction. Thus, even if Mr. Craven was challenging this instruction as opposed to Instruction No. 13 (which he is clearly not), it would be reviewable by this Court for fundamental error.

C. Mr. Craven Is Not Barred From Challenging the Elements Instruction On Appeal Because He Did Not Object During The Jury Instruction Conference

The State argues that in light of Mr. Craven's failure to object to the elements instruction at the jury instruction conference, this Court cannot review the error on appeal under Idaho Criminal Rule 30(b)(4). (Respondent's Br., p.8.) This argument must be rejected as Rule 30(b)(4) does not prevent an appellate court from reviewing an erroneous jury instruction for fundamental error. *See State v. Hall*, 161 Idaho 413, 422 (2016) (refusing to review an instructional error as preserved error under Rule 30(b) due to a failure to object at the jury instruction conference, but stating "[t]he issue can . . . be raised as fundamental error").

D. The District Court Committed Fundamental Error By Failing To Instruct The Jury Regarding The Knowledge Element Of The Offense

The State asserts Mr. Craven has failed to meet any of the three prongs of fundamental error review. (Respondent's Br., pp.9-13.) With respect to the first prong, the State claims Mr. Craven cannot show the district court's instructional error violated his unwaived constitutional right to due process because Mr. Craven "waived any claim of alleged error in the instructions" when he failed to object to the instructions in the district court. (Respondent's Br., p.9.) This is preposterous. Surely Mr. Craven did not waive his constitutional right to due process when he failed to object to the jury instructions. The State cites no authority for its argument, and there is none. There is a difference between waiving an objection to a jury

instruction, and thus waiving preserved error review, and waiving a constitutional right. The State properly acknowledges that "instructional errors relieving the state of its burden to prove an element [of the offense] present a constitutional issue." (Respondent's Br., p.9.) Mr. Craven did not waive his constitutional right to a properly instructed jury, and thus meets the first prong of *State v. Perry*, 150 Idaho 209, 226 (2010).

With respect to the second prong, the State claims "the purported error is not clear" because "there are at least two plain tactical reasons not to object to the elements instruction as written." (Respondent's Br., p.9.) According to the State, Mr. Craven had a tactical reason not to object because he could not have presented his lack of knowledge defense to the jury and his "state of mind was irrelevant to his own theory of the case below." (Respondent's Br., pp.10-11.) The State is incorrect. As an initial matter, it is unclear why a defendant would ever make the tactical decision to lower the State's burden of proof by failing to have the jury properly instructed regarding a necessary element of an offense. Moreover, the State's argument does not make sense.

In order to prove Mr. Craven was subject to criminal penalties for violating the registration requirement set forth Idaho Code § 18-8309(1), the State had to prove his failure to notify the sheriff of the change in his address was knowing. *See* I.C. § 18-8311(1) ("An offender subject to registration who *knowingly* fails to register, verify his address, or provide any information or notice as required by this chapter shall be guilty of a felony . . . .") (emphasis added). The word "knowingly" is not mere surplusage. *See Sweitzer v. Dean*, 118 Idaho 568, 572 (1990) ("The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein."). Instead, it defines the knowledge element of the offense. Thus, section 18-8311(1) does not make it a crime for an offender subject to registration

to simply fail to provide any information or notice as required; instead, it makes it a crime for an offender subject to registration to *knowingly* fail to provide any information or notice as required. The failure to object to the erroneous elements instruction could not have been a tactical decision on the part of defense counsel, as there was no possible benefit to Mr. Craven in failing to have an improperly instructed jury, especially considering he specifically contested that he knew he had to notify the sheriff when he moved from his room inside the hotel to the parking lot. (Tr., p.306, L.17 – p.309, L.13, Tr., p.313, Ls.17-25.)

With respect to the third prong, the State argues "there is no reason to think the inclusion of a knowledge element would have helped Craven below—it would have been irrelevant at best, and self-defeating at worst, for Craven to shoehorn a state-of-mind argument into his theory of the case." (Respondent's Br., p.12.) But this is precisely the point. Section 18-8311(1) has a state of mind requirement—it requires the offender's failure to provide any information or notice as required to be knowing in order for criminal liability to attach. Had the jury been properly instructed regarding the knowledge element of the offense, there is a reasonable possibility it would have found Mr. Craven "not guilty" in light of the evidence that he did not know he had to notify the sheriff when he moved from inside the motel to the parking lot. Mr. Craven testified he "was doing what [he] thought was right." (Tr., p.310, Ls.13-14.) The district court's failure to instruct the jury regarding the knowledge of the element of the offense was fundamental error and Mr. Craven is entitled to relief from this Court.

## CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant's Brief, Mr. Craven respectfully requests that the Court vacate his conviction and remand this case to the district court for further proceedings.

DATED this 16th day of July, 2018.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, electronically as follows:

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/s/ Evan A. Smith
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AWR/eas