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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47276-2019
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY
v.)	NO. CR42-16-6932
)	
ESIQUIO ANTHONY)	APPELLANT'S REPLY BRIEF
ALVAREZ,)	
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

HONORABLE BENJAMIN J. CLUFF
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Esiquio A. Alvarez appeals from the district court's judgment of conviction for robbery, burglary, and aggravated assault after a jury trial. He raises one fundamental error in the district court's failure to instruct the jury on the assault element of aggravated assault. The State responds and does not dispute that the omission of the assault element instruction violated Mr. Alvarez's right to due process. The State argues, however, the error is not clear from the record and was harmless. Mr. Alvarez replies and contends he has met the fundamental error standard.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were articulated in Mr. Alvarez's Appellant's Brief. (App. Br., pp.1-6.) They are not repeated here, but are incorporated by reference.

ISSUE

Did the district court commit fundamental error by failing to instruct the jury on the assault element of aggravated assault?

ARGUMENT

The District Court Committed Fundamental Error By Failing To Instruct The Jury On The Assault Element Of Aggravated Assault

On appeal, Mr. Alvarez argued the district court violated his right to due process by failing to instruct the jury on the essential element of assault for the charge of aggravated assault. (App. Br., pp.9–11.) He also argued this error is clear from the record, and it actually affected the trial’s outcome on that charge. (App. Br., pp.11–15.) The State responds and does not contest the district court’s instructional error. (Resp. Br., pp.8–9.) The State recognizes a criminal defendant has a due process right to a proper jury instruction on the elements of the charged offense. (Resp. Br., p.8.) That did not happen here. (Resp. Br., p.8; *see also* App. Br., pp.9–11.) Despite this constitutional violation, the State submits the error is not clear from the record. (Resp. Br., pp.9–10.) The State also submits the error in omitting an essential element of the offense was harmless. (Resp. Br. pp.10–12.) Mr. Alvarez takes each argument in turn.

First, this error is clear, without the need for additional facts outside the appellate record. The State asserts the error is not clear because counsel’s failure to object could have been strategic. (Resp. Br., pp.9–10.) Specifically, the State contends Mr. Alvarez’s counsel chose to pursue the defense that Ms. Jimenez staged the alleged crimes and, in doing so, gave up any intention to have correct jury instructions. (Resp. Br., pp.9–10.) Yet trial counsel can have more than one trial strategy. Trial counsel’s focus on an alibi defense, for example, does not mean counsel gives up all other objectives to ensure a fair trial, such as an impartial jury or proper jury instructions. To be sure, the record may show trial counsel strategically decided not to raise certain issues, such as failing to object to the admission of evidence, but that does not mean, in and of itself, that one strategy negates all others. Here, Mr. Alvarez’s counsel’s primary position was that Ms. Jimenez fabricated the alleged incident, but Mr. Alvarez’s counsel also took the

position that neither Ms. Jimenez nor E.J. was credible. (Tr. Vol. I, p.159, L.5–p.164, L.8 (Mr. Alvarez’s opening statement); Tr. Vol. II, p.15, L.5–p.19, L.25 (Mr. Alvarez’s cross-examination of E.J.); Tr. Vol. II, p.49, L.8–p.63, L.22 (Mr. Alvarez’s closing argument).) A challenge to Ms. Jimenez’s and E.J.’s credibility means the jury should not believe some or all of their testimony on the alleged aggravated assault. This in turn challenges the State’s evidence on the elements of the offense. In light of these dual strategies, there was no strategic or tactical reason for Mr. Alvarez’s counsel not to object to the district court’s instructions. Put another way, an improper jury instruction imparted no benefit or advantage to Mr. Alvarez’s defense.

Along the same lines, Mr. Alvarez disputes the State’s claim that his counsel’s response to the jury’s question supports a strategy to have incorrect instructions given to the jury. (Resp. Br., p.10.) The State takes Mr. Alvarez’s statement “I didn’t think that that was going to be an issue in this case” out of context. (Tr. Vol. II, p.74, Ls.5–6; Resp. Br., p.10.) Mr. Alvarez was *not* stating he did not think the assault elements were going to be an issue in the case; he was stating he did not think intent would be an issue. He stated in full:

Your Honor, I’ve been thinking about that. *I don’t think that they’re understanding the element of intent.* I’m almost wondering if we should add the standard intent. *I didn’t think that that was going to be an issue in this case* but maybe it is the standard that every crime in the State of Idaho requires that a person act with intent. I guess at this point I’d be requesting that. Like I said, I didn’t know that that was going to be an issue, but I think that they’re not grasping that concept right now.

(Tr. Vol. II, p.74, Ls.2–10 (emphasis added).) The State disagreed that the jury’s question was about intent and asserted the jury’s question was factual: whether Mr. Alvarez pointed the gun at E.J. or E.J. was merely in the bedroom with the gun. (Tr. Vol. II, p.74, Ls.13–18.) On this matter, neither party was wholly correct. The jury’s question pertained to multiple elements of assault: the actus reus of the threat, the intent to commit the threat, and the well-founded fear of

imminent violence. All of these elements were at issue in the jury's question. As such, Mr. Alvarez's counsel's response does not demonstrate a tactical decision to forgo the proper jury instructions and proceed solely on the "fabrication" defense. His response indicates he believed (1) the jury was already instructed on the elements of assault and an additional "union of act and intent" instruction might make it more clear for the jury or (2) an assault elements instruction was not necessary to properly instruct the jury. Neither belief establishes a trial tactic or strategy.

Second, the error actually affected the outcome of the jury's verdict for aggravated assault. The State claims the missing elements instruction did not affect the outcome because the jury believed Ms. Jimenez's and E.J.'s testimony. (Resp. Br., pp.10–12.) The State's claim is highly suspect for two reasons. First, the jury could not have believed both Ms. Jimenez and E.J. to find Mr. Alvarez guilty of aggravated assault. To find Mr. Alvarez committed the assault against E.J., the jury had to disbelieve him. E.J. testified that he was hiding under a blanket during the encounter in the bedroom. (Tr. Vol. II, p.9, Ls.21–22.) He never testified that Mr. Alvarez pointed a gun at him. (See Tr. Vol. II, p.6, L.24–p.21, L.17.) The jury would have had to discredit him and believe Ms. Jimenez to find that the State proved aggravated assault. The jury simply could not have believed both. Second, if the jury had no doubts about Ms. Jimenez's and E.J.'s testimony, the jury would not have asked a pointed question about the sufficiency of the evidence for assault. The jury's question indicates some or even all of the jurors believed E.J. and doubted Ms. Jimenez's recollection of the alleged assault. *Cf. State v. Thomas*, 157 Idaho 916, 342 P.3d 628, 631 (2015) (considering jury's question and its implications to hold preserved error not harmless). If the jury was properly instructed on the elements, a rational jury would not have found Mr. Alvarez guilty of aggravated assault.

Finally, Mr. Alvarez disputes the State's assertion that he incorrectly relied on a pre-*Miller* test for harmless error. (Resp. Br., p.12.) As stated in his Appellant's Brief, Mr. Alvarez recognizes *Miller*'s standard of whether the error "actually affected the outcome" controls. *State v. Miller*, 165 Idaho 115, 443 P.3d 129, 134 (2019). (See App. Br., pp.13–15.) However, *Miller* did not expressly hold that it also clarified the separate standard for review of erroneous jury instructions. 443 P.3d at 133–34; see also *State v. Perry*, 150 Idaho 209, 223 (2010) (discussing review for instructional error). Mr. Alvarez submits it is not improper to determine an instructional error is harmless "where the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element." *Perry*, 150 Idaho at 224; see also *State v. Medina*, 165 Idaho 501, 447 P.3d 949, 958 (2019) (reciting standard). An error in the elements instruction does not actually affect the outcome if the evidence for that element is overwhelming and uncontroverted. That is because, even with the correct instruction, the jury still would have found the defendant guilty due to the more-than-sufficient evidence. These standards—"actually affected the outcome" and "overwhelming and uncontroverted"—can, and should, be applied together on review of an unpreserved instructional error. As argued in his Appellant's Brief, the omitted assault element instruction for aggravated assault actually affected the jury's verdict on that offense and, therefore, this error was not harmless. (App. Br., pp.13–15.)

CONCLUSION

Mr. Alvarez respectfully requests this Court vacate his judgment of conviction for aggravated assault and remand this case to the district court for a new trial on this offense.

DATED this 1st day of April, 2020.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2020, I caused a true and correct copy of the foregoing APPELLANT’S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JCS/eas