No. 22-CM-795

DISTRICT OF COLUMBIA COURT OF APPEALS

EARL A. GLOSSER

Appellant,

v.

UNITED STATES,

Appellee

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

REPLY BRIEF FOR EARL A. GLOSSER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The government concludes that the point of law for which Mr. Glosser argues is "arbitrary." Gov. Br. at 34. It is not. Mr. Glosser's argument is grounded in the principle that a defendant must "know the facts that make his conduct fit the definition of the offense . . . ." *Elonis v. United States*, 575 U.S. 723, 735 (2015) (internal quotation marks and citations omitted). His argument is rooted in principles of notice, fairness and blameworthiness.

I Elements

A. Government's Interpretation of Trial Court's Findings

The government agrees with Mr. Glosser's reading (Op. Br. at 26) of the trial court's findings. The trial court concluded that knowledge of the area is not an element. It is enough to "tell the defendant[ ] to leave . . . ." Tr. 10/13/22 at 7. The trial court completed this sentence by stating "particularly where the context aids a defendant's understanding." *Id*. at 7-8. But this "understanding" does not refer to knowledge of the area. Instead, as the government reads the findings (at 32), "understanding" refers to knowledge that the person is "'remaining on property against the will of the lawful occupant.'" *Id*. at 32 (quoting Tr. 10/13/22 at 8-9).

The government's position is clarified further. It reads the trial court (at 34) has having "apprehended" a distinction between entering and remaining cases. The trial court, according to the government, recognized that knowledge of the area is "especially" relevant in entering cases (Gov. Br. at 33), but "less relevant" in remaining cases (*id*. at 35). But Mr. Glosser's view is that knowledge of the area either is or is not an element. *Mens rea* cannot be an "especially" relevant element in one case, a "more relevant" element in another (*id* at 35, n.14), and a "less relevant" element in a third. So, though it objects (at 31, 33) to Mr. Glosser's word choice, the government agrees with Mr. Glosser's reading of the trial court's findings. As far as the elements of Unlawful Entry go, the trial court concluded that knowledge of the area is "'irrelevant'" (*id*. (quoting Op. Br. at 26)). The government defends this conclusion.

B. Government's Authority

The government cites no case in which the defendant could not have had actual or imputed knowledge of the area from which he was told to leave but was nevertheless convicted of Unlawful Entry. The government leads (at 26) with *District of Columbia v. Murphy*, 631 A.2d 34 (D.C. 1993). This case did not sustain a conviction for

Unlawful Entry.[1] The court would not have had occasion to address whether knowledge of the area is an element of the crime. The plaintiff was not told to leave an open, unmarked area. *Id*. at 36. He was told to leave an apartment. *Id*.

The government (at 27) follows *Murphy* with a footnote from *Darab v. United States*, 623 A.2d 127 (D.C. 1993). The area from which the defendants in *Darab* were told to leave was not an open area but a mosque. *Id*. at 131. Furthermore, the instruction to leave appears to have been accompanied by a reading of the Unlawful Entry statute. *Id*. at 131 & n.14. The defendants knew they were burdening a property right to a defined area. The government cites *Rahman v. United States*, 208 A.3d 734 (D.C. 2019), but this remaining case occurred at a McDonalds. 208 A.3d at 737-38. *Murphy*, *Darab*, and *Rahman* join *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013) (Gov. Br., *passim*), *Woll v. United States*, 570 A.2d 819 (D.C. 1990) (Gov. Br. at 35-36), and *Smith v. United States*, 445 A.2d 961) (Gov. Br. at 36) in the long

[1] It was a civil suit against the District of Columbia seeking damages for false arrest. 631 A.2d at 34. The District defended on the grounds that the police had probable cause to arrest the plaintiff for Unlawful Entry. *Id*. at 37. In addressing whether there was probable cause, the court recited the elements of Unlawful Entry. *Id*. at 37, n.6.

list of cases (*see* Op. Br. at 26-27) cited by the government in which the defendant at least should have known the area from which he was told to leave.[2] *Acc'd Ortberg*, 81 A.3d at 308, n.6 & 7.

The list is important. It suggests the traditional understanding that someone convicted of Unlawful Entry should have reason to know the area forbidden to him and how to leave it. *See Odumn v. United States*, 227 A.3d 1099, 1102 (D.C. 2020) (rebuttable presumption that the legislature has not intended innovation upon common law unexpressed by statute). It shows that the basic if latent element for which Mr. Glosser argues would not upset this court's Unlawful Entry

[2] In its brief to the trial court on the elements, the government (at R. 272) led with *O'Brien v. United States*, 444 A.2d 946 (D.C. 1982) and *O'Brien's* recitation of the elements. On appeal, the government (at 37) dumps *O'Brien*, which is now "inapposite." But the facts of *O'Brien* support Mr. Glosser's argument in that they show that knowledge of the area can be inferred or imputed from boundary markers or officer communication. With *O'Brien* and other cases, the conclusion reached by the Model Penal Code on the need for and forms of notice is reflected in this Court's case law. Moreover, if requisite notice can come from officer communication, then misleading officer communications can negate adequate notice and a *mens rea* requirement. Here, the officers' reference to the curfew, combined with absence of physical markings, prevents a finding that Mr. Glosser knew or should have known that his presence from a particular area was unwanted.

jurisprudence.[3] Requiring some knowledge of the area would not, in the vast majority of cases, make it more difficult for the government to prosecute Unlawful Entry cases.

II Sufficiency of Evidence

Alternatively, the government argues that even if knowledge of the area was required, there was sufficient evidence to find this element beyond a reasonable doubt. Gov. Br. at 38-39. The government supports this claim by citing warning announcements made from the

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[3] The cases cited by the government bring to the fore a due process concern regarding the construction of the Unlawful Entry statute.

> "[A]lthough clarity [of a criminal statute] at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . , due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."

United States v. Lanier, 520 U.S. 259, 266 (1997) (citations and internal quotation marks omitted). The traditional application of the Unlawful Entry statute has been discussed above. The trial court's conclusion, defended by the government, was "novel." In light of the history of the Unlawful Entry statute, the "common mind" (*McBoyle v. United States*, 283 U.S. 25, 27 (1931) would rightfully not expect that a man could be convicted of Unlawful Entry without knowing the area he occupied and where to go to unburden the property interest. It cannot fairly be said that the statue or any prior decision "fairly disclosed" that a person could be convicted of Unlawful Entry for remaining in an open, unmarked area.

Ford Explorer ("Explorer Announcements") (*id*. at 39-42), "officer[ ] . . . admonish[ments] . . . to leave" (*id*. at 44) and additional circumstances (*id*. at 43). Mr. Glosser addresses these points.

A. Explorer Announcements

The government (at 42, n.16) characterizes the trial court's statement that Mr. Glosser "likely . . . heard" (Tr. 10/13/22 at 10) announcements from the Explorer as a "passing" comment. This gives the impression that the court did not address the factual question of whether Mr. Glosser heard the Explorer announcements. The government would presumably describe the trial court's comments in *Cave v. United States*, 75 A.3d 145, 146-47 (D.C. 2013)[4] the same way. But the outcome in *Cave* not the outcome for which the government argues here. The government does not confront *Cave*. The government thinks Mr. Glosser would only be entitled to a remand for a determination of whether Mr. Glosser heard the warnings. Gov. Br. 42,

[4] *See Cave v. United States*, 75 A.3d 145, 146-147 (D.C. 2013) ("[Mr. Cave's] testimony leads me to conclude that he did in fact resist the police officer. How it happened afterwards, who struck whom, whether there was flailing of the arms and legs and in what order is something I'll never know . . . but from Mr. Cave's own testimony . . . I am required to find him guilty . . . and that is my finding."

n.16. But in *Cave*, the Court said, "[t]here is no basis for remanding the record for findings the trial court has already made." 75 A.3d at 147. The trial court here made a finding of fact. It was only likely, not beyond a reasonable doubt, that Mr. Glosser heard the Explorer announcements. No remand is necessary.

B. Officer Admonishments

The government states that individual officers repeatedly admonished appellants to leave, but downplays the fact that these admonishments informed Mr. Glosser that his presence was unwanted because of a curfew. Gov. Br. at 44-45. Any analysis of whether the evidence was sufficient to show that Mr. Glosser knew the area from which he was told to leave must begin with the officers' misdirection. No reasonable fact finder could find that Mr. Glosser was aware of the particular area he was told to leave when the officers' message was that his presence was objectionable throughout the District because of the time of day.[5]

[5] In *Wicks v. United States*, 226 A.3d 743, 748 (D.C. 2020), the Court noted that the officer in that case "did not testify that he had a reliable, personal basis of knowledge that the sidewalk belonged to the Washington Nationals." Mr. Glosser notes here that officers were not familiar with Capitol Grounds. *See* Tr. 10/5/22 at 114 (Kyles) ("I didn't have a tape measure, but close enough."); Tr. 10/6/22 at 86 (Bonilla).

The situation was further confused by a different form of communication – the closing line. *See* Op. Br. Appendix, C. If the police were directing Mr. Glosser to leave the area by going to Third Street, that message was significantly confused by placing a line of eastward facing officers between the protesters and Third Street. Gov't. Ex. 302 at 19:21:40 – 19:21:46 (Quiles). Officers had to be told to let the protesters through. *Id*. Furthermore, protesters outside of area 2 were on Capitol Grounds but not surrounded by police. Op. Br. 16-17. These circumstances, combined with the officers' misdirection, prevent any reasonable trier of fact from reaching near certitude that Mr. Glosser had actual or imputed knowledge of the area from which he was told to leave.

C. Additional Circumstances

The government on appeal wants Pennsylvania Avenue to be viewed strictly as Pennsylvania Parking Lot. Gov. Br. at 43. But below, the government wanted the trial court to view the area as a road. To show that Mr. Glosser lacked authority to remain (R. 248), the government asked the trial court to take judicial notice of a statute entitled "Obstruction of roads" (R. 258). The government does not consider that describing the area as a "block" is a strange way to talk

about a parking lot. Gov. Br. at 6 ("[t]he block extends northwest to 3rd Street . . . and is used as a parking lot . . . ."). The government ignores testimony of its own witness that the area had characteristics of both a road and a parking lot. Tr. 10/4/22 at 35-36 (Gutierrez). Furthermore, another government witness viewed the area as part of an extending street. That is why he expressed his belief that he could have "kept going," moving protesters past Third Street, all the way "to 16th street." Tr. 10/5/22 at 129 (Kyles).

The 100 block of Pennsylvania Avenue is elongated, like a street. Malimon Ex. 5. It stretches a significant distance. *Id*. Mr. Glosser was exercising a constitutional right on an area with attributes of a public street that stretched into the distance. He was not in an ordinary parking lot from which knowledge of the area could be imputed. Police lines formed around him that bore no relation to Capitol Grounds. There was not sufficient notice of the area. *See* Tr. 10/6/23 at 29 (Quiles) ("[T]here has to be . . . some orders and leave an open line, a clear and decisive open line . . . they will make money.") *See also id*. at 18-19 ("20 people will leave, and probably from those 20, half of them will just turn around and come back in . . . so we were not doing much progress.").

In addition to ignoring the area's attributes of a street, the government ignores that: Mr. Glosser moved from area 1 to area 2 when he knew where the police wanted him to go and saw an unimpeded exit (Op. Br. 13); he assured the police that he would not return to area 1 (Op. Br. at 15); he expressed willingness to leave with further guidance (Op. Br. at 16) ("I'll wait for the shields to push me out, I guess."); and Mr. Glosser's confusion (Op. Br. at 17) ("what's the difference between that sidewalk and here? . . . What is going on . . . what have I done?"). Given these circumstances, no trier of fact could find beyond a reasonable doubt that Mr. Glosser should have had knowledge of the area from which he was told to leave.[6]

CONCLUSION

For the reasons stated in this Reply Brief and the Opening Brief, Mr. Glosser asks the Court to vacate his conviction.

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[6] The government (at 44-45) suggests that in claiming that the police misdirected him, Mr. Glosser is suggesting that the police should have told him to stay. This is a strawman and a false choice. Mr. Glosser instead is suggesting that to be exposed to the crime of Unlawful Entry, a crime against property, he needed notice of the area he occupied, and where he could go, so he would not be face exposure to an Unlawful Entry conviction.

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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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, and Richard Goldberg, Esq., counsel for Ms. Malimon (22-CM-0812) this 9th day of January, 2024.

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