

NO. 36686-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JACOB RIVERA,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 07-1-00119-1

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give an instruction requiring the State to satisfy its burden of establishing that Rivera intended to interrupt services not just damage property—a necessary requirement for a conviction of malicious mischief in the first degree as charged.
2. The trial court erred in allowing Rivera to be represented by counsel who provided ineffective assistance in failing to propose an instruction requiring the State to satisfy its burden of proving that he intended to interrupt services not just to damage property.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to give an instruction requiring the State to satisfy its burden of establishing that Rivera intended to interrupt services not just damage property—a necessary requirement for a conviction of malicious mischief in the first degree as charged? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Rivera to be represented by counsel who provided ineffective assistance in failing to propose an instruction requiring the State to satisfy its burden of proving that he intended to interrupt services not just to damage property? [Assignment of Error No. 2].
3. Whether there was sufficient evidence to uphold Rivera's conviction for malicious mischief in the first degree? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Jacob Rivera (Rivera) was charged by information filed in Mason County Superior Court with one count of malicious mischief in the first degree—knowingly and maliciously causing the interruption or impairment of service rendered to the public by damaging or tampering with property of the state. [CP 53].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Rivera was tried by a jury, the Honorable James B. Sawyer II presiding. Rivera proposed no instructions and had no objections and took no exceptions to the court's instructions. [CP 20-32; RP 101-102]. The jury found Rivera guilty as charged. [CP 19; RP 124-125].

The court sentenced Rivera to a standard range sentence of 39-months based on an uncontested offender score of 8. [CP 5-18; RP 134-136].

Timely notice of appeal was filed on August 24, 2007. [CP 4]. This appeal follows.

2. Facts

At approximately 5:25 on January 17, 2007, Rivera, who was an inmate of the Mason County Jail, was on the phone in M-cell, a common dayroom used by all inmates for meals, watching TV, and using the phone. [RP 38-41]. Rivera became upset and started screaming beating

on the sliding doors. [RP 42]. Officers responded to the commotion and Rivera was seen throwing the dayroom's TV breaking it. [RP 42-43, 53-56, 87]. A "lock down" was ordered and the other inmates present were sent to their cells while officers were required to handle the situation disrupting the jail schedule—take care of Rivera and clean up and document/investigate the damage. [RP 43, 56-58, 73-81]. Rivera was taken to a holding room where he did not calm down and proceeded to damage the smoke detector inside the holding room. [RP 57, 63-67, 87-89]. Because of the damage to the smoke detector, officers moved Rivera to a crisis stabilization room where Rivera proceeded to break the surveillance camera in the room. [RP 63, 89-95]. Rivera was eventually restrained. [RP 96-97]. The TV and smoke detector had to be replaced and the crisis stabilization room could not be used as the surveillance camera system hadn't been fully repaired. [RP 73-81].

Rivera did not testify at trial.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN FAILING TO GIVE AN INSTRUCTION REQUIRING THE STATE TO SATISFY ITS BURDEN OF PROVING THAT RIVERA INTENDED TO INTERRUPT SERVICES NOT JUST DAMAGE PROPERTY—A NECESSARY REQUIREMENT FOR A CONVICTION OF MALICIOUS MISCHIEF IN THE FIRST DEGREE AS CHARGED

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Washington Const. Art. 1 sec. 3; In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); City of Seattle v. Nordby, 88 Wn. App. 454, 554, 945 P.2d 269 (1997). A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). Jury instructions are sufficient if they properly inform the jury of the applicable law and permit the parties to argue their theory of the case, i.e. instructions are proper if, when read as a whole, they are readily understood, not misleading to the ordinary mind, and sufficiently clear. *See* State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

In the instant case, Rivera was charged and convicted of malicious mischief in the first degree pursuant to RCW 9A.48.070(1)(b)—

(paraphrasing) that he interrupted public services by causing damage to property. It has long been the law that this crime as charged, while not an element of the crime, requires an intent to interrupt public services not merely an intent to cause damage resulting in such an interruption. *See State v. Jury*, 19 Wn. App. 256, 266-267, 576 P.2d 1302 (1978). In instructing the jury, the court accurately instructed the jury on the definition of the crime of malicious mischief in the first degree (Instruction No. 5 [CP 27]), the definition of knowingly (Instruction No. 7 [CP 29]), the definition of maliciously (Instruction No. 8 [CP 30]), and even followed the WPIC with regard to the to-convict instruction (Instruction No. 6 [CP 28])—which stated “the defendant caused an interruption...of service rendered to the public by physically damaging...property...knowingly and maliciously.”

However, the court did not give an instruction that Rivera’s actions in damaging the property were done with the intent to interrupt services and not just to damage the property resulting in an interruption of services. Absent such an instruction, the instructions read as a whole could have been misleading to the jury in that the jury could have convicted Rivera of malicious mischief in the first degree merely because he knowingly and maliciously damaged property that by happenstance caused an interruption in services. This is not the standard of proof placed upon the State in

order to obtain a conviction for malicious mischief in the first degree and as such the jury was improperly instructed with the result that Rivera's conviction should be reversed.

- (2) RIVERA WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION REQUIRING THE STATE TO SATISFY ITS BURDEN OF PROVING THAT HE INTENDED TO INTERRUPT SERVICES NOT JUST TO DAMAGE PROPERTY.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both

¹ It has been argued in the preceding sections of this brief that the issues can be raised for the first time on appeal. This portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that counsel waived the error claimed and argued above by failing to propose an instruction regarding the State's burden to establish that Rivera intended to interrupt services not just to damage property as required for a conviction for malicious mischief in the first degree as charged, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to propose such an instruction particularly where the entire focus of his closing argument was centered on this requirement—"He was agitated not at the staff, not at the jail, but from whatever personal experience he had just had on the phone. He didn't tear—he didn't cause damage to the property in order to cause injury to the county or with the evil intent toward the county or with a design to vex, annoy, or injure another. It was strictly him venting his anger." [RP 116].

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable

probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that the State would have been held to its proper burden of proof with the likelihood had counsel done so, the outcome would have been different—Rivera would not have been convicted as he just damaged property without any intent to interrupt services.

- (3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT RIVERA WAS GUILTY OF MALCIOUS MISCHIEF IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201;

Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, Rivera was charged and convicted of malicious mischief in the first degree—interrupting public services by causing physical damage to property. [CP 28, 53]. In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Rivera caused the damage with the intent directed toward interrupting the public services not just to damage property otherwise he would only be guilty of malicious mischief in the second or third degrees. *See* State v. Jury, *supra*. There is no direct evidence that Rivera committed the crime with the intent to interrupt services as he made no statements to this effect. Based on the evidence elicited at trial, the sum of the State’s evidence to establish beyond a reasonable doubt that Rivera was guilty as charged was the fact that he caused damage to the jail TV, a smoke detector in a holding cell, and a surveillance camera in the crisis stabilization room (all of which had to be replaced) resulting in the jail being placed on “lock

down” while officers handled the situation—restraining Rivera and cleaning up/documenting the damage. However, as testified by the officers having contact with Rivera he was cooperative with them and only caused the property damage when he was alone and his anger, which was not directed at them or other inmates, got the better of him in fact part of their duties, the service they provide, is to handle inmates in just such a “crisis” exhibited by Rivera. [RP 61-62, 82, 97-100]. Given the totality of the facts presented at trial it cannot be said that the State established beyond a reasonable doubt that Rivera committed the crime of malicious mischief in the first degree as charged.

The State has failed to prove beyond a reasonable doubt that Rivera was guilty of malicious mischief in the first degree as charged. This court should reverse and dismiss Rivera’s conviction.

E. CONCLUSION

Based on the above, Rivera respectfully requests this court to reverse and dismiss his conviction for malicious mischief in the first degree.

DATED this 14th day of February 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of February 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 14th day of February 2008.

Patricia A. Pethick
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