

NO. 41913-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES WESLEY TWIGGS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki Hogan, Judge

BRIEF OF APPELLANT

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PLM 012/11

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective representation.
2. The state was relieved of proving the essential element of “true threat in the threat to bomb charges.

Issues Pertaining to Assignment of Error

1. Was appellant denied effective representation where defense counsel only minimally participated in cross-examination?
2. Was appellant denied effective representation where defense counsel did not challenge the POAA notice as defective?
3. Was the state relieved of proving all elements of the charge of threatening to bomb where the “to-convict” instruction did not list “list or define “true threat”?”

B. STATEMENT OF THE CASE

1. Procedural

James Twiggs was charged with two counts of Robbery in the first degree contrary to RCW 9A.56.190 and two counts of threat to bomb contrary to RCW 91.61.160. CP 1-3. Mr. Twiggs was convicted by a jury as charged, the honorable Vicki Hogan presiding. CP 55-58. The state filed a Persistent Offender notice (POAA) prior to trial. CP 4. Mr. Twiggs was sentenced under the POAA. CP 63-77.

The POAA notice provided in relevant part:

You,.....JAMES WESLEY TWIGGS, are hereby given NOTICE that the offense of ROBBERY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; THREAT TO BOMB OR INJURE PROPERTY; THREAT TO BOMB OR INJURE PROPERTY, with which you have

been charged, is a “Most Serious Offense” as defined in RCW 9.94A.030(28). If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other “most serious offenses,” you will be classified at sentencing as a “persistent Offender” as defined in RCW 9.94A.030(33) and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

CP 4. During sentencing, the prosecutor argued in favor of life without the possibility of parole and referred to RCW 9.94A.030(32)(v) and (I)(c).

Without objection from the defense, the state provided proof of conviction for two prior “most serious offenses”. RP 440; Supp. CP (Stipulation to Prior Record 3-18-10).

Following multiple pro se requests, the trial court ordered an evaluation at Western State to determine Mr. Twiggs “sanity” at the time of the commission of the crimes. Supp. CP (Order for hearing 6-30-10) Supp. CP (Order for Exam 6-30-10); Supp. CP (Forensic Eval 7-26-10); Supp. CP (Forensic Eval 7-29-10); Supp. CP; Supp CP (“Order to Compel” 8-2-10)1; Supp. (Motion for Order for Re-Eval. 9-30-10); Supp. CP (Supporting Motion 9-30-10) CP (Motion for Re-Evaluation 10-18-10)(to determine “Sanity”); Supp. CP (Order for Exam by Western State 10-18-10); Supp. CP (Forensic Eval. 10-29-10).The evaluations confirmed a lack of mental health issues. Id.

This timely appeal follows. CP 78-93

3. Substantive Facts

1 The “Order to Compel” designated in LINX is actually an “Order Regarding Competency of Defendant”, finding Mr. Twiggs competent to

James Twiggs was identified by tellers at Heritage Bank as the person who committed a robbery on March 24, 2010. RP 142, 144, 234. Mr. Twiggs was identified by tellers at Timberland bank as the person who committed a robbery therein on March 31, 2010. RP 254. Mr. Twiggs admitted to detective Barnes that he committed the robberies. RP 342.

For the Heritage bank robbery, Mr. Twiggs wrote on a paper bag “Bomb. Put money in bag”. RP 126. For the Timberland bank robbery Mr. Twiggs wrote a note on a paper bar, “a bomb will go off in two minutes. Put large bills in the bag”. RP 265.

C. ARGUMENTS

1. MR. TWIGG WAS DENIED EFFECTIVE REPRESENTATION BY COUNSEL’S FAILURE TO PROVIDE MEANINGFUL ASSISTNACE AND BY HIS FAILURE TO OBJECT TO THE STATE’S AFFIRMATIVE MISREPERESENTATION IN THE PERSISTENT OFFENDER NOTICE.

Under an ineffective assistance of counsel analysis, to establish ineffective assistance of counsel, an appellant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

State v. Stowe, 71 Wn.App. 182, 186, 858 P. 2d 267 (1993), A criminal defendant has the right to assistance of counsel under the sixth amendment to the United States Constitution. Strickland 466 U.S. at 686, quoting, McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The Sixth Amendment requires that counsel provide actual “assistance,” “for his defense.” United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)

To show that counsel provided ineffective assistance, a defendant must show:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), citing, State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Reversal is required when a defendant establishes both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

In Mr. Twiggs' case, the state filed a persistent offender notice and cited RCW 9.94A.030(28) for the definition of “most serious offense” and RCW 9.94A.030(33) for the definition of “persistent offender”. CP 4. Neither of these statues define “most serious offense” or “persistent

offender”. RCW 9.94A.030(28) provides “(28) “Home detention” means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.” RCW 9.94A.030(33) provides:

(33) “Offender” means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or....

Id. The persistent offender notice informed Mr. Twiggs that “most serious offense” meant “home detention” and “persistent offender” meant a person who committed any felony.

During the sentencing hearing, in support of a three strikes sentence, the prosecutor cited RCW 9.94A.030(32)(v), and (I)(c). At the time of the sentencing, March 9, 2011, RCW 9.945A.030 provided, “Nonviolent offense” means an offense which is not a violent offense. There are no sections (v) or (I)(c). RP 443. ² Defense counsel did not object or correct the errors in the POAA notice or during sentencing.

Notice is not required under the Persistent Offender Accountability Act, but giving notice is the best practice. RCW 9.94A.561; State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288, on remand, 150 Wn. App. 787, 209 P.3d 507 (2006).

RCW 9.94A.030 was amended effective April 15, 2011. The amendment

Counsel has not found any cases addressing affirmative misrepresentations in a POAA notice document, but has analyzed analogous cases that provide guidance. While the state was not required to provide persistent offender sentencing notice, once it chose to do so Mr. Twiggs was entitled to rely on the affirmative misrepresentations in the notice provided.

In State v. Stowe, 71 Wn.App. at 189, defense counsel was not required to advise Mr. Stowe of the collateral consequences of his plea, but once he chose to do so, he was required to give accurate advice. *Id.* In Stowe, the defendant pleaded guilty in reliance on counsel's affirmative misrepresentation that he would not be discharged from the military. This Court held under an ineffective assistance of counsel claim that Mr. Stowe was prejudiced by counsel's affirmative misrepresentation and permitted the defendant to withdraw his plea. Stowe, 71 Wn.App. at 189.

In State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (2007), the trial court gave conflicting jury instructions and provided an inaccurate definition of the reasonable use of force in self-defense. The Supreme Court held that the giving of a jury instruction that misstated the law was presumed prejudicial and could not be considered harmless beyond a reasonable doubt. Walden, 131 Wn.2d at 478-479.

did not alter sections: (28), (32) or (33).

In State v. Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) the State Supreme Court remanded for resentencing in a capital case where defense counsel was deemed ineffective for failing to object to shackling the defendant during the penalty phase. The Supreme Court reiterated that even where the state has a strong case, and there is no viable defense theory, “the Sixth Amendment still requires counsel to ‘hold the prosecution to its heavy burden of proof beyond a reasonable doubt.’” Davis, 152 Wn.2d at 744, citing, Cronic, 466 U.S. at 656 n. 19.

In Cronic, the Supreme Court reversed a conviction based on ineffective assistance of counsel where the trial court appointed an inexperienced real estate lawyer in a criminal case 25 days before trial. Cronic, 466 U.S. 667.

In State v. Crace, 157 Wn. App. 81, 108, 236 P.3d 914 (2007), the defendant like Mr. Twiggs was facing a third strike under the POAA and the possibility of life without the possibility of parole. Crace was charged with assault in the second degree, but his attorney failed to propose the lesser included non-strike offense of unlawful display of a weapon. *Id.*

In Crace, this Court held that counsel’s performance was deficient and prejudicial to Mr. Crace for failing to offer a lesser included fourth degree assault instruction that could have resulted in a misdemeanor, non-strike offense, with a sentence of less than a year instead of a life sentence

of life. “Pursuing an all-or-nothing strategy in these circumstances was not a reasonable trial tactic.” State v. Crace, 157 Wn. App. at 109.

Applying the Strickland test, Mr. Twiggs’ like the defendants in Stowe, Crace, and Cronic, was prejudiced by counsel’s failure to object to the affirmative misrepresentation of the definition of “most serious offense” and “persistent offender” because the notice failed to define those terms correctly and permitted Mr. Twiggs to believe that he could possibly be subject to a third strike based on the definitions of “home detention” and “offender” CP 4.

Like the matter in Stowe, there can never be a valid or tactical reason to fail to properly investigate the propriety of notice purporting to be the law. In Stowe, counsel failed to properly investigate whether Mr. Stowe would be discharged from the military. In Mr. Twiggs case, counsel never bothered to determine the criteria for imposing a third strike and failed to recognize that the state had no idea of the definitions of “persistent offender” and most serious offence” in the POAA notice and during sentencing.

It is not much of a stretch to assume that if counsel did not understand the persistent offender statute, he could not possibly have provided Mr. Twiggs with any assistance prior to or during the trial

process with respect to the impact of a guilty verdict on a sentence of life without the possibility of parole.

Similarly, counsel in Mr. Twiggs case like counsel in Crace's case provided deficient representation to Mr. Twiggs prejudice. In Crace, there was no possible reason to fail to offer a lesser included offense that could have avoided life in prison. Here to there was no valid reason to fail to object to the misinformation provided in the POAA notice.

During sentencing, counsel for Mr. Twiggs stated that "Mr. Twiggs was aware of what the state was seeking. He did go to trial." RP 441. It is impossible to determine if counsel advised Mr. Twiggs of the correct definition of "persistent offender" and "most serious offense" or of the terms cited to in the POAA notice. Had Mr. Twiggs understood the POAA notice he may have been willing to enter into plea negotiations to avoid a sentence of life in prison. Regardless of the inability to speculate on what Mr. Twiggs actually knew, the record provides ample evidence that Mr. Twiggs was affirmatively misrepresented and decided to go to trial, which resulted in life without the possibility of parole.

In addition to failing to advise Mr. Twiggs of the correct definitions of "persistent offender" and "most serious offense", counsel failed to provide any meaningful assistance. The state presented eight witnesses. The only cross examination provided by defense counsel was a

few inadmissible questions to detective Portmann asking whether the detectives knew that Mr. Twiggs was in poor health and whether he ever visited Mr. Twiggs' sister. RP 154-15. And a few questions to officer Jimenez asking whether Mr. Twiggs was cooperative during his interview and whether the officer could have started the tape recorder earlier in the interview. RP 305-309, 311, 315-316. During trial, counsel did ask the court to permit evidence that Mr. Twiggs was using pain medication for cancer. RP 310, 312. Counsel did not raise these questions during the 3.5 hearing and did not offer any argument following the 3.5 hearing. RP 60.

Stowe, and Crace stand for the proposition that counsel's performance is deficient and a defendant is prejudiced when a person is affirmatively misinformed or where counsel in a three strikes case pursues an "all or nothing strategy" when a lesser included is available. The State Supreme Court recognizes "that notice provides a criminal defendant with the important opportunity to weigh his or her options and to intelligently" rely on the notice to make his or her decisions. State v. Crawford, 159 Wn.2d at 96-97; citing, Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

The Court in Cronic, explained in great detail that counsel must actually provide assistance and the mere fact of the presence of defense counsel does not necessarily satisfy this requirement. Mr. Twiggs trial

lasted six days and involved three strikes. Defense counsel did virtually nothing during the course of this trial and presumably did nothing prior to trial to prepare for this case.

2. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY IN THE THREAT TO BOMB CHARGES RELIEVED THE STATE OF ITS BURDEN OF PROVING A "TRUE THREAT".

The "to convict" jury instruction in Mr. Twiggs' case failed to list the essential element of "true threat". CP 33-54 (instructions 15, and 16).

Jury instructions 15 and 16 provided in relevant part:

- (1)(a) The defendant threatened to bomb....
- (b) communicated any information concerning a threat to bomb...; and
- (i) ...acted knowingly....; and
- (ii) ...with intent to alarm

CP 33-54. These instructions did not mention or define "true threat". In a separate instruction, number 14, the court provided a definition of "threat" that satisfied the definition of "true threat" CP 33-54.

A "true threat" is made when "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of an intention". State v. Johnston, 156 Wn.2d 355, 361-362, 127 P.3d 707 (2006); Jury instruction 14; CP 33-54.

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Thus, “a ‘to convict’ [jury] instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)³, citing, State v. Smith, 131 Wn. 2d 258, 263, 930 P. 2d 917 (1997), quoting, State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

The jury shall not be required to look to other instructions to supply a missing element from a “to convict” jury instruction. Smith, 131 Wn. 2d. at 262-63. “An instruction purporting to list all of the elements of a crime must in fact do so.” Smith, 131 Wn.2d at 262-263, quoting, Emmanuel, 42 Wn. 2d at 819-820.

An accused is denied his right to a constitutional trial when the trial court fails to delineate in the “to convict” instruction all of the essential elements of the crime charged. Smith, 131 Wn.2d at 262-263.

This Court reviews the adequacy of jury instructions de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). When a “to-convict” instruction relieves the state of proving beyond a reasonable doubt all contested essential elements, the charges must be reversed. State

³ In Seibert, a controlled substance case, the narcotic was not an essential element because it did not increase the maximum sentence. Sibert, 168 Wn.2d at 311.

v. Seek, 109 Wn. App. 876, 883, 37 P.3d 339 (2002).

RCW 9.61.160 provides that it

shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

Id.

In State v. Johnston, supra, the Supreme Court analyzed RCW 9.61.160 in the context of a First Amendment challenge. Johnston, 156 Wn.2d at 359-360. The Court held that RCW 9.61.160 requires the state to prove beyond a reasonable doubt that the treat to bomb was a “true threat”. Johnston, 156 Wn.2d 360-361.

This means that using an objective standard, with a focus on the speaker, a jury must determine “whether a true threat has been made” Johnston, 156 Wn.2d at 361, quoting, State v. Kilburn, 151 Wn.2d 36, 44, 84 P.3d 1215 (2004).

Under Johnston, the trial court is required to instruct the jury that the state bears the burden of proving a “true threat” beyond a reasonable doubt. Johnston, 156 Wn.2d at 363-364. In Mr. Twiggs’ case the “to-

convict” jury instruction did not contain the element of “true threat”. CP 33-54. Even though jury instruction 14 did provide a definition of “threat”, this does not satisfy the requirement that the “to-convict” instruction contain all essential element because as stated supra, “jurors are not required to supply an omitted element by referring to the jury instructions beyond the “to-convict” instruction. Smith, 131 Wn2d at 263.

The “to convict” instruction on threatening to bomb in the instant case omitted the essential element of “true threat”. The “to convict” instructions number 15 and 16, the “yardstick” provided in Mr. Twigg’s case relieved the state of proving this essential element. The deficiency was not corrected by any other instructions under Smith, supra, and Emmanuel, supra. Under Johnston, the remedy is reversal of the convictions and remand for a new trial.

a. Missing Element Not Harmless Error

“[I]t is the duty of the court to define to the jury the elements of the offense with which the accused is charged and such definition must be at least not misleading.” Id.

An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. Smith, 131 Wn.2d at 264-265, citing, State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). “A harmless error is an error which is *trivial*, or *formal*, or *merely*

academic, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” (Emphasis in original) Wanrow, 88 Wn.2d at 237, 559 P.2d 548. Once an error is established to be prejudicial, it is the State's burden to show that it was harmless. State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976).

In finding the error prejudicial and reversible error in Smith, the Court cited to State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995), noting that the trial court's failure to instruct the jury that intent was an element of attempted rape was not harmless error. Smith, 131 Wn.2d at 264-265, citing, Aumick, 126 Wash.2d at 430, 894 P.2d 1325. The Court in Smith made clear that even when other instructions supply the missing element, when the “to convict” instruction omits an element it is not possible to “conclude that the erroneous instruction ‘in no way affected the outcome of the case.’”, thus the error can never be harmless. Smith, 131 Wn.2d at 264-265. The reviewing Courts “assume that the jury relied upon the “to convict” instruction as a correct statement of the law.” Id.

In Mr. Twiggss’ case, under Smith and Emmanuel, the error of omitting “true threat” was not harmless and the conviction must be reversed and the matter remanded for a new trial.

D. CONCLUSION

Mr. Twiggs respectfully requests this Court reverse his convictions for threat to bomb and remand for a new trial and reverse his three strikes sentence of life without the possibility of parole and remand for sentencing.

DATED this 2 day of June 2011.

Respectfully submitted
LAW OFFICES OF LISE ELLNER

Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and James Twiggs DOC# 278772 Dalla East 112 Washington State Penitentiary 1313 N. 13th Ave. Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on June 2, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature