

NO. 44846-7-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID WAYNE WILLIAMS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01249-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A COMPETENCY EVALUATION OF WILLIAMS
- II. THERE IS SUFFICIENT EVIDENCE TO SUPPORT MALICIOUS MISCHIEF IN THE SECOND DEGREE
- III. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A LESSER INCLUDED INSTRUCTION ON MALICIOUS MISCHIEF IN THE THIRD DEGREE

B. STATEMENT OF THE CASE

David Williams (hereafter 'Williams') was incarcerated at the Clark County Jail in July 2012. RP 244-45. On July 14, 2012, a fire alarm went off in the jail that appeared to be coming from cell F 4-11. RP 246-47. The alarm system goes off when there is a drop in pressure in the system. RP 248. Officer Duncan Paddy went to inspect cell F 4-11 to determine if the fire alarm code was coming from that office. RP 247. Officer Paddy was looking for oil on the walls of the cell, as when the fire system goes off, it releases a mixture of oil and air in a mist into the room. RP 249. Officer Paddy did not see any oil on the walls of cell F 4-11, and the fire-suppression nozzles in that cell appeared to be intact. RP 249. The two inmates in that cell indicated they had heard a hissing sound but did

not know where it came from. RP 250. Officer Paddy suspected Williams may have had something to do with the issue as Officer Paddy had had a run in with him earlier that evening where he had to take clothes from Williams which he was not allowed to have. RP 245, 250. Officer Paddy went to Williams' cell and could see the mist and smell the oil that he had observed on prior times when the fire-suppression system was activated. RP 251. Williams had to be secured prior to removal from his cell, so Officer Paddy returned to the office and got a key that was needed to secure Williams. RP 251.

Officer Paddy removed Williams from his cell and put him in another cell and asked him what had happened. RP 254. Williams told him "I can't take it anymore." RP 254. Williams indicated he had not eaten in a week, and the antagonizing from custody staff was getting to him. RP 255. When asked why he wasn't eating the food he was given, the nutraloaf, Williams responded, "I can't eat that shit." RP 255. After speaking with Williams, Officer Paddy had jail staff call a maintenance person employed by Clark County Maintenance to come evaluate the issue. RP 259-50. The maintenance worker found one of the sprinkler heads in Williams' cell was damaged and spent an hour fixing it. RP 268-69. Jail inmates and trustees cleaned the oil off the floor and walls of Williams' cell. RP 258-59.

Williams' actions caused the fire-suppression system to be activated. RP 260. Once that occurs, the system throughout the whole building, the entire jail, is then deactivated. RP 260. This system is then not working until a maintenance person fixes the issue and reactivates the system. RP 260. Officer Paddy testified that it is possible that once the fire-suppression system alarms to one area that it may not trip the fire-suppression system to alarm to another area if there was a fire in that area. RP 262. Also, the maintenance worker testified that "the system is in trouble....it is in a 'trouble' state, saying there's something wrong with the fire system." RP 277. When the system is in this 'trouble' mode, it needs to be reset in order for the alarms to work correctly. RP 278-79.

Williams was initially charged with Malicious Mischief in the Second Degree under RCW 9A.48.080(1)(a). CP 1. The charge against Williams was later amended to Malicious Mischief in the Second Degree under RCW 9A.48.080(1)(b). CP 78. During Williams' first appearance in court on this matter on July 16, 2012, he told the court he deliberately damaged the sprinkler head in his jail cell. RP 290. During that first appearance, Williams was very outspoken and angry-appearing, he "went off" multiple times, and used profanity with the court. RP 165-66. Williams was in what is referred to as a "suicide smock," clothing provided by the jail. RP 167-68. On another appearance in court, Williams

had another extreme outburst, had problems with spitting, and used profanity. RP 18-19. On July 25, 2012, defense counsel sent a letter to the trial court indicating that Williams was “not eating and is progressively getting weaker, thus incompetent.” Ex. 1; RP 185. On July 27, 2012, defense counsel told the trial court: “I mean there’s an issue of competency going on, but we’ll deal with that later.” RP 3. Defense counsel also referred to his client as possibly incompetent on August 8, 2012, when he said, “...he might have starved himself to death by then, or whatever he would, due to incompetence.” RP 14. The court at that time acknowledged that defense counsel may be concerned about Williams’ competency. RP 15. Further, the trial court said, “maybe he’s not competent if he’s that self-destructive.” RP 15.

On August 23, 2012, after the trial court observed Williams’ second extreme episode of behavior in court, the trial court, on her own motion, ordered Williams be evaluated for competency at Western State Hospital. RP 137-38, 141-42, 150. The trial court judge asked her legal assistant to contact the prosecutor to arrange an order to have Williams evaluated for competency. RP 159-60. That same afternoon, another judge, Judge Melnick, signed the competency order on behalf of the trial court judge. CP 21.

On October 23, 2012, the trial court entered an order of competency. RP 20-27; CP 37. The trial court set a trial date of November 5, 2012. RP 25. Defense objected on speedy trial grounds. RP 25. Defense counsel filed a motion to dismiss for violation of speedy trial. CP 40-43. The court appointed a new attorney, as original counsel was a witness to the motion to dismiss. RP 28-34. On April 8, 2013, the trial court heard Williams' motion to dismiss for speedy trial violations. Original defense counsel testified at the hearing that neither he nor the prosecutor had asked for the competency evaluation. RP 134-58. The State called the docket prosecutor who was in court at the time of Williams' first appearance and observed his behavior in person. RP 163-73. The docket prosecutor testified that in court Williams was very outspoken to the extreme and upset; that he used profanity and had to be taken out of the courtroom by jail staff. RP 165-67, 172. The docket prosecutor testified she believed any defense attorney would have questioned Williams' competency based on his behavior. RP 166. The trial court denied Williams' motion to dismiss finding the original trial court judge did not abuse her discretion to order that Williams be evaluated for competency in light of the court's observations of Williams' manner, appearance, speech, and behavior. CP 170-72.

The case went to trial before a jury with evidence from Officer Duncan Paddy, the maintenance worker, and the deputy prosecutor who was in court when Williams made statements about the deliberate nature of his actions. RP 241-80, 287-90. The trial court did not instruct the jury on any lesser included offenses finding Malicious Mischief in the Third Degree was not a lesser included offense of Malicious Mischief in the Second Degree as charged. RP 334. The jury returned a verdict of guilty. CP 133. The trial court sentenced Williams to a standard range sentence. CP 147.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A COMPETENCY EVALUATION OF WILLIAMS

Williams argues the trial court abused its discretion in ordering a competency evaluation when it was not requested by either defense or the State. The trial court had just caused based on Williams' outrageous behavior in court on two consecutive appearances to believe he may suffer from a mental disease or defect which could prevent him from understanding the nature of the proceedings. The trial court did not abuse

its discretion in ordering a competency evaluation, and therefore Williams' right to a speedy trial was not violated.

“It is fundamental that no ‘incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.’” *State v. Lawrence*, 108 Wn.App. 226, 231, 31 P.3d 1198 (2001) (quoting RCW 10.77.050). A defendant must have the capacity to understand the nature of the proceedings against him and the ability to assist in his own defense in order to be competent. *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). Any party to a criminal case or the trial court may move to have a defendant evaluated for competency. RCW 10.77.060(1)(a). A trial court's decision whether or not to order a competency evaluation on a criminal defendant is reviewed for abuse of discretion. *City of Seattle v. Gordon*, 39 Wn.App. 437, 441, 693 P.2d 741 (1985). A trial court abuses its discretion when its decision is arbitrary or is based upon untenable grounds or made for untenable reasons. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999).

The statute on competency requires that whenever there is a reason to doubt a defendant's competency, the court shall appoint or request the secretary to designate two qualified experts or professionals to examine and report upon the mental condition of the defendant. RCW 10.77.060(1). The procedures of this statute are mandatory. *Gordon*, 39 Wn.App. at 441.

Therefore, “once there is a reason to doubt a defendant’s competency, the court must follow the statute to determine his or her competency to stand trial.” *Id.* “A reason to doubt” is not defined and thus a large measure of discretion rests with the trial court. *Id.* The trial court is granted “great deference” on its decision regarding a defendant’s competency. *Lawrence*, 108 Wn.App. at 232 (citing to *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

The facts of the record, in this case, clearly show the trial court had a valid, legitimate basis on which to doubt Williams’ competency. The trial court was in a position to observe David Williams in court on two occasions and observed his extreme outbursts. RP 18-19, 165. The trial court was also in court speaking with defense counsel at times when defense counsel intimated that Williams may have a competency issue. On July 27, 2012, defense counsel stated to the trial court: “I mean there’s an issue of competency going on, but we’ll deal with that later.” RP 3. Defense counsel also referred to his client as possibly incompetent on August 8, 2012, when he said, “...he might have starved himself to death by then, or whatever he would, due to incompetence.” RP 14. The court at that time acknowledged that defense counsel may be concerned about Williams’ competency. RP 15. Further, the trial court said, “maybe he’s not competent if he’s that self-destructive.” RP 15.

Also, Williams was at the time, according to defense counsel, liable to starve himself to death because he did not like the food the Clark County Jail was feeding him. RP 14. This was known to the trial court. Based on Williams' appearance in court and his angry and inappropriate outbursts, and defense counsel's references to a problem with Williams' competency, as well as the facts as known to the trial court about the case as the trial court had reviewed the probable cause declaration, it was entirely appropriate and reasonable for the trial court to doubt Williams' competency. CP ___ (supplemental clerk's papers, declaration of probable cause). Based on what was before the trial court, the judge clearly had a legitimate basis to doubt his competency. It is clear from the August 8, 2012, court date that the defense counsel and the court were starting to doubt his competency. After an additional angry, non-sensical outburst on August 23, 2012, as well as the defendant's problem with spitting on that day, the trial court was reasonably and appropriately convinced he may be incompetent to assist in his defense or understand the proceedings, as if he could understand the proceedings he would not have acted the way he did. The trial court also had a letter it had received from defense counsel indicating Williams was "not eating and is progressively getting weaker, thus incompetent." Ex. 1; RP 185. This letter to the trial court was dated July 25, 2012, well before the trial court made its own motion to have

Williams evaluated for competency. Once the trial court doubts a defendant's competency, the provisions in RCW 10.77.060(1) are triggered and the trial court is required to have the defendant evaluated for competency. This is the procedure the trial court followed here.

Further, even Williams' counsel, who as Williams points out has known him for years, believed Williams was "decompensating and becoming irrational." CP 23. All the facts in the record point to Williams as a person who suffered from mental illness and who had extreme outbursts in court in front of the judge. It was not an abuse of discretion for the trial court to order Williams to be evaluated for competency. Further, the delay in Williams' trial was 61 days-the amount of time between when the trial court ordered an evaluation on his competency and entered an order of competency. RP 180-83.

CrR 3.3(e)(1) excludes competency proceedings from the calculation of speedy trial. Because the trial court's exercise of its discretion in ordering a competency evaluation was appropriate, there was no abuse of discretion and no violation of Williams' right to speedy trial. Further, Williams' counsel was present when the order to evaluate was entered and had an opportunity to object. Based on the evidence and the extreme behavior in court, even the docket prosecutor believed Williams would be evaluated for competency based on his behavior on just one

occasion. RP 166. The trial court had significantly more information available to it than that docket prosecutor. Clearly, the trial court was in the best position to actually observe Williams' extreme behavior in person in the courtroom, and based on that, she did not abuse her discretion. Williams received a speedy trial and his conviction should be affirmed.

II. THERE IS SUFFICIENT EVIDENCE TO SUPPORT MALICIOUS MISCHIEF IN THE SECOND DEGREE

Williams claims there was insufficient evidence to support his conviction for Malicious Mischief in the Second Degree. However, when the entire facts of the case are reviewed in the light most favorable to the State, it is clear Williams was convicted on sufficient evidence. His conviction should be affirmed.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Williams claims there was no evidence to support that the defendant's actions caused a substantial risk of interruption or impairment of service rendered to the public. However, Officer Paddy testified that the defendant's actions caused the fire-suppression system to be activated. RP 260. Once that occurs the system throughout the whole building, the entire jail, is then deactivated. RP 260. This system is then not working until a maintenance person fixes the issue and reactivates the system. RP 260. Further, it is possible that because Williams' actions caused the fire-suppression system to alarm to his area that if there had been a fire in another part of the building, the suppression system may not send water to that area were there a real fire that needed extinguishing. RP 261. Also, the maintenance worker testified that "the system is in trouble....it is in a 'trouble' state, saying there's something wrong with the fire system." RP 277. When the system is in this 'trouble' mode, it needs to be reset in order for the alarms to work correctly. RP 278-79.

Even though it may have been a short interruption or impairment, the State was not required to prove any actual interruption or impairment of services by Williams' actions. Rather, the State had to prove there was a substantial risk of interruption or impairment of services. RCW

9A.48.080(1)(b); CP 126, 130. The testimony supports the notion that the fire-suppression system was compromised by Williams' actions and may not have worked properly had there truly been a fire somewhere else in the building until the system was reset. This clearly created a substantial risk of impairment of services because had there been a fire, the system would have not have been working properly during that time period. Especially when the evidence is considered in the light most favorable to the State, it created a substantial risk of interruption or impairment of services. The malicious mischief statute, under which Williams was charged and convicted, RCW 9A.48.080(1)(b) requires that the defendant "[c]reate[] a substantial risk of interruption or impairment," not that he actually interrupt or impair the service. *State v. Turner*, 167 Wn.App. 871, 877, 275 P.3d 356 (2012). Williams may have actually only caused a brief interruption in services by having several people have to come in to repair and supervise the repair and clean up of the cell, but it is reasonable to infer that as he actually caused a brief interruption and impairment, that he created a substantial risk of significant impairment or interruption of services. Though Williams argues in his brief that the impairment or interruption was too brief to satisfy the statute, it is clear that his actions did create a substantial risk of such impairment or interruption of services.

Williams likens his case to that of *State v. Hernandez*, 120 Wn.App. 389, 85 P.3d 398 (2004), in which the Court found insufficient evidence when a defendant spit inside a patrol vehicle, causing the officer to have to clean it out, taking about 15 minutes of time. However, Williams' case is quite dissimilar from *Hernandez*. And in *Hernandez*, the Court discussed that Hernandez's actions "simply did not rise to the level of knowing and malicious creation of a substantial risk of interruption or impairment of service to the public [because] [u]nlike the defendant in *Gardner*, Mr. Hernandez did not disrupt emergency services by physically manipulating a device crucial to those services." *Id.* at 392. This statement summarizes why the facts in Williams do satisfy evidence beyond a reasonable doubt that Williams committed Malicious Mischief in the Second Degree. Williams did "physically manipulate[e] a device crucial to [emergency] services." *See Hernandez*, 120 Wn.App. at 392 (referring to *State v. Gardner*, 104 Wn.App. 541, 16 P.3d 699 (2001)). Williams physically damaged the water sprinkler of a fire-suppression system at the Clark County Jail. By doing that, he risked the efficacy and operability of the entire system. By doing that, he especially risked the operability of the sprinkler head in his cell.

The facts, taken in the light most favorable to the State, present sufficient evidence to sustain Williams' conviction for Malicious Mischief

in the Second Degree. The case law on the subject supports Williams' conviction as he physically damaged a device crucial to rendering emergency services to the public, a sprinkler head meant to suppress fire at the Clark County Jail. This clearly created a substantial risk of impairment or interruption of services. Sufficient evidence was presented at the trial to support the conviction. This Court should affirm his conviction.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A LESSER INCLUDED INSTRUCTION ON MALICIOUS MISCHIEF IN THE THIRD DEGREE

Williams argues the trial court erred in failing to give a lesser included instruction on Malicious Mischief in the Third Degree. Williams was not entitled to an instruction on a lesser offense and the trial court properly declined to give such an instruction. Williams' conviction should be affirmed.

A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are elements of the offense charged; and (2) the evidence must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If it is possible to commit the greater offense without committing the lesser offense, then the latter is not a lesser included crime. *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (citing *State v.*

Roybal, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)). There is no case directly on point as to whether Malicious Mischief in the Third Degree is a lesser included offense of Malicious Mischief in the Second degree by causing or creating a substantial risk of interruption or impairment of property of the state

The proponent of the lesser included instruction must satisfy both the legal requirement showing that the proposed instruction describes an offense that is an inferior degree of the charged offense, and show that the evidence would tend to show he is not guilty of the greater offense, but guilty of the lesser. *State v. McDonald*, 123 Wn.App. 85, 469, 96 P.3d 468 (2004). Here, Williams cannot show that Malicious Mischief in the Third Degree is legally a lesser included offense of Malicious Mischief in the Second Degree as the State charged it.

The significant question is whether a person can commit the greater offense without committing the lesser offense. If the person can, then the lesser offense is not a lesser included, legally. *Bishop*, 90 Wn.2d at 191. Here, it is clear from the elements of the crime of Malicious Mischief in the Second Degree under RCW 9A.48.080(1)(b) that actual physical damage is not required for a conviction. Under Malicious Mischief in the Third Degree, physical damage is a requirement for its commission. RCW 9A.48.090(1)(a). Where a person could be found guilty

of Malicious Mischief in the Second Degree by tampering with certain property and not damaging it; that same person would not have committed Malicious Mischief in the Third Degree by doing that act of tampering. This is the hallmark of a lesser included offense-it is completely subsumed by the greater offense so that a person always commits the lesser if they commit the greater. This is not true here. The trial court properly denied Williams' request to have a lesser included instruction for Malicious Mischief in the Third Degree.

Williams' claim that the trial court erred in failing to give his lesser included instruction fails.

D. CONCLUSION

The trial court did not abuse its discretion in ordering a competency evaluation on Williams given his extreme outbursts in court and his deteriorating condition as it was conveyed to the trial court. Williams therefore received a speedy trial. There was sufficient evidence to convict Williams of Malicious Mischief in the Second Degree when all the evidence presented at trial is considered in the light most favorable to the State. Malicious Mischief in the Third Degree is not legally a lesser included offense of Malicious Mischief in the Second Degree as charged

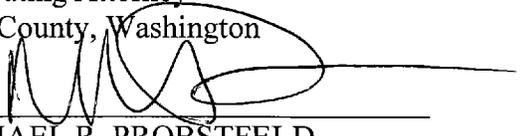
by the State as one could commit Malicious Mischief in the Second Degree without committing Malicious Mischief in the Third Degree. The trial court did not err in failing to give a lesser included instruction. The trial court should be affirmed in all respects.

DATED this 17th day of March, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL R. PROBSTFELD,
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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