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NO. 35298-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK LENNARTZ,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove beyond a reasonable doubt whether appellant intended to cause an interruption or impairment of service to the public.

2. The jury instructions failed to make clear that a conviction must be based on proof beyond a reasonable doubt of the intent to cause an interruption or impairment of service to the public.

3. The prosecutor committed misconduct when he misstated the law, telling the jury it need not find appellant acted with intent to cause an interruption or impairment of service to the public in order to convict.

4. Appellant's right to effective assistance of counsel was violated because his attorney failed to object to the improper jury instructions or to the prosecutor's rebuttal argument.

5. Cumulative error violated appellant's right to a fair trial.

Issues Pertaining to Assignments of Error

1. First degree malicious mischief requires proof of intent to cause an interruption or impairment of service to the public. Appellant was angry and frustrated and hit a jail cell window repeatedly until it broke, but told the officer he did not mean to break it. Did the State fail to prove beyond a reasonable doubt whether appellant intended to cause an interruption to service to the public?

2. The jury instructions required the jury to find appellant caused an interruption or impairment of service to the public by damaging property and that he acted knowingly and maliciously. Did the instructions improperly relieve the State of its burden to prove intent to interrupt public services when a reasonable juror could conclude the mental state of maliciously applied only to the property damage, rather than to the resulting interruption or impairment of services to the public?

3. Prosecutors may not misstate the law during closing argument; to do so is misconduct that may violate the defendant's right to a fair trial. The prosecutor argued in closing that, to convict, the jury need not find intent to cause an interruption or impairment of service to the public, but only intent to cause property damage. Did this argument compound the impact of the improper jury instructions and deprive appellant of a fair trial by relieving the State of its burden to prove an essential element of the offense?

4. Accused persons enjoy a constitutional right to effective assistance of counsel for their defense. Was this right violated when counsel failed to object to jury instructions and prosecutorial misconduct that relieved the State of its burden to prove every element of the offense beyond a reasonable doubt?

5. The compounded effect of multiple trial errors can result in a violation of the right to a fair trial. Did the combination of ineffective assistance, prosecutorial misconduct, and incorrect jury instructions amount to cumulative error that deprived appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kittitas County prosecutor charged appellant Patrick Lennartz with one count of malicious mischief in the first degree and one count of custodial assault. CP 41. The jury found Lennartz guilty, and the court imposed concurrent sentences at the high end of the standard range. CP 72-73. Notice of appeal was timely filed. CP 80.

2. Substantive Facts

Patrick Lennartz was in the Kittitas County Jail awaiting trial for a misdemeanor. CP 72. He was indigent and could not make bail. RP 159-60. He has been in and out of jail and mental health facilities since the age of 13. CP 27. As a child, he lived with his father, who abused him, causing three hospitalizations for head injuries. CP 10, 28. Lennartz has been diagnosed with intermittent explosive disorder, schizophrenia by history, and antisocial personality disorder. CP 9.

One day, upset about his lunch, he acted out, hitting a window repeatedly until it broke. RP 115-19. Lennartz told an officer he did not

mean to break it, but did use a sandal to protect his hand while striking the window. RP 175-77. Additional evidence at trial showed Lennartz' cell and the ones next to it were out of commission for a number of days. RP 145-47.

Approximately a month later, when he was not released as he expected, Lennartz testified, he threw a wet towel through the cuff port window at the wall across from him. RP 180. The corrections officer claimed Lennartz threw a cup of urine on him. RP 161. Lennartz denied this allegation. RP 180.

Before trial, an evaluation was ordered to determine whether Lennartz was competent to stand trial. CP 2. Despite the above-mentioned diagnoses, the evaluator concluded Lennartz was capable of understanding the proceedings and assisting in his defense. CP 9. The court, therefore, found him competent. CP 33.

The jury instruction listing the elements of first-degree malicious mischief stated that three elements must be proved beyond a reasonable doubt:

1. That on or about December 23, 2016, the defendant caused an interruption or impairment of service rendered to the public, by physically damaging or tampering with property of the state or a political subdivision thereof; and
2. That the defendant acted knowingly and maliciously; and
3. That this act occurred in the state of Washington.

CP 57. In rebuttal closing argument, the prosecutor argued the State did not have to prove intent to cause an impairment of public service, only an evil intent. RP 219-20. Specifically, the prosecutor told the jury:

And I would urge you to look at what the elements say. That the defendant acted knowingly and maliciously. It does not say that he had to – if we're talking about malice, it does not have to say he had an evil intent to cause an impairment. It says his actions had to have an evil intent. His action is breaking the window. We're talking about cause and effect here. His action is breaking the window. The effect is that it caused an impairment. He doesn't have to plan to cause an impairment. He has to have a plan to break that window. He has to have his evil intent to break that window.

...

His plan doesn't have to be I'm going to take this jail or I'm going to cause an interruption in service, no, I don't think anybody really thinks like that.

RP 219-20. Lennartz' attorney did not object to the instructions or the closing argument.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SHOW LENNARTZ INTENDED TO IMPAIR OR INTERRUPT SERVICES TO THE PUBLIC.

Lennartz' conviction for malicious mischief should be reversed because the State failed to prove he intended to cause an interruption or impairment of service to the public when he broke a window in the Kittitas County Jail. The intent to interrupt or impair public services is the element that distinguishes first-degree malicious mischief, a class B felony, from

third-degree malicious mischief, a gross misdemeanor. RCW 9A.48.070; RCW 9A.48.100; State v. Jury, 19 Wn. App. 256, 267, 576 P.2d 1302 (1978). Without proof of that fact, the State has proved only third degree malicious mischief. Id. Here, the evidence that Lennartz vented his frustration by breaking a window in his cell was insufficient to show whether he understood, let alone intended, the subsequent interruption or impairment of a public service.

Insufficient evidence is a question of constitutional law that appellate courts review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014)). In every criminal prosecution, due process requires the State to prove every fact necessary for conviction beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. A conviction must be reversed for insufficient evidence when, viewed in the light most favorable to the State, no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). A conviction based on insufficient evidence cannot stand. Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A conviction for first degree malicious mischief requires proof that a person “knowingly and maliciously . . . causes an interruption or impairment

of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.” RCW 9A.48.070. The mental state required for first-degree malicious mischief is the specific intent to cause an interruption or impairment of public service, not just the intent to cause property damage. Jury, 19 Wn. App. at 267.

In Jury, the court held that the jury instructions describing the elements of first degree malicious mischief were incorrect. The to-convict instruction stated the elements as:

(1) That on or about July 17, 1976, the defendant did knowingly and maliciously cause physical damage or tamper with an emergency vehicle or property of the City of Centralia, Washington;

(2) That such damage or tampering caused an interruption or impairment of service rendered to the public.

Id. The court concluded that this instruction erroneously reduced the mental state for first degree malicious mischief to the one required for third degree malicious mischief. Id. The court explained,

It is evident that the distinguishing feature in the 3 degrees of the crime relates to the state of mind required. For first-degree malicious mischief, the intent is directed toward interrupting public service; for second-degree malicious mischief, the intent is directed toward creating a substantial risk of interrupting public service; for third-degree malicious mischief, the defendant need only intend to cause the physical damage.

Id. The jury instructions were incorrect because they indicated the mental state of “knowingly and maliciously” applied only causing the property damage, and not to causing the interruption or impairment of services to the public. Id. at 267-68. Under Jury, first degree malicious mischief requires proof of intent that is “directed toward interrupting public service.” Id. at 267.

Lennartz’ conviction must be reversed because the State failed to prove this intent. Intentionally breaking a window does not show intent to cause an interruption or impairment of service to the public. The state relied on evidence that Lennartz was more and more agitated and was hitting the window repeatedly and on purpose. RP 205. But the mere fact tha hitting the window was not an accident does not prove intent to cause an interruption in service to the public. The state also relied on the testimony that Lennartz put a shoe over his hand to protect it while he was hitting the window. RP 205-06. This may show premeditated intent to break the window, but it does not have any relevance to the question of intent to interrupt service to the public.

Next the state argued this showed intent to annoy the jail staff, make them stop and pay attention to him. RP 206. This also does not show an intent to interrupt service to the public. The jail staff’s job includes attending to the needs of incarcerated persons. Assuming Lennartz intended to get the

attention of jail staff, that does not constitute an intent to interrupt service to others or the public in general.

This case provides no evidence that Lennartz even knew that an interruption or impairment of service to the public would result from his conduct, much less that he intended such a result. The conviction for first-degree malicious mischief must be reversed for insufficient evidence and the charge dismissed with prejudice. *See, e.g., State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (when conviction is reversed for insufficient evidence, defendant cannot be retried; case dismissed with prejudice).

2. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN OF PROOF.

“Instructions should tell the jury in clear terms what the law is.” *State v. Byrd*, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), *aff’d*, 125 Wn.2d 707 (1995). Specifically, the so-called “to-convict” jury instruction must list all the essential elements that the jury must find in order to render a guilty verdict. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). Jury instructions are reviewed de novo on appeal and viewed in the context of the instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Here, the to-convict instruction failed to inform the jury that, in order to find Lennartz guilty of first-degree malicious mischief, it must conclude beyond a reasonable doubt that he intended to cause an interruption or

impairment of service to the public. Omission of an essential element from the to-convict instruction relieved the State of its burden of proof and requires reversal.

While formatted slightly differently, the jury instructions here suffer from the same defect as those in Jury. The to-convict instruction for first-degree malicious mischief lists the following elements:

- (1) That on or about December 23, 2016, the defendant caused an interruption or impairment of service rendered to the public, by physically damaging or tampering with property of the state or a political subdivision thereof; and
- (2) That the defendant acted knowingly and maliciously; and
- (3) That this act occurred in the state of Washington.

CP 57. This instruction does not make clear that intent to cause an interruption or impairment of service to the public was required. CP 57. The jury could have concluded that the elements were met if Lennartz acted knowingly and maliciously as to the property damage only.

Defense counsel should not have to persuade the jury what the law is. Byrd, 72 Wn. App. at 780. Here, the ambiguity of the jury instruction left defense counsel in the position of trying to persuade the jury that intent to interrupt public service was required. And, as discussed below, he had to do so in the context of argument by the prosecutor that disputed this requirement. RP 219-20. The defense theory of the case was, therefore, an

uphill battle about the correct law to apply. Under these circumstances, it is reasonably probable that the State was improperly relieved of its burden of proof.

Instructional error that relieves the State of its burden of proof is manifest constitutional error that requires reversal, even if raised for the first time on appeal. State v. Hayward, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009). In Hayward, the definition of recklessness stated that this element was established if the person acted intentionally. In the context of second degree assault, which requires both proof of intentional assault and reckless infliction of substantial bodily harm, the court found this instruction created a mandatory presumption that relieved the State of its burden to prove recklessness if the jury found an intentional assault. Id. at 644-45. The court concluded the instruction violated Hayward's due process rights. Id. at 645.

As in Hayward, the instructions in this case permitted the jury to convict without finding the requisite mental state. The jury could have convicted based on malicious property damage, rather than any intent to interrupt or impair services to the public. Because the jury instructions relieved the State of its burden to prove this essential element beyond a reasonable doubt, reversal is required.

Erroneous jury instructions that relieve the State of its burden of proof are presumed prejudicial. Id. at 646. To avoid reversal, the State would

need to prove beyond a reasonable doubt that the element omitted from the jury instructions was supported by “uncontroverted evidence.” Id. at 646-47. This, it cannot do. Evidence of Lennartz’ mental state included his statement to the officer that he did not mean to break the window. RP 175-77. If he did not mean to break the window, he certainly did not intend the resulting interruption or impairment of service to the public. The evidence is far from uncontroverted, and the omission of this essential element from the to-convict jury instruction requires reversal of Lennartz’ conviction for first-degree malicious mischief.

3. THE PROSECUTOR’S CLOSING ARGUMENT
RELIEVED THE STATE OF ITS BURDEN TO PROVE
INTENT TO INTERRUPT SERVICE TO THE PUBLIC.

The prosecutor misstated the law and relieved the State of its burden of proof when he argued to the jury that he did not have to prove an intent to cause an interruption or impairment of services to the public. RP 219-20. Jury makes clear that intent to interrupt or impair public services is an element of the offense because the term “knowingly and maliciously” applies to causing interruption or impairment, not just to property damage. Jury, 19 Wn. App. at 267. The mere intent to cause property damage shows only a lesser degree of malicious mischief. Id.

The prosecutor in Lennartz’ case misstated the law, telling the jury, “He doesn’t have to plan to cause an impairment. He has to have a plan to

break that window. He has to have his evil intent to break that window.” RP 219-20. The prosecutor further told the jury, “His plan doesn’t have to be I’m going to take this jail or I’m going to cause an interruption in service.” RP 219-20. Lennartz’ conviction for malicious mischief should be reversed because the prosecutor misstated the law and relieved the State of its burden to prove an element of the offense.

Prosecutorial misconduct during closing argument has the potential to violate the accused person’s right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Reversible error results when the prosecutor’s comments are improper and were substantially likely to affect the outcome. Id.

A prosecutor commits misconduct by attempting to mislead the jury regarding its duty to acquit: “By misstating the basis on which a jury can acquit, the State ‘insidiously shifts the requirement that [it] prove the defendant’s guilt beyond a reasonable doubt.’” State v. Vassar, 188 Wn. App. 251, 260, 352 P.3d 856 (2015) (quoting Glasmann, 175 Wn.2d at 713). “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). In short, “The prosecutor may not misstate the law to the jury.” State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 339 P.3d 635 (2014).

A misstatement of law requires reversal when there is a substantial likelihood that it affected the jury's verdict and thereby denied the defendant a fair trial. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). Even where there is no objection, reversal is required when a prosecutor's remark is so flagrant and ill-intentioned that it causes an enduring prejudice that could not have been neutralized by a curative instruction to the jury. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The prosecutor's statements caused such prejudice here.

Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (because average juror is conscious of prosecutor's special role, "improper suggestions, insinuations, and . . . assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"). Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Otherwise, there would be no point in making them. Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand the evidence and apply the law." CP 45 (Instruction 1).

Improper arguments are flagrant and ill-intentioned when the argument has been declared improper by previous published opinion. State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (citing State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996)). The misconduct in this case requires reversal, despite the lack of objection below, because Jury has been the law since 1978.

Because the prosecutor's argument was flagrant and ill-intentioned, the lack of an objection below does not preclude this Court's review. Fleming, 83 Wn. App. at 214. Despite correct written jury instructions, a misstatement of the burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Johnson, 158 Wn. App. at 685-86.

Due process was undermined here because the jury was in no position to determine whether the prosecutor's misstatement of the law was correct. The jury instructions did not make clear whether the State had to prove intent to interrupt service to the public or merely intent to cause property damage. CP 57. This left defense counsel in the unenviable position of having to persuade the jury what the law is. The prosecutor violated Lennartz' right to a fair trial by placing that burden on the defense and relieving the State of its burden to prove the required mental state beyond a reasonable doubt.

4. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INCORRECT JURY INSTRUCTIONS AND PROSECUTORIAL MISCONDUCT THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF.

Alternatively, in the event this Court finds the misconduct could have been cured by instruction, counsel was constitutionally ineffective in failing to object and request such an instruction. Counsel was likewise ineffective in failing to object to the incorrect jury instructions. Ineffective assistance of defense counsel requires reversal of Lennartz' conviction.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987). Confidence is undermined when there is a reasonable probability that, absent the error, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694).

Defense counsel's theory of the case on the malicious mischief charge rested on the absence of any intent to cause an interruption or impairment of service. RP 212. But instead of ensuring that the jury instructions accurately reflected this requirement, or objecting when the prosecutor misstated it, defense counsel did nothing.

The failure to request that the jury instructions correctly reflect the law supporting that defense theory of the case is unreasonably deficient. Thomas, 109 Wn.2d at 228. As is the failure to object to a misstatement of the law. There is no valid tactical reason for permitting the jury to base its decision on written instructions that permit and prosecutorial argument that encourages a misapprehension of the relevant law.

In Jury, the court held counsel was ineffective in failing to object or propose a correct instruction regarding the intent element of first degree malicious mischief. 19 Wn. App. at 266. The court concluded the error was prejudicial because the evidence was ambiguous as to Jury's reason for kicking out the window of a police car. Id. at 267-68. Therefore, the court reversed the conviction for ineffective assistance of counsel. The result here should follow Jury.

Counsel's performance in this case was even more deficient than in Jury because, in addition to failing to object to the jury instructions, counsel also failed to object when the prosecutor misstated the law during closing

argument. Had counsel performed competently, the outcome would likely have been different. If counsel had researched and informed the court of the law as stated in Jury, the court would likely have corrected both the written jury instructions and the prosecutor's misstatement during closing argument. Jurors are generally presumed to follow the court's instructions. State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014).

A properly instructed jury would likely have found reasonable doubt and acquitted Lennartz of first-degree malicious mischief. In Jury, the court reversed because evidence of the missing element, specific intent to impair public service, was ambiguous. 19 Wn. App. 267-68. Here, the evidence of intent to impair public service was non-existent, as discussed above. Ineffective assistance of defense counsel also requires reversal of Lennartz' conviction.

5. CUMULATIVE ERROR DEPRIVED LENNARTZ OF A FAIR TRIAL.

Taken cumulatively, the prosecutor's misstatement of the law and the ambiguous to-convict jury instruction each exacerbated the prejudice caused by the other and deprived Lennartz of a fair trial. Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a

defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984)**Error! Bookmark not defined.**; Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). That is the case here.

Taken together, the misstatement of the law in closing argument and the ambiguous jury instruction require reversal. Even if the jury might have otherwise correctly interpreted the ambiguous jury instruction, it was not likely to do so in the face of the prosecutor's argument that it need not find intent to impair public service. Similarly, even if the jury might have disregarded the prosecutor's argument to the extent it was inconsistent with the written jury instructions, it was not likely to do so here because the relevant jury instruction was ambiguous and could be harmonized with the prosecutor's argument. The combined prosecutorial misconduct and incorrect jury instruction in this case misled the jury as to the required elements of the crime. Lennartz' conviction for first-degree malicious mischief must be reversed.

6. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Lennartz indigent and entitled to appointment of appellate counsel at public expense. CP 83-84. If Lennartz does not prevail on appeal, he asks that no appellate costs be authorized under title 14

RAP. RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.). “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Lennartz’ ability to pay must be determined before discretionary costs are imposed. At the time of his conviction, Lennartz’ attorney declared under penalty of perjury that Lennartz had no money, no income, and no funds from which to pay for appellate counsel. CP 82. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2 (f). Without a basis to determine that Lennartz has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

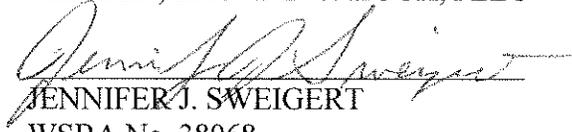
D. CONCLUSION

For the foregoing reasons, Lennartz requests this Court reverse his conviction for malicious mischief in the first degree and remand the case for resentencing on the remaining charge.

DATED this 16th day of November, 2017.

Respectfully submitted,

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