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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 17-1-00017-4-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PATRICK JOSEPH LENNARTZ,

Defendant/Appellant

Respondent's Brief

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I. APPELLANT'S 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. Cumulative error violated appellant's right to a fair trial.

II. ISSUES PRESENTED

1. The evidence presented to the jury was sufficient for the jury to find the Appellant had the intent to cause an interruption or impairment of services.

2. The jury instructions adequately informed the jury of the elements which must be proved by the State in a Malicious Mischief First Degree for an interruption or impairment of services.
3. The prosecutor's statement during closing argument, standing alone, is not a basis for overturning a jury verdict where the instructions given by the court were proper and the defense did not object.
4. Appellant's counsel was not ineffective when evaluated under the required standard.
5. If there was error, any such error was de minimis, and harmless.

III. STATEMENT OF THE CASE

On December 23, Corporal Fernando Contreras was working at the Kittitas county jail where Appellant was an inmate. RP 110, 111-112. The Appellant was alone in his cell. RP 113. The Corporal was serving lunches to the inmates with the assistance of an inmate trustee. RP 113, 115.

When the Corporal arrived at the appellant's cell, the appellant was sitting on his bunk away from the door. RP 113. The Corporal opened the appellant's cuff port in order to provide him with his lunch tray. RP 113-114. There was a window in the cell which the

Corporal testified was intact at that time. RP 114. The Appellant did not come to the cuff port and get his lunch tray and the Corporal told the trustee to continue down the line with the tray to serve another inmate. RP 115. The Corporal then went back to the Appellant's cell with a different lunch tray. This seemed to the Corporal to upset the Appellant based on the Appellant's behavior of clinching his fists, pounding on the wall and window with a close fist and screaming vulgarities at the Corporal. RP 115-116, 117. The Appellant continued in this behavior and the Corporal ultimately removed the offered lunch tray, closed up the cuff port and went to a nearby area to continue his distribution of lunch trays to the other inmates. RP 118.

The Corporal could hear the Appellant's banging continue after he moved on to other inmate cells. RP 118 . Because the banging had continued the Corporal decided to return to the area of where the Appellant was housed. RP 119. The Corporal heard a loud crash and upon inspecting the cell where Appellant was housed saw that the window had been broken. RP 119. The Appellant had placed a sandal over his hand to protect his hand from sustaining an injury while he beat on the glass window. RP 175-177.

The Corporal called in his Sergeant while maintaining constant visual contact with the Appellant to assure safety of the Appellant, the facility and personnel. RP 120. Because of the Appellant's actions additional staff and law enforcement units were called in to assist. RP 120.

The Corporal continued to give Appellant verbal commands and after, some amount of time, Appellant became compliant with his commands. RP 120, 139. The Corporal also testified that in addition to eventually following his commands, the Appellant's demeanor became calmer in as much as the Appellant unclenched his fists and stopped pacing . RP 120-121, 139. The Appellant was subsequently cuffed and taken into a "time-out cell" without further incident. RP 121 at l. 7-8.

Corporal Contreras testified that the breaking of the window required that all staff respond which included himself and two other officers. RP 136, 140. All other operations of the jail had to be shut down until the situation involving the broken window was rectified. RP 136, 140. Additionally a jail lieutenant testified the cell was not usable for ten (10) days after this incident. RP 146. Lieutenant Buntin indicated the window was an exterior window which allowed for the potential of air, snow and moisture to come into the facility

which in turn increased the workload of the heating system. RP 146.

The Lieutenant testified further that, when an exterior window is broken, the jail must consider and take action to protect against the possibility of contraband being introduced into the facility through the broken window. RP 147. In addition to the Appellant's cell the jail was unable to use adjacent cells due to the coldness. RP 145-147

The jail window which the Appellant broke was about six to seven feet long and three feet high. RP 147. The window was heavy and was constructed of tempered glass, between one-and-a-half to two inches thick with laminate down the center of the glass pane. RP 147. Replacing the glass pane was much more complex, laborious and costly than replacing a normal window due to its utilization inside a secure facility. RP 147. Correspondingly, the windows are very difficult to break. RP 148. The Lieutenant testified that as a result of the Appellant's conduct in breaking the window multiple operations were impacted within the jail including classification, staff, safety and security. RP 149.

In addition to the cost of seven hundred and sixty-eight dollars (\$768.00) the jail expended to have the window replaced, the jail had shut down a portion of the jail, hire installers with proper security credentials, limit inmate movement in other portions of the jail, have

their maintenance person and an officer escort the installers, and allow the cell to remain empty for a day or two in order to allow the installation materials, such as caulking, to adequately set or dry. RP 150 at l. 22, 150. Dealing with the initial situation of the breaking of the window and the aftermath required the diversion of hours of manpower away from normal duties in the jail. RP 152.

The Appellant was also charged, tried and convicted for a separate offense which occurred about a month after the breaking of the window. RP 157-159. The Appellant became upset about release conditions imposed by the judge which in some way prevented him from being released. RP 159. The Appellant was agitated and an officer attempted to talk to him about the situation and calm him down. RP 159. Instead of calming down, the Appellant became more agitated, reached through the cuff port and threw a cup of urine, which he had apparently stored in his cell for such a purpose, striking the officer in his face, mouth and chest. RP 161. The officer testified the liquid smelled and tasted like urine. RP 161.

A competency evaluation was ordered and completed. CP 2. The mental health experts and accordingly, the court, determined the Appellant was competent to stand trial for his offenses. CP 33.

IV. ARGUMENT

1. *The evidence presented to the jury was sufficient for the jury to find the Appellant had the intent to cause an interruption or impairment of services.*

In reviewing a claim for sufficiency of the evidence the court must consider whether, after viewing the evidence in the light most favorable to the prosecution, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Johnson*, 188 Wn.2d 742, 750-751, 399 P.3d 507, 511(2017), *citing State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*emphasis in original*).

Jackson v. Virginia, 443 U.S. 307, 318-319, 61 L. Ed. 2d 560, 573 99 S. Ct. 2781, 2788-2789 (1979).

As set forth in the Respondent's Statement of Facts, the evidence upon which the jury could rely in determining the Appellant's intent to cause an interruption in the jail services by damaging his cell window was extensive. The defendant was angry with a corrections officer and beat on a two inch window until it broke. A jury can make reasonable inferences from the evidence to conclude a defendant acted knowingly or with intent. Intent may be inferred from the surrounding facts and circumstances if it is plainly indicated as a matter of logical probability. *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993), (quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Such is the case at bar.

2. The jury instructions adequately informed the jury of the elements which must be proved by the State in a Malicious Mischief First Degree for an interruption or impairment of services.

The decision in *Jury* is simply not applicable in the case at bar because in that case the court gave an erroneous instruction of the elements of the offense thereby relieving the State of its burden of proving the defendant's intent to cause an interruption or impairment of services. *State v. Jury* 19 Wn.App.256, 576 P.2d 1302 (1978).

Unlike in *Jury*, the jury instruction on the definition of malicious mischief, as well as the to-convict instruction on the malicious mischief in the case at bar, was legally correct. CP 57. The to-convict instruction must list all of the essential elements that the jury must find to reach a guilty verdict and the instruction in the case at bar did set forth those essential elements. *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997). The to-convict instruction is straight forward and can only be interpreted to apply the knowingly and maliciously of element 2, to the interruption or impairment set forth in element number 1. The instruction replicates the most recent iteration of the Washington Pattern Jury Instructions which addressed the problems of *Jury*.

The court in *Jury* did not hold that the challenged instruction was inadequate because it used the statutory term ‘knowingly’ instead of the word ‘**intent**’ as is argued by Appellant but rather the court held that one of the instructions that was given, in that case, eliminated the State’s burden for first degree malicious mischief by instructing on the scienter for a third degree malicious mischief. *State v. Jury* 19 Wn. App.256, at 266-67; 576 P.2d 1302 (1978). In fact, the *Jury* court noted that the instruction given by the trial court defining first degree malicious mischief, which used the statutory term

"knowingly," was an appropriate instruction. Jury, 19 Wn. App. at 266. It was the definitional instruction on malicious mischief which was in error. Id.

In the case at bar, the instructions individually and collectively adequately presented the law governing the case.

3. The prosecutor's statement during closing argument, standing alone, is not a basis for overturning a jury verdict where the instructions given by the court were proper and the defense did not object.

State's Attorney, Ms. George, stated in her rebuttal closing that

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 have a 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. And I submit to you there's no other reason than he wants to break that window other than evil intent to vex, annoy, or injure another person. That's what we're talking about. 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. (emphasis added).

RP 219-220.

Ms. George's rebuttal closing statements were at worst a misunderstanding of the elements and at best an accurate description of malicious.

In any regard, in *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105(1995) the court held that where improper argument is claimed, the defense bears the **burden** of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which, in the case at bar, the defense did not request.

The failure to object to the prosecuting attorney's improper remark is a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. In light of the complete, legally correct instructions regarding the State's **burden** of proof, no prejudice has been shown. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105, 1122-1123

(1995). Here an objection with a curative instruction would have sufficed to correct any confusion.

Further the jury is presumed to follow the law as given to them by the court in the instructions. *State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760, (2010). The court instructs the jury that the attorney's statements and arguments are not evidence rather they should rely upon the instructions from the court.

4. Appellant's counsel was not ineffective when evaluated under the required standard.

A criminal defendant has the right to effective assistance of counsel. However, to successfully challenge the effective assistance of counsel, a two prong test must be satisfied. There must be a showing that:

- (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. The United States Supreme Court has defined reasonable probability as 'a probability sufficient to undermine confidence in the outcome.'

In re Pers. Restraint of Davis, 152 Wn.2d 647, 672-673, 101 P.3d 1, 16 (2004).

A failure to establish either element of the test defeats the ineffective assistance of counsel claim. *Id.*

The Appellant's premise that counsel was ineffective is based upon a conclusion that the jury instructions were incorrect however, as previously discussed the instructions to the jury on the law in the case were accurate in form and substance.

Even accepting the premise of the Appellant, *arguendo*, that defense counsel's representation was defective in that he failed to object to a perceived misstatement in the prosecutor's closing rebuttal, any such deficiency falls far short of undermining the confidence in the outcome of the trial as determined by the jury.

5. If there was error, any such error was de minimis, and harmless.

If there was error in this matter, the error was harmless, given a totality of the facts, instructions and law of the case. The evidence against the defendant was significant and unequivocal.

V. CONCLUSION

For the reasons stated, the jury verdict should be affirmed.

There was no erroneous instruction, much less one that shifted

the burden from the state. The defense attorney performed adequately under the analysis of the two prong test and the verdict was not undermined in any substantive way.

Dated this 15th day of February, 2018.

s/Deborah King

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PROOF OF SERVICE

I, Deborah King, do hereby certify under penalty of perjury that on 16th day of February, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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