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Court of Appeals
Division III
State of Washington
7/27/2018 4:57 PM

No. 35916-6-III

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

STATE OF WASHINGTON, Respondent

v.

RYAN BARONE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WHITMAN COUNTY
THE HONORABLE GARY J. LIBEY

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The evidence was insufficient to sustain a conviction for malicious mischief in the second degree.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A. Mr. Barone was charged with one count of malicious mischief for putting food in the toilet of a holding cell at the county jail and urinating in another holding cell. Where the evidence failed to show that Mr. Barone knowingly and maliciously created a substantial risk of interruption or impairment of service rendered to the public, must his conviction be reversed?

II. STATEMENT OF FACTS

On the afternoon of February 3, 2018, Ryan Barone was taken to the Whitman County jail. RP 11,13-14. The jail complex includes two booking cells: a "wet" cell, so named because it has a toilet and a sink; and a "dry cell" which does not have water options but is equipped with a floor drain. RP 15,37. Before being evaluated for mental status, medical status, or given an orientation to jail rules, officers placed Mr. Barone in the wet cell. RP 16,31,47.

Because he wore urine-soaked pants the booking officer offered, and Mr. Barone declined use of an orange jail jumpsuit. RP

14,16. Instead, he stripped off his wet clothing. RP 33,44. Within less than 20 minutes, the corrections officer served a chili cheese dog and salad dinner to Mr. Barone, along with two cups of juice. RP 16-17.

Shortly after that, Mr. Barone scraped the food, Styrofoam cups, plastic utensils and juice into the toilet. RP 17. Mr. Barone then manually flushed it one time. It did not overflow. RP 18,33. The corrections officer removed Mr. Barone from the wet cell and placed him in the dry cell so they could resolve the toilet issue. RP 19,33.

If, while being held in the cry cell, a detainee needs to use the toilet, he must bang on the cell door, yell, or wave at the surveillance camera to alert the officer. RP 38. The corrections officer remembered that once Mr. Barone went into the dry holding cell, he was "acting erratically, and I remember him peeing on the floor along with running, jumping, at the camera..." RP 33-34. Mr. Barone urinated on the floor of the dry cell. RP 35. Both cells were clean by the time another individual was presented for booking that evening. RP 45-46.

The corrections officer testified that a jail inmate would typically be subject to lockdown and loss of privileges for disruptive

behavior. RP 26. The State charged Mr. Barone with malicious mischief in the second degree. CP 7-8. The matter proceeded to trial, and the jury convicted Mr. Barone on the charged count. CP 43. He makes this timely appeal. RP 41.

III. ARGUMENT

The Evidence Was Insufficient To Sustain A Conviction For Malicious Mischief In The Second Degree.

The State was required to prove beyond a reasonable doubt that by putting his dinner into the toilet and flushing it once, and later urinating on the floor of a dry cell, which had a floor drain, Mr. Barone knowingly and maliciously created a substantial risk of interruption or impairment to public service by physically damaging or tampering with property of the state or a political subdivision. RCW 9A.48.080(1)(b); *In re Winship*, 397 U.S. 358, 368, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

A reviewing Court should reverse a conviction and dismiss the prosecution for insufficient evidence, where after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103,

954 P.2d 900 (1998). Here, the evidence is insufficient to establish that Mr. Ball's conduct was knowing and malicious or that it interrupted or impaired a public service because the jail holding cells had to be cleaned.

In *State v. Hernandez*, 120 Wn.App. 389, 85 P.3d 398 (2004), the Court considered whether the defendant's conduct met the requirements for malicious mischief in the second degree. There, the defendant was belligerent and uncooperative when he was detained for questioning about the theft of a school television. Hernandez screamed, cursed, and spit four times while he was in the backseat of the patrol car. He was warned that if he did not stop he would be charged with malicious mischief. After dropping Hernandez off at the juvenile detention facility, the officer spent about 15 minutes cleaning the backseat of his car with a disinfectant. *Id.* at 390-391. On review, the Court held that under the plain terms of RCW 9A.48.080(1), the spitting did not constitute knowing and malicious damage or tampering that created a substantial risk of interruption or impairment of the patrol car's service to the public. *Id.* at 392.

By contrast, in *State v. Turner*, 167 Wn.App. 871, 276 P.3d 356 (2012), the defendant wrestled with arresting officers and

refused to get in the patrol car. Once in the car, Turner kicked out the passenger side window. *Id.* at 875. The Court distinguished the conduct in *Hernandez*, which created a 15-minute service interruption while the officer cleaned the car, with the conduct by Turner, which caused the day long loss of use of the car because it needed repair. *Id.* at 877. The Court concluded there was substantial evidence that Turner's actions created a substantial risk of interruption or impairment of service to the public. *Id.* at 878.

This case is similar to *Hernandez* rather than *Turner*. Here, Mr. Barone used the only method available when he attempted to get the officer's attention by jumping and waving at the camera before he urinated on the floor. Having to use a restroom is not inherently wrongful and being unable to wait for assistance does not amount to a knowing and malicious creation of a substantial risk of interruption or impairment of the property for public service.

Additionally, the de minimis effort and time it took to clean up the cells distinguishes this case from *Turner*. In *Turner*, the patrol car was unavailable for a day and the window had to be replaced. Here, the State presented no testimony on the length of time it took to refresh the cells, however, the corrections officer testified that

during his shift another individual was booked into the jail and the cells were clean. RP 45-46.

Under the plain terms of RCW 9A.48.080(1)(b), the evidence is insufficient that Mr. Barone knowingly and maliciously created a substantial risk of interruption or impairment of public services.

IV. CONCLUSION

Based on the foregoing facts and legal authorities, the evidence is insufficient to sustain the conviction. This matter must be remanded for an order of dismissal with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

Respectfully submitted this 27th day of July 2018.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on July 27, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Whitman County Prosecuting Attorney at denist@co.whitman.wa.us and amandap@co.whitman.wa.us and to Ryan Barone, 9118 E. Columbia Court, Apt. C203, Spokane, WA 99212.



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July 27, 2018 - 4:57 PM

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Appellate Court Case Title: State of Washington v. Ryan A. Barone
Superior Court Case Number: 18-1-00022-4

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