

FILED
Court of Appeals
Division III
State of Washington
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COA No. 35916-6-III

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

STATE OF WASHINGTON,

Respondent

v.

RYAN BARONE

Appellant.

Appeal from Whitman County Superior Court
The Honorable Gary Libey
No. 18-1-00022-38

BRIEF OF RESPONDENT

Merritt Decker
Senior Deputy Prosecuting Attorney
Whitman County
Attorney for Respondent
400 North Main Street
Colfax, WA 99111
(509) 397-6250

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I. ASSIGNMENT OF ERROR

Whether the evidence was sufficient to support the conviction for malicious mischief in the second degree?

II. STATEMENT OF THE CASE

The State agrees with the Defendant's statement of the case.

III. ARGUMENT

The Defendant's only contention is that the evidence presented at trial was insufficient to support his conviction of malicious mischief in the second degree. While there are alternative ways in which one can commit this offense, the State alleged only one of the alternatives; that the Defendant, knowingly and maliciously, created a substantial risk of interruption or impairment of service rendered to the public by physically damaging or tampering with property of the state or a political subdivision thereof. RCW 9A.48.080(1)(b). The Court of Appeals has made it very clear that the statute does not require *actual* interruption or impairment. *State v. Turner*, 167 Wn. App. 871, 877, 275 P.3d 356 (Div 3, 2012).

When reviewing whether sufficient evidence supports a criminal conviction, the reviewing court is to view the evidence in the light most favorable to the State to determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In support of his argument, the Defendant cites the only two cases on point that the State is aware of, *State v. Hernandez* and *State v. Turner*. In *Hernandez*, the Court of Appeals found that a juvenile's act of spitting four times in the back of a patrol car while being transferred to a detention facility was insufficient to support a conviction of malicious mischief in the second degree. *State v. Hernandez*, 120 Wn.App. 389, 85 P.3d 398 (Div 3, 2004). In that case, after the act was completed and the juvenile was delivered to the detention facility, the officer "spent about 15 minutes cleaning the back seat of his patrol car with disinfectant." *Id.* at 391.

In *State v. Turner*, the Court of Appeals found that the act of breaking a patrol car's window was sufficient to support a conviction, reasoning that "[p]olice cannot use patrol cars with broken windows... [and this act] necessarily causes the patrol car to be unavailable for some period of time." 167 Wn.App. at 877.

While *Hernandez* and *Turner* are the only two published cases on this issue, the Court of Appeals discussed this issue and these two cases in an unpublished opinion. *State v. Williams*, 184 Wn.App. 1045, 2014 WL 6657547 (Div 1 2014). While this case is non-binding on this court, because it was filed after March 1, 2013, if the court deems appropriate, it may view it as persuasive on this issue. GR 14.1(a). In *Williams*, the court affirmed a malicious mischief in the second degree conviction where an

inmate damaged a sprinkler head in his jail cell. Upon finding the damaged sprinkler, it took a maintenance worker one hour to repair it, and an additional thirty to forty minutes for inmate workers to clean the floor and walls of the inmate's cell. The Court relied on the decision in *Turner*, in affirming the defendant's conviction; stating:

[A] jail cell was out of commission for around one and a half hours. During this time, two jail inmates were brought in to clean up the mess caused by Williams. The inmates, who were being supervised by Paddy, spent between 30 and 40 minutes cleaning. Additionally, Dobrava spent around one hour repairing the sprinkler. Furthermore, as a result of Williams' actions, the entire fire-suppression system was in a "trouble" state until the system was reset, which required Dobrava's expertise. In view of the foregoing evidence, the jury could have inferred—based on a common understanding of "impairment"—that the loss of use of a cell for over one hour, the diversion of prison resources to clean up the mess and repair the damage, the actual damage caused to the sprinkler, and the "trouble" state in which the fire-suppression system remained until it was reset by Dobrava—together—demonstrated a substantial risk of interruption or impairment of service rendered to the public. Accordingly, Williams is not entitled to appellate relief.

Just as in *Williams* and *Turner*, in the case at hand, the Defendant's act of physically tampering with property of the State created a substantial risk of interruption or impairment of service rendered to the public. The Defendant argues that because the interruption or impairment he caused was not as long as the interruption or impairment was in *Turner*, the facts cannot support a conviction. In *Turner*, the State property at issue, a

patrol car, was put out of commission for one day while it was being repaired. *Turner*, 167 Wn.App. at 875. However, in *Williams*, the property at issue, the jail cell, was out of commission for, at most, one hour and forty minutes.

Further, this case can be distinguished from *Hernandez*. In that case, the court found that the act of spitting several times in a patrol vehicle, which resulted in the officer taking 15 minutes to disinfect, was insufficient to support the conviction. While it is highly likely that the outcome in *Hernandez* would be different today, given the fact that the awareness of the dangers that biohazards present has increased over the last fourteen years, the case at hand is dealing with things that are more dangerous than spittle; an overflowing toilet and urine. Officer Meserve testified that, because of the Defendant's actions, the affected cells were unusable because any additional use of the toilet would have potentially flooded the cell with toilet water and the dry cell had urine all over the floor. RP 44-45. The Defendant's acts created a biohazard and the cells could not be used until the problem was resolved.

IV. CONCLUSION

The court should affirm the Defendant's conviction because there was more than sufficient evidence to support the verdict rendered by the jury.

The State requests that the court affirm the Defendant's conviction.



Merritt Decker, WSBA 46248
Senior Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

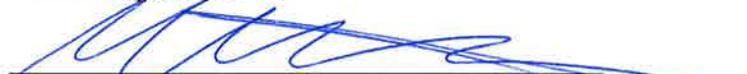
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Ryan Barone
1015 S. Walnut Road #6
Spokane, WA 99204

Dated: September 24, 2018



Merritt Decker, WSBA# 46248
Senior Deputy Prosecuting Attorney

WHITMAN COUNTY PROSECUTOR'S OFFICE

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