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Court of Appeals
Division III
State of Washington
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No. 35933-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

TAMARA LOUISE COOKE,

Appellant

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

NO. 17-1-00925-7

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. There was sufficient evidence for a jury to convict the defendant of Burglary in the First Degree given that she only lived at the victim's residence for a few days several months earlier, that she stole his truck when she left, that on this occasion she forced her way into the residence while the victim was at work and stabbed him with an ice pick when he arrived home.
- B. There was sufficient evidence for a jury to convict the defendant of Assault in the First Degree given that she stabbed the victim in the back with an ice pick, causing a collapsed lung, which resulted in him needing hospitalization for five days and missing work for one month.
- C. The State concedes for the reasons stated in the Argument, Section C, that the trial court did not make a sufficient finding to impose the five-year minimum sentence for Assault in the First Degree.
- D. The Court properly imposed restitution and this matter should not be raised for the first time on appeal.
- E. The State concedes that the \$200 filing fee can be stricken.
- F. The State respectfully suggests that the defendant is misreading the Judgment and Sentence. It does not require her to "commence immediately" LFO payments.

G. The State will not seek appeal costs.

II. STATEMENT OF FACTS

Tim Ahrens and Terry Abel were best friends for about 25 years. RP at 75-76. The defendant was Mr. Abel's wife. RP at 75. Mr. Abel passed away five to six years before the time of trial (March 2018), the defendant fell on hard times, and Mr. Ahrens let her stay in his residence for a few days in April 2017. RP at 76-77.

She repaid the kindness by stealing Mr. Ahrens's truck and leaving without a goodbye. RP at 77. There was no further contact between the two until the night of the offense. *Id.*

On August 7, 2017, Mr. Ahrens arrived home from work later than usual at about 7:30 P.M. RP at 77-78. He tried to turn on a light, but it was not working. RP at 78. He later found that some of his light bulbs had been removed and disabled. *Id.* When he turned to shut his door, he was stabbed from behind by the defendant who was holding an 8-10" ice pick. RP at 78-79.

Mr. Ahrens described himself as being in shock with his adrenalin pumping. RP at 79. He asked her how she got in the residence, what she was doing in his house, and whether she stabbed him. RP at 78-79. Her answers were very vague. *Id.* She said, "Will you let me leave," he told her to go and she left on foot. RP at 79.

Mr. Ahrens did not immediately realize how injured he was. *Id.* However, he started feeling shoulder soreness and shortness of breath. RP at 80. He had a collapsed lung and was in the hospital for five days. RP at 81. He missed one month of work. *Id.*

Mr. Ahrens later found various items missing from his home, including fishing equipment, a laptop, personal mail, and flashlights. RP at 82.

Officer McMullen, Kennewick Police Department, found evidence of a forced entry into Mr. Ahrens's residence. RP at 108. Specifically, the door frame was cracked, and, in his opinion, the defendant could have shouldered or kicked the frame loose because it was not a sturdy frame. RP at 109.

Officer McMullen found the defendant at her residence in Pasco around midnight. RP at 123. She admitted to being near Mr. Ahrens's residence on this evening. RP at 112, 114. However, she stated that she was at the residence of "Jeff Graham", a man whose address, phone number, or approximate age she could not provide. RP at 112.

III. ISSUES

- A. Viewing the evidence in the light most favorable to the State, could a reasonable jury convict the defendant of Burglary in the First Degree?

1. What is the standard on appeal?
 2. Given her unceremonious leaving of Mr. Ahrens's residence three months earlier, including the theft of his truck, her forced entry into his residence on this occasion, and her disabling his lights, could a rational jury conclude that the defendant had no permission to enter his residence?
- B. Viewing the evidence in the light most favorable to the State, could a rational jury convict the defendant of Assault in the First Degree?
1. What is the standard on review?
 2. Given that the defendant stabbed Mr. Ahrens with an ice pick 8-10" long in the back when he arrived home, causing a collapsed lung and for Mr. Ahrens to be hospitalized for five days, could a jury find that she intended to inflict great bodily harm?
- C. Was the trial court correct to impose a five-year minimum sentence for Assault in the First Degree?
- D. Should the defendant be allowed to raise the issue about the amount of restitution for the first time on appeal?
1. What is the standard on review?
 2. Can the defendant show any prejudice or violation of a constitutional right?

3. Regarding the ineffective assistance claim, can the defendant show the defense attorney fell below reasonable professional standards or that the restitution was not appropriate?
- E. Should the \$200 filing fee be stricken?
- F. Did the trial court actually order the defendant to “commence immediately” LFO payments, or was this clause part of a section on Payroll Deductions which the court did not order?
- G. The State will not seek appeal costs.

IV. ARGUMENT

A. In the light most favorable to the State, there was sufficient evidence to conclude that the defendant had no permission to enter Mr. Ahrens’s residence.

1. Standard on appeal for sufficiency of evidence claims.

Evidence is sufficient to convict, if, after it is viewed in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. The forced entry, disabling Mr. Ahrens’s lighting, and the previous theft of his truck establish the defendant did not have permission to enter his residence.

Clare Booth Luce is often credited for saying, “No good deed goes unpunished.” Here, the victim’s best friend’s widow, the defendant, was down and out and needed a place to stay. RP at 76. Mr. Ahrens allowed her to stay at his house for a few days. *Id.* There was nothing romantic or inappropriate about this; he was simply doing her a favor. RP at 77.

She repaid him by leaving unannounced and stealing his truck, which was never found. *Id.* Several months later, on August 7, 2017, she broke into Mr. Ahrens’s house, disabled his house lights, stole various items, and stabbed him when he interrupted the burglary. RP at 78, 82, 108.

There was more than sufficient evidence that the defendant was not permitted or licensed to be in Mr. Ahrens’s house. In fact, his first words to her after getting stabbed, were: What are you doing in my house and how did you get in. RP at 78-79.

B. There was sufficient evidence for a rational jury to conclude the defendant intended to cause great bodily injury.

1. The standard on appeal is set for above.

Evidence is sufficient to convict, if, after it is viewed in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d.

2. There was sufficient evidence of the defendant's intent to cause Mr. Ahrens great bodily harm.

Specific intent can be inferred as a logical probability from all the facts and circumstances. *State v. Pierre*, 108 Wn. App. 378, 385, 31 P.3d 1207 (2001). A jury can consider the manner in which the defendant exerted the force and the nature of the victim's injuries to the extent that it reflects the amount or degree of force necessary to cause the injury. *Id.*

In this case, it is reasonable to infer that Mr. Ahrens interrupted the defendant as she was burglarizing his residence. She had taken steps to hide her presence by taking out light bulbs in the residence. She plunged an 8-10" ice pick in his back the moment he turned to shut his door.

In this case, a jury could infer the defendant had only one "exit strategy" if Mr. Ahrens came home while she was burglarizing his residence: stab him immediately and thereby severely injure him. When Mr. Ahrens was not totally disabled, she had no explanation for why she was in his house or how she got in. Instead she asked, "Will you let me go?" It is reasonable to infer she expected her stabbing of Mr. Ahrens would render him, at a minimum, disabled.

It is also reasonable to infer the defendant's intent from the extent of Mr. Ahrens's injuries and from her carrying the ice pick. The only reason for her to have the ice pick was to stab Mr. Ahrens. She did so, and

it was reasonable in the light most favorable to the State to infer she did so to cause great bodily harm. With any hospitalization five days long, a jury could infer that the perpetrator of such an assault intended extremely harmful consequences to the victim.

With all due respect to the defendant, she is conflating the intent to cause great bodily harm—which the State must prove, with prior animosity or threats to harm—which the State does not have to prove. Br. of Appellant at 15-16.

The jury was correctly instructed about the legal definition of intent, and there was more than sufficient evidence to support the verdict.

C. The State concedes that the trial court did not specifically find the defendant intended to kill Mr. Ahrens or used force which was likely to result in his death and therefore should not have imposed the five-year minimum sentence.

RCW 9.94A.540 (1)(b) requires imposition of a five-year minimum sentence for Assault in the First Degree if the offender used force or means likely to result in death or intended to kill the victim. This is slightly different than the elements for Assault in the First Degree, which require a jury to find the defendant intended to inflict great bodily harm by means of a deadly weapon likely to produce great bodily harm or death. RCW 9A.36.011 (1)(a).

Under *State v. McChristian*, 158 Wn. App. 392, 404, 241 P.3d 468 (2010), a jury need not find that the defendant met the requirements of RCW 9.94A.540 (1)(b) if the minimum sentence does not increase the penalty for first degree assault. However, in *McChristian*, the trial court commented that the victim could have easily died. *McChristian*, 158 Wn. App. at 404. The Court held that was sufficient to find that the trial court made a finding pursuant to RCW 9.94A.540 (1)(b). In this case, the trial court did not make such a finding, and the deputy prosecutor did not alert the judge to this necessity. Therefore, the State believes the defendant's argument is well-taken and will concede this point.

Of course, this will have no practical effect on the length of the defendant's sentence.

D. The defendant on appeal should not assume there was no evidence supporting the restitution amount or that her attorney was ineffective.

1. Standard on review regarding raising issue for first time on appeal.

RAP 2.5 (a) generally prohibits a party from raising an issue for the first time on appeal. Two exceptions are if the trial court lacks jurisdiction, or if there was a manifest error affecting a constitutional right. Thus, a timeliness challenge can be raised for the first time on appeal because such a challenge involves whether the trial court exceeded its statutory authority. *State v. Moen*, 129 Wn.2d 535, 543-44, 919 P.2d 69

(1996). However, *Moen* also stated that restitution does not affect a constitutional right. *Id.* at 543.

2. This Court should decline to review the amount of restitution ordered by the trial court.

The defendant's argument is built on the impression that there were no documents from the Crime Victims Compensation fund to justify the award of restitution. That impression is incorrect. Attorneys frequently exchange documents and come to an agreement on various points without the involvement of a court. This is true on issues of restitution. There is nothing in the record showing the amount the Crime Victims Compensation (CVC) fund paid on Mr. Ahrens's medical bills because the documents were shared between the attorneys.

That is where RAP 2.5 (a) comes in. If the defendant or her attorney felt that the CVC payment was excessive, they should have objected. If this Court remands the issue, it will have far reaching implications. Virtually any agreement by the parties, any concession by the defense, any issue in which the attorneys jointly ask the court to find certain facts, could be attacked on appeal if documents are not introduced or witnesses called to testify to verify those facts.

3. Standard on review for ineffective assistance claims.

To establish ineffective assistance of counsel, the defendant must establish that her attorney's performance was deficient, and the deficiency prejudiced the defendant. Deficient performance is falling below an objective standard of reasonableness based on consideration of all the circumstances. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. If either element of the test is not satisfied, the inquiry ends. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

There is a strong presumption that counsel's performance was reasonable. When counsel's conduct can be characterized as legitimate trial strategy or tactics, the performance is not deficient. *Id.* at 862-63.

- a. **This Court should presume the defense attorney acted appropriately. The defendant has also not shown any prejudice.**

In the experience of this deputy prosecutor, restitution orders are usually agreed and, therefore, documents substantiating the amounts requested are almost never filed with the court. The defendant is correct that there is no record in the trial court verifying that the CVC fund paid out \$19,413.23 in restitution. But that does not mean that such

documents do not exist. It simply means that the parties saw no reason to introduce the documents since there was no dispute about restitution.

The defendant's attorney acted as standard professional. This Court should presume that he did not let the prosecution or the CVC simply produce numbers out of thin air. As far as prejudice, to date, the defendant has presented nothing showing that the restitution awarded is not correct.

This argument is without merit.

E. The State concedes that the \$200 filing fee should be stricken based on new legislation.

This is not a criticism of the trial court. When the defendant was sentenced, the \$200 filing fee was mandatory. New legislation made it discretionary and applicable to pending cases.

F. The trial court did not order that the defendant immediately commence restitution payments.

The defendant is probably referring to a provision in the Judgment and Sentence that:

“[] The Department of Corrections (DOC) or the clerk of the court may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760 (8).

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, *commencing immediately*, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____ . RCW 9.94A.760.” (Emphasis added.)

CP 134.

This provision, allowing for Payroll Deductions, was not checked. The comment regarding payments to commence immediately is under the provision about Payroll Deductions. Therefore, because the provision was not checked, the Court did not order the defendant to begin to pay immediately. Further, even this sentence containing the phrase “commencing immediately”, only orders that payments be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections. There is no requirement that the policy of the clerk or the schedule established by the Department of Corrections require immediate payments, especially if the defendant is incarcerated for 111 months.

This is further illustrated by the next sentence, which is in **bold** in the original: “**The defendant shall report to the Benton County Clerk, 7122 West Okanogan Place, Kennewick, Washington, and provide financial information as requested. RCW 9.94A.760 (7)(b).**” CP 134.

This sentence would not have been required or emphasized if the Court had intended to impose immediate payments.

This was followed by another sentence, also in **bold** in the original: “**The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full . . .**” *Id.* Taken

together, the bold sentences tell the defendant that interest will start upon entry of the Judgment and Sentence, but that LFO payments will be decided once the defendant is out of custody and reports to the Clerk's Office.

The defendant has not claimed that the Clerk or DOC is requiring immediate payments.

It would be easy to simply strike the "commencing immediately" from the Judgment and Sentence. However, the trial court did not order that, and neither the Clerk nor DOC are requiring it. This Court should decline to grant this request.

G. The State will not seek appeal costs.

The defendant has raised some issues which the State agrees with. The State will not seek appeal costs.

V. CONCLUSION

The defendant had a fair trial and was found guilty of Burglary in the First Degree and Assault in the First Degree. Tim Ahrens did her a favor by allowing her to stay at his residence for a few days in April. She rewarded him by sneaking out of his house and in the process stealing his truck. A few months later on August 7, 2017, she broke into Mr. Ahrens's house when he was not there and stole various personal property. These

facts contradict the defendant's argument on appeal that she still had some authority to reside in his house.

When Mr. Ahrens arrived home and interrupted the burglary, she immediately stabbed him with an 8-10" ice pick. It is reasonable to infer that she carried the ice pick in order to disable Mr. Ahrens should he come home during the burglary. She had no other strategy to get away. She carried the ice pick and stabbed him meaning to disable him. She was surprised he was still standing after the attack and fled on foot when he did not try to detain her. The stabbing caused serious harm to Mr. Ahrens; he was in the hospital for five days and lost thirty days of work. A rational jury would have found these facts establish that the defendant stabbed Mr. Ahrens with the intent to inflict great bodily harm.

The defendant is wrong concerning the restitution order. At the heart of the defendant's argument is the idea that there is nothing to substantiate that the CVC fund paid restitution or that Mr. Ahrens's medical bills ran to about \$19,413. There is nothing in the record because the defense was satisfied with the proof on this point. Lawyers frequently agree to facts and inform courts that there is no dispute on some matters. To require attorneys to now call witnesses or produce documentation establishing those facts would be highly onerous and improper. This Court should assume the defense attorney acted appropriately and that the

documentation on restitution is in order. This Court should decline to hear the issue; if there was something to it, the defense attorney would have spoken up.

The defendant's reading of the Judgment and Sentence that the defendant is required to immediately commence LFO payments is incorrect. That provision is in a section about Payroll Deductions that was not checked by the trial court. Further, the defendant is told, emphatically, to report to the Clerk to provide financial information. This is obviously because LFOs will not be due until the defendant is released.

The defendant has found two issues the State will not contest. The State did not alert the trial court about a needed finding for imposition of the five-year minimum for Assault in the First Degree. That provision should be stricken. The \$200 filing fee should also be stricken.

Otherwise the convictions and sentence should be affirmed.

RESPECTFULLY SUBMITTED on December 5, 2018.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read 'Terry J. Bloor', is written over a horizontal line.

Terry J. Bloor, Deputy
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 5, 2018.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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