

60991-2
NO. 55942-7-1

83343-5

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

STATE OF WASHINGTON,

Respondent,

v.

HELEN D. IMMELT,

Petitioner.

2008 FEB -4 PM 3:48

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

I. IDENTITY OF RESPONDENT AND RELIEF SOUGHT

The State of Washington, respondent, asks that petitioner Helen Immelt's motion for discretionary review be denied.

II. DECISION BELOW

The Snohomish County Superior Court, the Hon. Richard J. Thorpe, sitting as an appellate court on RALJ appeal, affirmed petitioner's conviction, after jury trial in Evergreen Division of Snohomish County District Court, for violation of Snohomish County's noise ordinance, SCC 10.01.040 and 10.01.080(3).

III. ISSUE PRESENTED FOR REVIEW

The petitioner awoke several of her neighbors at 6 a.m. on a Saturday morning by blasting her car horn for over five minutes. She was angry at them. Some minutes later, after being warned by police, she honked the horn again. She was convicted under a local noise ordinance that criminalizes a "public disturbance noise," including sounding a vehicle horn for non-safety reasons, if occurring twice in a 24-hour period. The petitioner alleged what she did was protected "speech." The RALJ court affirmed. Should this Court accept review, when no statewide concerns are identified and the petitioner did not overcome the ordinance's presumption of constitutionality?

2. The petitioner claims the instructions specified no mens rea. Should this Court accept review, when the "to convict" instruction required an intentional act?

3. The petitioner argues the government should have been required to prove the horn was defective, with instructions drafted accordingly. Should this Court accept review, when the jury had to find an intentional act to convict?

5. The petitioner represented herself at trial but did not testify. After she repeatedly argued facts not in evidence in her pro se closing, the prosecutor objected, adding she could reopen her case and take the witness stand if she wished. The trial court denied petitioner's subsequent motion for mistrial, and the RALJ court affirmed. Should this Court accept review of the denial for abuse of discretion, when the prosecutor never implied that the defendant's failure to testify was evidence of guilt, his comments were prompted by repeated misconduct by the petitioner, and the jury was instructed not to draw any inference from a defendant's failure to testify?

IV. STATEMENT OF THE CASE

Petitioner Helen Immelt lived in a cul-de-sac in a development governed by restrictive covenants. 1 TRP 94-95, 137; 2 TRP 204-05, 257-58, 270-73, 304, 393.¹ Sometime on or before May 12, 2006, she received a letter from her homeowners' association that the covenants forbade her continuing to keep chickens in her back yard. 1 TRP 139-40, 152-55; 2 TRP 216-17, 340. On the afternoon of May 12, 2006, she yelled and cursed at a neighbor, Tara Knudson, demanding to know who was behind the letter. 1 TRP 98-103. Ms. Knudson, who knew nothing about it, was frightened and called police. 1 TRP 98-104.

The petitioner went across the street to confront another neighbor, Jeremy Brumbaugh, the president of the homeowners' association. That conversation became heated and attracted three other neighbors, Tina Creed, John Vorderbrueggen, and Mike Menalia. 1 TRP 140-44, 164-65; 2 TRP 211, 213-14, 220, 224, 273-76. 2 TRP 273-75. It came out that Vorderbrueggen was the one who had complained about the chickens. 1 TRP 166; 2 TRP 228, 234, 340.

¹ The citation is to the verbatim report of proceedings, of record below.

Shortly before 6:00 am the next morning, Saturday, May 13, Vorderbrueggen awoke to the sound of a car horn honking. 1 TRP 171; 2 TRP 206. He looked out and saw a car he had seen for some weeks parked in the petitioner's driveway now parked in front of his house. 2 TRP 206, 215. The horn blowing continued for six minutes or more. 1 TRP 145-47, 175; 2 TRP 241, 261. Jeremy Brumbaugh woke up to it, too. Looking out, he could see the petitioner parked in front of Vorderbrueggen's house. 1 TRP 145-46, 172. Mike Menalia, already awake, heard the honking start at 5:54 a.m. Looking out, he saw the petitioner. 1 TRP 259-62, 281, 287. Tara Knudson heard the honking but could not see who it was. 1 TRP 113, 115, 125-25. The petitioner then drove all along the cul-de-sac, still honking. 2 TRP 207. Vorderbrueggen saw her lower her window and wave at him. 2 TRP 207, 215.

Vorderbrueggen called police. 2 TRP 207, 310-11. He got a call from the defendant, saying she just wanted to make sure he was up at 6. 2 TRP 216. She said something about chickens. Id.

Deputy David Casey of the Snohomish County Sheriff's Office responded and went to talk to the defendant about the noise complaint. 2 TRP 242-44, 310-13. The defendant yelled at the officer, called him a liar, and said he just hated chickens. 2 TRP

314-19, 339, 341. She told the deputy the horn didn't work or that it went off by itself, but declined to let him check the car. 2 TRP 316-17, 343. Deputy Casey warned her not to do that again or he'd have to arrest her. 2 TRP 317-18, 343.

Deputy Casey then went to get Vorderbrueggen's statement. 2 TRP 319. While there, he heard three long horn blasts as the defendant drove away. 2 TRP 245-47, 320-23, 346-49. Vorderbrueggen and Brumbaugh heard it, too. 1 TRP 177-80; TRP 249-47. Deputy Casey rushed outside where he encountered Mike Menalia walking alongside the road, who said the petitioner had angrily honked at him. 2 TRP 246-48, 264-67, 295-96, 299, 320-23. He admitted he had blown her a kiss. 2 TRP 266-67.

Deputy Casey followed the petitioner and pulled her over. 2 TRP 299-300, 325, 351. He reminded her he had warned her about honking the horn again. 2 TRP 326. The petitioner told him that she didn't do it; that the horn went off by itself; and/or that she had done so in response to Menalia "flipping her off." 2 TRP 326-27, 360-61. Deputy Casey arrested the defendant. 2 TRP 328-29, 363. An unnamed City of Monroe office arrived to impound the vehicle. 2 TRP 326, 331, 351. The defendant screamed at Deputy

Casey on the way to jail. 2 TRP 332-33, 369. The deputy suggested she might want to remain silent. 2 TRP 333.

The owner of the car the defendant had used testified the horn buttons sometimes stick and sometimes don't work, but the horn never goes off by itself. 2 TRP 417, 419, 424-25. The defendant did not testify. 3 TRP 441.

The defendant was charged by amended complaint with violation of the county noise ordinance, SCC 10.01.040 and 10.01.080(3). Pretrial motions to dismiss were denied on August 31 and November 30, 2006. See docket; see also 1 TRP 37-38. The matter proceeded to a three-day jury trial on December 6-8, 2006 and the defendant, who acted pro se, was convicted. See docket and 3 TRP 495-96 (verdict). A RALJ appeal followed. The RALJ court affirmed the conviction. The defendant now seeks review in this Court. Her jail sentence remains stayed.

V. ARGUMENT

A. NONE OF THE FACTORS FAVORING DISCRETIONARY REVIEW ARE IMPLICATED.

Discretionary review of a superior court decision entered in a RALJ appeal proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d) (emphasis supplied). None are implicated here.

All but the constitutional attack on the ordinance involve fact-specific trial court rulings on instructions and a motion for mistrial. None were in conflict with precedent, and the last is reviewed for abuse of discretion. The constitutional issue was decided consistent with precedent as well. The Superior Court decision affirming the trial court thus is not in conflict with or contrary to Court of Appeals or Supreme Court precedent, nor did the Superior Court depart from the accepted and usual course of judicial proceedings in so deciding. Correspondingly, factors (1) and (4) are not implicated.

Because the local ordinance affects Snohomish County alone, and there is no claim that it or similar language is used

elsewhere in the state, petitioner's attack on the ordinance does not present an issue of broad "public interest" that this Court should determine per RAP 2.3(d)(3).

That leaves RAP 2.3(d)(2). An attack on the noise ordinance poses a question of constitutional law, but that does not make it "significant" within the meaning of the rule. The decisions below correctly applied the standard that a party who asserts an ordinance is unconstitutionally vague must overcome an ordinance's presumption of constitutionality, by demonstrating *beyond a reasonable doubt* that the ordinance fails to sufficiently define the offense or provide ascertainable standards of guilt. Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005); State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A lower court decision that correctly applies precedent to uphold the constitutionality of an ordinance does not pose a significant question suitable for review. See RAP 2.3(d)(2).

B. PETITIONER HAS NOT SHOWN THE SNOHOMISH COUNTY NOISE ORDINANCE IS UNCONSTITUTIONAL.

Per Snohomish County Code (SCC)10.01.040,

[i]t is unlawful for any person to cause, or for any person in possession of property to allow to originate from the property, sound that is a public disturbance noise.

SCC 10.01.040(1)(d) defines as a "public disturbance noise," among other things, "the sounding of vehicle horns for purposes other than public safety." SCC 10.01.080(3) classifies violations of the public disturbance noise ordinance as infractions unless two are committed in a 24-hour period; in which case the second violation is criminalized as a misdemeanor. In relevant part, the ordinance provides:

(3) Public Disturbance Enforcement. Any person found to be in violation of the provisions of section SCC 10.01.040 governing public disturbance noise . . . shall be deemed to have committed a civil infraction as established in Chapter 7.80 RCW and for each violation shall be subject to a civil penalty of \$50; provided that penalties for an additional separate violation of a like nature by the same person within a one year period shall be \$100; and provided further that any second violation within a 24 hour period shall constitute a misdemeanor punishable by incarceration for a period not to exceed 90 days and/or monetary fine not to exceed \$1,000.

RCW 10.83.080(3).

Citizens must be afforded fair warning of proscribed conduct.

Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). A statute is "void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess

at its meaning and differ as to its application." Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). A vagueness claim requires the challenger to demonstrate beyond a reasonable doubt that the statute either (1) fails to sufficiently define the offense so that ordinary people can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Coria, 120 Wn.2d at 163; City of Spokane v. Douglass, 115 Wn.2d at 178. Local ordinances, no less so than statutes, are presumed to be constitutional. Kitsap County v. Mattress Outlet, 153 Wn.2d at 509; Brown v. City of Yakima, 116 Wn.2d at 559. If a statute or ordinance is susceptible to several different interpretations, the court will construe it so as to be constitutional. Dep't of Natural Resources v. Littlejohn Logging, Inc., 60 Wn. App. 671, 677, 806 P.2d 779 (1991).

"If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case." Coria, 120 Wn.2d at 163; accord, Douglass, 115 Wn.2d at 181-82. By this analysis, the statute is tested for unconstitutional vagueness by inspecting the actual conduct of the party challenging the statute and not by examining hypothetical situations at the periphery of the

statute's scope. Weden v. San Juan County, 135 Wn.2d 678, 708, 958 P.2d 678 (1998); Douglass, 115 Wn.2d at 182-83.

The petitioner honked her horn at 6 a.m. on a Saturday morning for six-plus minutes for no "public safety purpose," *was warned about it*, and then did it again. There was no lack of notice; there was nothing for her to guess at; and the standards are not subject to arbitrary enforcement. Her as-applied challenge (Motion for Discr. Rev. 12-13) fails. The trial court and the RALJ court correctly so found.

The defendant argues that "public safety purpose" is so vague that it gives no guidance to the citizenry or to law enforcement. Motion at 13. But the fact that a particular term in an ordinance is undefined does not automatically render the enactment unconstitutionally vague. See, e.g., Douglass, 115 Wn.2d at 180. Statutes and ordinances are not void for vagueness merely because all of their possible applications cannot be specifically anticipated. Seattle v. Eze, 111 Wn.2d at 27; State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)). Some imprecision in the language of a statute will be tolerated. Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 89 L. Ed. 2d 944 (1945); State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988).

And any motorist can tell the difference between a warning honk triggered by traffic safety concerns and sounding a horn in anger for several minutes when no traffic safety concern is present. This is not a situation where “a person of ordinary intelligence could not reasonably understand” what is prohibited. See Douglass, 115 Wn.2d at 179.

Next, the defendant argues that she was engaged in constitutionally protected “speech” which the Snohomish County ordinance sought to prohibit. Motion at 9-12. It is true that horn-honking *can* be a form of “speech” or expression, as in front of a family planning center or at an antiwar rally. See, e.g., Madsen v. Women’s Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (nonetheless upholding carefully-crafted ban there). But the petitioner reads “speech” too broadly. A rock through a window is, broadly viewed, a form of expression too, but that does not make it constitutionally protected speech. The defendant simply wanted to harm and retaliate against her neighbors. The lower courts correctly found the First Amendment does not protect her.

The defendant responds that she really was protesting a homeowners’-association ban on keeping chickens. *But there was*

no testimony below to support this. In her first encounter with police at her front door, she said the horn didn't work or that it went off by itself. 2 TRP 316-17, 343. Later, when the same officer stopped her, she first denied honking the horn a second time, then said the horn went off by itself; and finally that she had done so in response to a neighbor making an obscene gesture. 2 TRP 326-27, 360-61. At most she can point to accusing Deputy Casey of hating chickens, 2 TRP 314-19, 339, 341, and saying "something" about chickens to Vorderbrueggen when she called him, 2 TRP 216. That does not establish that "speech" was implicated by her early morning horn-honking.

It might be different had there been a pro- or anti-war rally – or, for that matter, a pro- or anti-covenant rally – going on in the neighborhood, and the petitioner had honked in support and been cited. That is what happened in the Oregon case cited by the defendant. Motion at 10-11, citing City of Eugene v. Powlowski, 116 Or. App. 186, 840 P.2d 1322 (1992) (interpreting Oregon constitution). Motorists honked for one side or the other during competing anti-war demonstrations and were cited. But that is not what the defendant did here. *Nor did the Eugene ordinance contain the twice-in-24-hour warning provision present here.* The

Eugene ordinance thus was “not limited to those circumstances when, because of noise or abuse, the public interest may be implicated.” Eugene v. Powlowski, 840 P.2d at 190. This ordinance is. It is thus constitutional. The trial court and the RALJ court did not err when, consistent with other jurisdictions,² both upheld it. No RAP 2.3(d) factors are implicated.

C. THERE WAS NO IMPERMISSIBLE COMMENT IN CLOSING ARGUMENT.

The petitioner also alleges prosecutorial misconduct in closing argument.

The petitioner represented herself at trial. She did not testify. 3 TRP 441. Yet in closing she repeatedly argued facts not evidence. For example, she argued the car was flooded, 3 TRP 467, that she was only trying to apologize to Vorderbrueggen, 3 TRP 468, and that the officer had refused to look at the car, 3 TRP

² Anti-noise ordinances elsewhere have been repeatedly upheld as constitutional. State v. Clarksburg Inn, 375 N.J. Super. 624, 868 A.2d 1120 (2005); City of Columbus v. Kendall, 154 Ohio App. 3d 639, 798 N.E.2d 652 (2003); State v. Cornwell, 149 Ohio App. 3d 212, 776 N.E.2d 572 (2002); People v. Hodges, 70 Cal. App. 4th 1348, 83 Cal. Rptr. 2d 619 (1999); State v. Powell, 250 N.J. Super. 1, 593 A.2d 342 (1991); State v. Dorso, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The Supreme Court upheld an anti-noise ordinance in the vicinity of schools even though First Amendment concerns were squarely implicated. Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). But see Lionhart v. Foster, 100 F. Supp. 383 (E. D. La. 1999) (declaring unconstitutional an anti-noise ordinance prohibiting amplified music “in a manner likely to disturb, inconvenience or annoy”); Luna v. City of Ulysses, 28 Kan. App. 2d 413, 17 P.3d 940 (2000) (anti-noise statute prohibiting loud or excessive noise that was “mentally annoying or disturbing” held unconstitutionally vague).

470, 474. The prosecutor objected to her arguing facts not in evidence, adding he would not object if she wanted to reopen her case and take the stand. The trial court sustained the objection. 3 TRP 469-70.

The petitioner asked for a mistrial, stating the prosecutor had commented on her right not to testify. The State responded the petitioner had brought this on herself, plus the jury was properly instructed to draw no inference from a defendant's failure to testify. 3 TRP 486-89. The court denied the petitioner's motion. Id.

A prosecutor violates a defendant's Fifth Amendment rights if the prosecutor makes a statement "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Sargent, 40 Wn. App. 340, 346, 698 P.2d 598 (1985); accord State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001).

Here, the petitioner had not been sitting silent. The jury had, in fact, heard from her throughout trial. The petitioner had said a *great deal*, just none of it as *testimony*. The prosecutor was not commenting that the defendant's failure to take the stand indicated guilt, but that she ought to take the stand if she wanted to continue to argue things not in evidence, and that he would not object if she

did so. The trial court did not abuse its discretion in denying her motion for mistrial.³ State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Trial courts should grant a mistrial only when defendants have been so prejudiced that nothing short of a new trial can insure a fair trial. Rodriguez, 146 Wn.2d at 270. That was not the case here.

D. ALLEGED INSTRUCTIONAL ERROR

In her petition, Ms. Immelt alleges instructional error, but furnishes no argument. At trial, the jury had been instructed that the elements of the crime were:

1. That on or about the 13th day of May, 2006, the defendant intentionally caused a sound that was a public disturbance noise;
2. That she had done so on a previous occasion within a 24hour period, and
3. That the acts occurred in Snohomish County, Washington.

Court's Instruction No. 5. Further, the jury was told:

³ A mistrial is not warranted when the government objects to unsubstantiated comments in a pro se defendant's closing, noting they were never heard from the witness stand, as long as there was strong proof that the defendant had committed the charged crime and the jury was told of the defendant's right not to testify and instructed to draw no adverse inferences from an exercise of that right. U.S. v. Neely, 63 Fed. Appx. 671 (4th Cir., 2003) (unpublished). The Fourth Circuit permits citation to unpublished authority if counsel believes there is no published opinion that will serve as well, and provides a copy to all parties. Fourth Circuit Local Rule 36(c); cited in Kosmynka v. Polaris Industries, 462 F.3d 74, 84 (2nd Cir. 2006); see GR 14.1 (permitting citation to unpublished authority from other jurisdictions if permitted there and if copies furnished to all parties).

[t]he term “public disturbance noise” includes the sounding of a vehicle horn for purposes other than public safety.

Instruction No. 7.

The petitioner alleges that the Court’s instructions did not require the State to prove intent. The clear language of Instruction No. 5 set forth above shows otherwise.

The petitioner also alleges the State bore the burden to prove the horn was not defective. At trial the petitioner had proposed a “to convict” instruction that included the absence of a defect in the horn as an element, and also required the jury also find there was no First Amendment protection. The trial court properly rejected this instruction. First, whether or not the defendant’s conduct implicated the First Amendment was a legal question for the court, not a factual question for the jury. Secondly, the jury had to find an intentional act in order to convict. Had they concluded the horn was defective – specifically, that either one of the two horn-honking incidents was due to a defective horn, rather than the result of an intentional act – they would have had to acquit. This properly, and fairly, covered the situation. See State v. Lively, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996), quoting State v. Riker, 123 Wn.2d 351, 367, 869 P.2d 43 (1994) (“generally, affirmative

defenses are uniquely within the defendant's knowledge and ability to establish") These claims merit no further review under RAP 2.3(d).

VI. CONCLUSION

The motion for discretionary review should be *denied*.

RESPECTFULLY SUBMITTED on February 4, 2008.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

by: 
CHARLES F. BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent

On this day I mailed a properly stamped envelope addressed to the attorney for the ~~defendant~~^{petitioner} that contained a copy of this document. I certify under penalty of perjury under the laws of the State of Washington that this is true.
Signed at the Snohomish County Prosecutor's Office
this 4 day of Feb, 2008



also fax &
e-mail

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STATE OF WASHINGTON
2008 FEB - 4 PM 3:48

INSTRUCTION NO. 5

To convict the defendant of the crime of Public Disturbance, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 13th day of May, 2006, the defendant intentionally caused a sound that was a public disturbance noise;
2. That she had done so on a previous occasion within a twenty-four hour period; and
3. That the acts occurred in Snohomish County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 7

The term "public disturbance noise" includes the sounding of a vehicle horn for purposes other than public safety.

INSTRUCTION NO. _____

To convict the defendant of the crime of Public Disturbance, each of the following elements of the crime must be proven by the State beyond a reasonable doubt:

1. That on May 13th, 2006, the defendant intentionally blew her car horn for other than a public safety purpose in front of the Vorderbrueggen home and that the defendant, later, intentionally blew her car horn at Mike Menalia for other than a public safety purpose.
2. That there was no defect in the horn.
3. That the defendant had no first amendment protection for blowing her horn.
4. That the acts occurred in Snohomish County, Washington.

The defendant has no obligation to prove or disprove any of the above elements.

The burden of proof always lies with the State and never shifts to the Defendant.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Westlaw.

63 Fed.Appx. 671
 63 Fed.Appx. 671, 2003 WL 1984490 (C.A.4 (Va.))
 (Cite as: 63 Fed.Appx. 671)

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U.S. v. Neely
 C.A.4 (Va.),2003.

This case was not selected for publication in the Federal Reporter.UNPUBLISHEDPlease use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,Fourth Circuit.
 UNITED STATES of America, Plaintiff-Appellee,
 v.
 Ronald Darrell NEELY, Defendant-Appellant.
 No. 02-4704.

Submitted April 15, 2003.
 Decided April 30, 2003.

Defendant was convicted in the United States District Court for the Western District of Virginia, James C. Turk, J., of possession of firearm by convicted felon, and he appealed. The Court of Appeals held that: (1) defendant was not entitled to access to adequate law library; (2) government was not required to prove that defendant's civil rights had not been restored; and (3) prosecutor's statement in closing arguments that defendant had not testified did not warrant mistrial.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇨641.10(3)

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in General
 110k641 Counsel for Accused
 110k641.10 Choice of Counsel
 110k641.10(3) k. Appearing Both Pro Se and by Counsel; "Hybrid Representation". Most Cited Cases
 Defendant who elected to proceed pro se was not entitled to access to adequate law library, where he was appointed standby counsel.

[2] Weapons 406 ⇨4

406 Weapons
 406k4 k. Manufacture, Sale, Gift, Loan, Possession, or Use. Most Cited Cases
 Under Virginia law, civil rights of defendant previously convicted of felony were not automatically restored by passage of time, but rather were restored only if governor granted pardon, and thus government was not required to prove that defendant's civil rights had not been restored in order to convict defendant of being felon in possession of firearm. 18 U.S.C.A. §§ 921(a)(20), 922(g); West's V.C.A. Const Art. 5, § 12.

[3] Criminal Law 110 ⇨730(8)

110 Criminal Law
 110XX Trial
 110XX(E) Arguments and Conduct of Counsel
 110k730 Action of Court
 110k730(8) k. Comments on Evidence or Witnesses. Most Cited Cases
 Prosecutor's statement in closing arguments that defendant had not testified did not warrant mistrial, where statement was made when government objected to comments made by defendant during his pro se closing argument, prosecutor's remarks were isolated, remarks were not made deliberately to divert jury's attention to extraneous matter, there was strong proof that defendant was guilty of crime charged, and court twice instructed jury that defendant had right not to testify and that jury could not make adverse inferences from his exercise of that right.

*672 Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Senior District Judge. (CR-02-34). Charles R. Allen, Jr., Roanoke, Virginia, for Appellant. John L. Brownlee, United States Attorney, Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for Appellee.

Before MICHAEL, TRAXLER, and GREGORY,

63 Fed.Appx. 671
 63 Fed.Appx. 671, 2003 WL 1984490 (C.A.4 (Va.))
 (Cite as: 63 Fed.Appx. 671)

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Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM:

****1** Following a jury trial, Ronald Darrell Neely was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (2000). The district court sentenced Neely to seventy-two months in prison. Neely appeals, raising three grounds of error. Finding no merit to his claims, we affirm his conviction.

[1] Neely filed a motion to proceed pro se and be appointed standby counsel; the court granted the motion. On appeal, Neely argues that the court erred by denying his motion for access to legal resources. The government must provide a criminal defendant with access to an adequate law library or adequate access to counsel, but not both. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir.1978). Where a defendant has elected to proceed pro se in a criminal case, he can be required to rely on standby counsel to overcome any research handicaps due to incarceration. ***673** *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir.1978). Because Neely had standby counsel available to assist him, we find that the district court did not err by denying his motion for access to legal resources.

Next, Neely claims that the district court erred by denying his motion for judgment of acquittal because the government failed to establish that his civil rights had not been restored. The lack of restoration of civil rights is not an element of the offense stated in § 922(g), but is a component of the element under § 922(g) that the accused was convicted in any court of a crime punishable by more than a year in prison. *United States v. Clark*, 993 F.2d 402, 406 (4th Cir.1993). Under 18 U.S.C. § 921(a)(20) (2000), a crime punishable by a prison term exceeding one year does not include "[a]ny conviction ... for which a person ... has had civil rights restored ... unless such ... restoration of civil

rights expressly provides that the person may not ship, transport, possess, or receive firearms." Thus, in every § 922(g)(1) prosecution, the court must determine whether the jurisdiction in which the predicate conviction occurred restores felons' civil rights. *United States v. Essick*, 935 F.2d 28, 30 (4th Cir.1991).

[2] In Virginia, felons' civil rights are not automatically restored by the passage of time. To regain his rights, a felon must receive a pardon from the governor. Va. Const. art. V, § 12. Accordingly, we find that the government was not required to prove that Neely's civil rights had not been restored and the district court did not err by denying the motion for judgment of acquittal. *Cf. United States v. Thomas*, 52 F.3d 82, 85 (4th Cir.1995) (government not required to prove that defendant's civil rights had not been restored where predicate North Carolina offense was committed within five years of § 922 crime and therefore did not trigger North Carolina's automatic restoration of civil rights).

Finally, Neely argues that the district court erred by failing to declare a mistrial when the government commented in closing arguments that Neely had not testified. The government made the remark when it objected to Neely commenting (falsely) in his pro se closing argument that he was in the military and that his unit was the first to respond to the scene of the crash of the hijacked airplane in Pennsylvania on September 11, 2001.

****2** [3] The prosecutor's remarks were isolated, consisting of two sentences at the end of closing arguments, made in response to Neely's closing argument. The remarks were not made deliberately to divert the jury's attention to extraneous matter. Absent these remarks, there was strong proof that Neely was guilty, namely unrefuted evidence presented at trial that Neely possessed a firearm in Virginia that had traveled in interstate commerce and that Neely was a convicted felon. Moreover, the court twice instructed the jury that Neely had the right not to testify and that the jury could not make adverse inferences from his exercise of that right. Under these circumstances, we find that

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Neely was not prejudiced by the prosecutor's remarks. *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir.1983).

For these reasons, we affirm Neely's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

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