

62416-4

62416-4

NO. 62416-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LUCIANO PICON PEREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was the defendant's conviction for Malicious Mischief in the First Degree supported by sufficient evidence?

2. Did the trial court err by including WPIC 2.13 in its instructions to the jury?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Luciano Picon Perez was charged by way of information with the offense of Malicious Mischief in the First Degree. The information alleged the following:

That the defendant LUCIANO PICON PEREZ, in King County, Washington, on or about September 11, 2007, did knowingly and maliciously cause physical damage in excess of \$1,500 to a motor vehicle, the property of the Seattle Police Department; in violation of RCW 9A.48.070(1)(a), and against the peace and dignity of the State of Washington.

CP 1¹.

During the course of the trial, counsel for the defendant submitted several proposed jury instructions to the court, including

¹ References to the file will be designated as "CP." The Verbatim Report of Proceedings consists of three volumes, referred to in this brief as 1RP (August 5, 2008), 2RP (August 6, 2008), and 3RP (August 7, 2008).

one containing the first sentence of WPIC 2.13. This proposed instruction stated the following:

Malice and maliciously mean an evil intent, wish, or design to vex, annoy or injure another person.

CP 116.

In its packet of proposed jury instructions, the State included one instruction setting forth both sentences of WPIC 2.13, which stated:

Malice and maliciously mean an evil intent, wish, or design to vex, annoy or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

CP 103.

The trial court included the State's version of WPIC 2.13 in its instructions to the jury. CP 115. At the conclusion of its deliberation, the jury returned a verdict of guilty as charged.

CP 114.

2. SUBSTANTIVE FACTS.

On September 11, 2007, Seattle Police officers were dispatched to the Manila Café, located at 6538 4th Avenue South in

Seattle, concerning a "man with a weapon" call. 2RP 26, 42. The dispatch indicated that an intoxicated, shirtless man was swinging a weapon at people. 2RP 27.

The first officer to arrive on the scene was Seattle Police Officer Renner, who stated he saw the defendant sitting on a concrete barrier. 2RP 27. The defendant was the only person in the area who was shirtless. 2RP 28. Lying next to the defendant was a long tube sock that was filled with rocks. 2RP 28. Officer Renner moved the sock away from the defendant because the rock-filled sock was a weapon that could be swung like a club. 2RP 29. According to Officer Renner, the defendant was extremely intoxicated but initially cooperative. 2RP 28. The longer the defendant was detained, however, the more uncooperative he became. 2RP 37.

The primary officers for this call, Seattle Police Officers Gochnour and McDougald, placed the defendant under arrest and had him sit in the back seat of their patrol car. 2RP 45. When the officers had driven a few blocks from the scene, the defendant started to kick the patrol car windows. 2RP 45. The officers stopped the car and Officer Gochnour warned the defendant to stop

kicking the window or he would be sprayed with pepper-spray.

2RP 45. The defendant looked at Officer Gochnour and then kicked the window again. 2RP 45. At that point, the defendant was pepper-sprayed. 2RP 46. According to Officer Gochnour, the only force used against the defendant was this one incident of pepper-spraying. 2RP 46.

After being sprayed with the pepper-spray, the defendant stopped kicking the window for approximately one minute. 2RP 46. As the officers started to pull into the sally-port at their precinct, the defendant kicked and shattered the driver's side back window. 2RP 47. Fifteen or twenty seconds later, the defendant kicked and shattered the passenger's side back window. 2RP 47. Officer Gochnour was standing less than two feet from the passenger's side window when it shattered, and she was covered with broken glass. 2RP 47-48. As a result of the defendant's actions, the police car had to be taken out of commission and placed in the maintenance garage for repairs. 2RP 51. According to a stipulation reached by the parties, the damage to the patrol car exceeded \$1,613.00. 2RP 90-91.

At trial, the defendant took the stand in his own defense and stated the following:

1. At the time of his arrest, the police began cursing at him and using racial slurs. 2RP 87.
2. Four police officers started beating him, and one officer hit him with a nightstick several times, almost breaking his shoulder. 2RP 87, 3RP 16.
3. The officers pepper-sprayed him in the face three or four times. 2RP 87-89. Several of the officers twisted his arms 3RP15, and one of the officers ground his face into the cement. 3RP 16.
4. The defendant only remembered kicking out one of the windows, and he did that only so he could breath. 2RP 91.

According to Shannon Phillips, who is a corrections officer with the King County Jail, if the defendant had been injured when he was brought into the jail, the jail would have refused to accept him and he would have been transferred to the hospital. 3RP 35. The defendant was not injured when he was brought to the jail because he was examined by the jail nurse who admitted him into the jail. 3RP 36.

C. ARGUMENT

1. THE DEFENDANT'S CONVICTION FOR MALICIOUS MISCHIEF IN THE FIRST DEGREE WAS SUPPORTED BY SUFFICIENT EVIDENCE.

The defendant first contends that there was insufficient evidence to support the jury's verdict of guilty. The defendant is incorrect in this assertion.

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980).

As it has already been pointed out, the defendant testified on his own behalf and relayed to the jury his story about being beaten, clubbed and pepper-sprayed on numerous occasions by at least

four police officers. It is apparent from the jury's verdict that the jury did not accept the defendant's story. If the jury had accepted the defendant's testimony, he would have been acquitted of the charge.

The defendant cannot now argue on appeal the same facts that were presented to and rejected by the jury. Credibility determinations such as this are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the fact finder's credibility determination, resolution of conflicting testimony, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The evidence at trial showed that the defendant kicked out the driver's side rear window and fifteen to twenty seconds later kicked out the passenger's side rear window. 2RP 47. He was not kicking these windows out because of any shortage of air. If he had, one window would have been sufficient for that purpose. He kicked out both windows because of his intent, wish and design to vex and annoy the officers who had placed him under arrest.

Significantly, the defendant began kicking the windows well before he was pepper-sprayed by the officers. The officers sprayed

him because he would not stop kicking the windows. The defendant's kicks against the window before being pepper-sprayed were not motivated by any need to obtain air. These kicks, like his kicks after the pepper-spraying, were done maliciously. There was substantial evidence at trial to support the jury's determination of guilt in this case.

2. THE TRIAL COURT DID NOT ERR WHEN SHE PROVIDED THE JURY WITH WPIC 2.13.

The defendant next contends that the trial court erred in providing the jury with WPIC 2.13, and this error violated his right to due process. The State disagrees with this contention.

A trial court's choice of jury instructions is reviewed for an abuse of discretion, State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005), but the standard of review for a jury instruction challenged on an issue of law is de novo review, State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483, overruled on other grounds, State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

Jury instructions are sufficient if they (1) correctly state the law, (2) are not misleading, and (3) permit counsel to argue his or her theory of the case. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d

73 (1980). Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

The defendant has relied upon two cases where similar instructions were given and the convictions in those cases were reversed. These cases are State v. Johnson, 23 Wn. App. 605, 608, 596 P.2d 1047 (1979), and Bellevue v. Kinsman, 34 Wn. App. 786, 790, 664 P.2d 1253 (1983). The defendant's reliance on these cases is misplaced.

Both Johnson and Kinsman held that for such an instruction to be valid, the inferred fact must follow from the proven fact beyond a reasonable doubt. These cases were overturned because the State had not met its burden of proof. This standard was changed by the United States Supreme Court in the case of County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), from "beyond a reasonable doubt" to "more likely than not." The Washington Supreme Court adopted the "more likely than not" standard in State v. Johnson, 100 Wn.2d 607, 608, 674 P.2d 145 (1983).

WPIC 2.13 creates a permissive inference instead of a mandatory presumption. State v. Ratliff, 46 Wn. App. 325, 330, 730 P.2d 716 (1986). Such a permissive inference is valid when there is a “rational connection” between the proven fact and the inferred fact, and the inferred fact flows more likely than not from the proven fact. Ratliff at 331. In making a determination such as this, the court may utilize common experience as well as the evidence introduced at trial. State v. Simmons, 28 Wn. App. 243, 247, 622 P.2d 866 (1980).

There can be no question that in this trial, the inferred fact – that the defendant was acting with malice – flows more likely than not from these proved facts:

- (1) When ordered by the officer to stop kicking the glass, the defendant stared at the officer, and then kicked the glass again.. 2RP 45;
- (2) The defendant began kicking the windows before he was ever pepper-sprayed by the officer. 2RP 45; and
- (3) The defendant shattered both windows within a 15 to 20 second period – not to get air – but to complete his destruction of the patrol car before the officers were able to pull him out of the patrol car.

The trial court did not err in providing this instruction to the jury.

D. CONCLUSION

For the foregoing reasons, this Court should affirm defendant Perez's conviction for Malicious Mischief in the First Degree.

DATED this 29th day of June, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LUCIANO PICON PEREZ, Cause No. 62416-4-I, in the Court of Appeals, Division I, for the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Wenita Schwantes

Name

Done in Seattle, Washington

June 29, 2009

Date