

No. 36686-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB J. RIVERA,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II
Cause No. 07-1-00119-1

BRIEF OF RESPONDENT

EDWARD P. LOMBARDO
Deputy Prosecuting Attorney for
Gary P. Burleson, Prosecuting Attorney

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Tel: (360) 427-9670 Ext. 417
Fax: (360) 427-7754

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give an instruction requiring the State to satisfy its burden of establishing that Rivera intended to interrupt services not just damage property-a necessary requirement for a conviction of malicious mischief in the first degree as charged.
2. The trial court erred in allowing Rivera to be represented by counsel who provided ineffective assistance in failing to propose an instruction requiring the State to satisfy its burden of proving that he intended to interrupt services not just to damage property.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court adequately instruct the jury on the elements of malicious mischief first degree-interruption or impairment of service- when these instructions: (a) were supported by substantial evidence; (b) allowed the parties to argue their theories of the case; and (c) when read as a whole, properly informed the jury of the applicable law?
2. Did Rivera receive ineffective assistance of counsel when his court-appointed attorney did not propose an instruction that would have been unnecessary and/or cumulative?
3. Did the trial court err by not taking the case from the jury for lack of sufficient evidence when ample testimony was given as to: (a) Rivera's intentional destruction of county property in the jail; and how (b) Rivera's intentional actions interrupted and/or impaired the services at that facility?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Rivera’s recitation of the procedural history and facts and adds the following:

While Rivera was in custody in the Mason County Jail (MCJ) on or around January 17, 2007, Officer Watz saw him, “running around very, very agitated” in the “M-cell dayroom.” RP 54: 21-22,17-18; 38: 22-24. When officers from the MCJ went into that room, Officer Watz noted how Rivera saw them and then bent down to “pick up the TV” that had been “laying on the floor.” RP 54: 22-23, 19-20. After looking at Officer Watz, Rivera “just threw it [the TV] off to the side and...was just really agitated.” RP 54: 22-24.

In addition to destroying the TV in the M-cell, Rivera had also “torn apart the smoke detector, the protective cover...and the unit itself he had taken apart” in holding cell H-6. RP 64: 10-14. Because Rivera destroyed the TV in the M-cell dayroom, “everybody in that cell block

was locked-down.” RP 74: 20-25. Rivera’s actions also forced the MCJ to “close down” the fire alarm “system in holding cell 6 until it could be repaired”; action that took “two beds” out of operation. RP 77: 17-20.

Rivera also “shatter[ed]” the “barrier that was guarding the camera” in the MCJ’s F-cell. As Officer Cassidy testified:

After we had placed Mr. Rivera in the F-cell, I had proceeded into our control room where-the area in the jail that controls all the doors and has all the cameras and monitors. Once inside the control room, I was discussing the incident with our control room operator, and he says to me that it looks like he’s [Rivera] jumping at something in F-cell. I looked over at the monitor that was in the control room that was-had the camera for that room, and observed Rivera with his handcuffs around the front was jumping up trying to smack the camera. It took him about two tries from me watching him to hit the barrier that was guarding the camera and shattering it. RP 91: 2-13.

Sergeant Chaplin testified that F-cell remained “out of service to date” as of August 21, 2007, because the MCJ had been unable to “get parts for the plastic covering the camera.” RP 78: 15-16. The case went to the jury and it unanimously found him guilty as charged of malicious mischief in the first degree. RP 125: 2-4.

3. Summary of Argument

The trial court adequately instructed the jury on the elements of malicious mischief first degree-interruption or impairment of service- because these instructions: (a) were supported by substantial evidence; (b)

allowed the parties to argue their respective theories of case; and (c) when read as a whole, properly informed the jury of the applicable law. Rivera also received effective assistance of counsel because his court-appointed attorney did not propose an instruction that would have been unnecessary and/or cumulative. Lastly, the trial court did not err by not taking the case from the jury for lack of sufficient evidence because ample testimony was given as to: (a) Rivera's intentional destruction of county property in the jail; and how (b) his intentional actions interrupted and/or impaired the services at that facility. The State respectfully requests that the judgement and sentence of the trial court be affirmed.

E. ARGUMENT

1. THE TRIAL COURT ADEQUATELY INSTRUCTED THE JURY ON THE ELEMENTS OF MALICIOUS MISCHIEF FIRST DEGREE-INTERRUPTION OR IMPAIRMENT OF SERVICE-BECAUSE THESE INSTRUCTIONS:
 - (a) WERE SUPPORTED BY SUBSTANTIAL EVIDENCE;
 - (b) ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF CASE; AND
 - (c) WHEN READ AS A WHOLE PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW

The trial court adequately instructed the jury on the elements of malicious mischief first degree-interruption or impairment of service- because these instructions: (a) were supported by substantial evidence; (b)

allowed the parties to argue their respective theories of case; and (c) when read as a whole, properly informed the jury of the applicable law.

Challenges to jury instructions are reviewed de novo, within the context of jury instructions as a whole. State v. Slaughter, ---P.3d---, 2008 WL 1703511, ¶ 10 (Div. 1, April 14); see State v. Jackman, 156 Wash.2d 736, 743, 132 P.3d 136 (2006). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. Slaughter, WL 1703511 at ¶ 10; see State v. Clausing, 147 Wash.2d 620, 626, 56 P.3d 550 (2002). Instructional errors that tend to shift the burden of proof to a criminal defendant are of constitutional magnitude because they may implicate a defendant's due process rights. Slaughter, WL 1703511 at ¶ 10; see State v. McCullum, 98 Wash.2d 484, 488, 656 P.2d 1064 (1983).

Whether the words used in an instruction require further definition is a matter of judgement to be exercised by the trial court. State v. O'Donnell, 142 Wash.App. 314, 325, 174 P.3d 1205 (Div.3, December 27, 2007); see City of Seattle v. Richard Bockman Land Corp., 8 Wash.App. 214, 217, 505 P.2d 168 (1973). In a criminal case, however, the trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-

explanatory. O'Donnell, 142 Wash.App. at 325. This is referred to as the technical term rule. O'Donnell, 142 Wash.App. at 325; see State v. Olmedo, 112 Wash.App. 525, 534, 49 P.3d 960 (2002). The purpose of the rule is “to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law.” O'Donnell, 142 Wash.App. at 325.

The reasoning of O'Donnell is applicable to Rivera's case, because the Court in that case found that the term “theft” has specifically been held to be a “term of sufficient common understanding to allow the jury to convict of robbery.” O'Donnell, 142 Wash.App. at 325; see State v. Ng, 110 Wash.2d 32, 44, 750 P.2d 632 (1988). The O'Donnell Court also held that even if the trial court erred by failing to define “theft,” that O'Donnell may not challenge the jury instruction on appeal because failure to provide a definition is not an issue of constitutional magnitude. O'Donnell, 142 Wash.App. at 325.

In Rivera's case, the record does not show that he objected to any of the jury instructions and/or proposed any of his own. Under the holding of O'Donnell, Rivera's argument that “intent” should have been defined fails because that issue is not of constitutional magnitude. In addition, “intent,” as does “theft,” has a common understanding, such as state of

mind and/or the specific design or purpose that a person has.

<http://www.merriam-webster.com/dictionary/intent>.

Based on the evidence presented at trial, it was for the jury to decide whether Rivera intended to interrupt or impair the functioning of the MCJ when he destroyed a television, tore apart a smoke alarm and smashed the cover to a security camera. RP 54: 22-24; 64: 10-14; 91: 2-13. As presented to the jury, the instructions satisfied the three-part test that the Court enunciated in Slaughter, in that they were: (a) supported by substantial evidence, (b) allowed the parties to argue their theories of the case, and (c) when read as a whole properly informed the jury of the applicable law. No error occurred.

2. RIVERA RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COURT-APPOINTED ATTORNEY DID NOT PROPOSE AN INSTRUCTION THAT WOULD HAVE BEEN UNNECESSARY AND/OR CUMULATIVE.

Rivera received effective assistance of counsel because his court-appointed attorney did not propose an instruction that would have been unnecessary and/or cumulative.

We start with the strong presumption that counsel's representation was effective. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); see State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); State v. Schwab, 141 Wash.App. 85, 95, 167 P.3d 1225 (Div. 2, October

2, 2007). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct.

Rodriguez, 121 Wash.App. at 184; see State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. State v. Walker, ---P.3d---, ¶ 20-22, 2008 WL 933443 (Div. 2, April 8); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McFarland, 127 Wash.2d at 334-335; State v. Keend, 140 Wash.App. 858, 864-865, 166 P.3d 1268 (Div. 2, September 18, 2007).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances.

Rodriguez, 121 Wash.App. at 184. Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland 127 Wash.2d at 334-335. Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Had Rivera's court-appointed attorney proposed an instruction for "intent," it would have been unnecessary and/or cumulative because that term has a common understanding. As argued above, it was for the jury to decide based on the evidence and testimony presented whether Rivera's actions constituted malicious mischief in the first degree-interruption or impairment of a service. Counsel for Rivera argued in closing on behalf of his client on the issue of intent, and tried to convince the jury that although:

Mr. Rivera was agitated...[h]e was agitated not at the staff, not at the jail, but from whatever personal experience he had just had on the telephone. He didn't tear- he didn't cause damage to the county property in order to cause injury to the county or with an evil intent toward the county or with a design to vex, annoy or injure another. It was strictly him venting his anger...If it was directed towards the jail staff or directed to [the] jail or the county, then it would be a different story and his conduct would have been different. He would have been trying to fight the officers. He was cooperative with them. RP 116: 19-25; 117: 1-9.

That this argument was ultimately unsuccessful does not mean that Rivera's representation from court-appointed counsel was deficient. Because "intent" is a term of common understanding, an instruction defining that term would have made no difference in the verdict. The trial court did not err by allowing Rivera to be represented by counsel who wisely did not propose an unnecessary instruction.

3. THE TRIAL COURT DID NOT ERR BY NOT TAKING THE CASE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE AMPLE TESTIMONY WAS GIVEN AS TO:
- (a) RIVERA’S INTENTIONAL DESTRUCTION OF COUNTY PROPERTY IN THE JAIL; AND HOW
 - (b) HIS INTENTIONAL ACTIONS INTERRUPTED AND/OR IMPAIRED THE SERVICES AT THAT FACILITY.

The trial court did not err by not taking the case from the jury for lack of sufficient evidence because ample testimony was given as to: (a) Rivera’s intentional destruction of county property in the jail; and how (b) his intentional actions interrupted and/or impaired the services at that facility.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Eichelberger, --P.3d--, 2008 WL 1723938 ¶ 17 (Div. 2, April 15); see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993).

In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); see State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State’s evidence and requires that all reasonable inferences be drawn in favor of

the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992); see State v. Rooth, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

Eichelberger is comparable to Rivera's case because the trial court employed similar reasoning. In Eichelberger, the Court found that the defendant escaped when he ran from the courtroom after arguing with the judge who told him to "have a seat." Eichelberger, 2008 WL 1723938 at ¶ 20-21. As the Court reasoned, although defendant Eichelberger denied knowing that he was in custody and testified that he did not hear the judge yell at him, the trial court was not obligated to believe his testimony.

This reasoning is applicable to Rivera's case because it was for the jury to decide whether Rivera intended to interrupt or impair a service when he destroyed county property. That Rivera "threw it [the TV] off to

the side and...was just really agitated” when he saw Officer Watz, tore apart a smoke detector and smashed a camera cover constituted ample evidence for the jury to consider. RP 54: 22-24; 64: 10-14; 91: 2-13.

Had Rivera not intended to interrupt or impair the operations of the MCJ, he would have stopped destroying county property and causing a major disturbance far sooner than he did. That Rivera refused to calm-down and/or follow the rules of the MCJ shows that his intent was to disrupt that facility and to irritate its staff to express his anger at being incarcerated. As of his trial, the MCJ had still been unable to bring its services back up to standard and/or completely repair its equipment that had been diminished because of Rivera’s outburst. RP 78: 15-16. The trial court made the correct decision to allow Rivera’s case go the jury.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 21ST day of APRIL, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
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 Respondent,)
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 vs.)
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 JACOB J. RIVERA,)
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 Appellant,)
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No. 36686-0-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
08 APR 22 PM 1:55
STATE OF WASHINGTON
DEPUTY

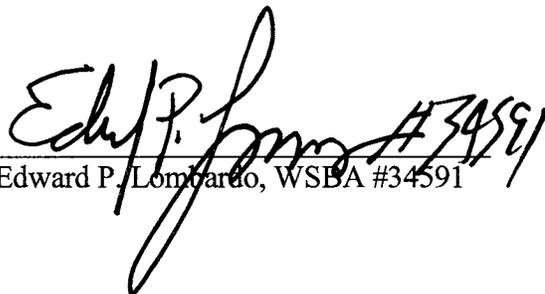
I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, APRIL 21, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 21ST day of APRIL, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
Tel. (360) 427-9670 Ext. 417
Fax (360) 427-7754