

No. 41405-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA A. STACY,

Appellant.

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

The Honorable Paula Casey, Judge
Cause No. 10-1-01051-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence was insufficient for a rational trier of fact to find appellant guilty of count I, burglary in the second degree.

2. Whether the court's incorrect instruction to the jury was reversible error.

3. Whether defense counsel's failure to object to the jury instruction constituted a denial of Stacy's right to effective assistance of counsel.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

C. ARGUMENT.

1. There was sufficient evidence presented at trial to persuade a rational trier of fact that the elements of count 1, burglary in the second degree, were proved beyond a reasonable doubt.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A claim of insufficiency requires that all reasonable inferences from

the evidence 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). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict a defendant of second degree burglary, the State must prove that (1) the defendant entered or remained unlawfully in a building other than a dwelling, (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.030

Stacy argues that the State failed to produce sufficient evidence to find him guilty of count 1, because “[n]o direct evidence was presented that he entered the site on this occasion or that he initiated the fire, the charge for which he was found not guilty.” Appellant’s Opening Brief at 5. Stacy was charged with two counts of second degree burglary and two counts of second degree arson. He was subsequently found guilty on both counts of burglary but only one count of arson.

a. The State did not need to prove count II to prove count I.

Count 1 concerned the burglary which transpired either on July 6 or 7 of 2010. The State failed to prove to the jury that Stacy was guilty of the resulting crime of second degree arson, but that

crime was tried as a separate count and was not inclusive of all crimes identified in count 1.

The State produced evidence related to count 1 that Stacy entered the fenced area around the construction site. There was photographic evidence and eyewitness testimony which proved that city hall was guarded by cyclone fencing and other barriers which signaled to pedestrians that this was a construction site and that it was off limits to the general public. [Vol. 1 RP at 21, 23, 29-30, 42, 45, 60 & 62-63]. Because a fenced area is expressly included in the definition of “building” without regard for how the area is used, the act of breaching that fence also satisfied the first element of burglary in the second degree. See State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282, 286 (2003). By entering unlawfully he also remained unlawfully into the fenced area. State v. Johnson, 132 Wn. App. 400, 409, 132 P.3d 737, 741 (2006).

The State further proved that Stacy was guilty of malicious mischief as defined in RCW 9A.48.090. The statute states, in relevant part, that a person is guilty of malicious mischief if he or she (1) “knowingly and maliciously” (2) “writes, paints or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned

by [another], unless [he or she has] the express permission of the owner.” RCW 9A.48.090(1). If there was sufficient circumstantial evidence to find that Stacy spray painted the modular, then he is guilty of malicious mischief and therefore of burglary in the second degree. See State v. Mahoney, 80 Wn.App. 495, 499, 909 P.2d 949, 952 (1996).

b. The State had sufficient evidence at trial to prove that Stacy voluntarily breached the fence in count I.

Stacy was convicted of count III: burglary in the second degree, and count IV: arson in the second degree. He has not appealed his convictions for counts III & IV. The factual circumstances of the burglary which occurred on July 8, 2010, and which appear as count III is a near facsimile to the burglary committed on July 6-7, which appears in the Report on the Proceedings as count I.

Both counts I & III concerned the burglary of the same target: Olympia’s unfinished city hall. Because the timeline for these burglaries was sequential, the jury could accept the evidence admitted to prove count III as a factor in determining Stacy’s guilt or innocence in count I. It was reasonable for the jury to infer that

whoever burglarized city hall on July 6-7 also burglarized city hall on July 8.

The State's evidence included a taped interview in which Stacy admitted entering the fenced area on July 8, despite knowing that it was illegal for him to do so. [Vol. 1 RP at 185]. In that same interview, Stacy also referred to a history of being in trouble for criminal trespass. [Id. at 187]. Finally, he admitted that he had initially lied to the police about entering the construction site on July 8 and to being on the perimeter of the construction site the previous evening. [Id. at 194]. Stacy offered confusing, incomplete and ultimately suspicious explanations for why he twice visited the construction site at such unusual hours. [Id. at 194]

The State also submitted historic GPS coordinates which were sent via signal from the ankle bracelet Stacy was required to wear as a condition of his release. This data confirmed Stacy's proximity to the construction site on the night of both incidents. [Id. at 142-145]. Stacy was so close in fact that at 11:58 p.m. on July 6, the signal from his ankle bracelet appeared to be coming from the roof of the city hall building. [Id. at 144]. The State also provided photos of the defendant taken from a civilian's surveillance camera,

which confirmed Stacy's proximity and subsequent ability to burglarize the construction site on July 8. [Id. at 142-144].

c. The State produced sufficient evidence at trial to prove that Stacy engaged in malicious mischief on July 6-7.

The court received both photographic evidence and testimony that on July 6 or 7 the construction site was vandalized with red graffiti subsequent to the fire. [Id. at 48-49]. Specifically the letters "DSP" were sprayed across the modular. The following day, identical red spray-paint graffiti was found in the halls of the unfinished city hall. [Id. at 35]. The messages proclaimed "Dark Patriot for Life," "DSP," and "F*** Pigs." [Id. at 36-37]. It was reasonable for the jury to infer that whoever wrote "DSP" inside city hall on July 8 also wrote "DSP" on the modular the previous evening, and that the same person had therefore entered the fenced area.

In the aforementioned taped interview, Stacy denied knowing what "DSP" meant, and proclaimed that if he was going to spray paint a message, it would be "F*** Pigs." [Id. at 192]. Although Stacy claimed to be speaking hypothetically, it was reasonable for the jury to accept his comment as evidence that he was responsible for writing "F*** Pigs" on the wall on July 8. It was

likewise reasonable for the jury to conclude that, given the identical color, message, pattern and style of graffiti, whoever vandalized city hall on the night of July 8 also vandalized the modular outside city hall during the previous evening.

As our Supreme Court has observed: “[w]hether circumstantial evidence tending to connect appellant with the crime excludes, to a moral certainty, every other reasonable hypothesis than that of appellant's guilt [is] a question for the jury, and not for the court.” State v. Walters, 56 Wn.2d 79, 85, 351 P.2d 147, 151 (1960). To the jury’s satisfaction, the State established Stacy’s proximity to the construction site at the understood time of both the July 6-7 and July 8 incident. Stacy admitted to his history of trespassing and of illegally entering the construction site on July 8. The graffiti that vandalized city hall on July 8 was very similar to that which appeared on the modular on July 6-7. The only way the graffiti could have been sprayed on the sides of the modular in such detail is if someone climbed over the fence to do it. Stacy admitted to lying to law enforcement to avoid responsibility for his criminal trespasses and only admitted to trespassing on July 8 after Officers Johnstone and Herbig made him aware that his GPS ankle bracelet had given him away. It was therefore reasonable for the jury to

conclude that Stacy was lying again and that he was therefore guilty of count I, burglary in the second degree.

2. The court's instruction was, under the circumstances of this particular trial, a harmless error. The special verdicts should therefore be upheld and the exceptional sentence affirmed.

The superior court incorrectly instructed the jury that it had to unanimously answer the questions in the special verdict. [CP 49-50]. The questions which the jury subsequently deliberated on were: (1) was the crime a major economic offense? (2) Did the crime involve a destructive and foreseeable impact on persons other than the victim? (3) Did the defendant commit the crime shortly after being released from incarceration? [CP at 56]. The court further instructed that answering question 1 meant agreeing that the actual monetary loss was substantially greater than typical for the crime. [CP at 51] The jury was polled and unanimously found that a special verdict was warranted. [Vol. 2 RP at 290-296].

Stacy, who did not object at trial, now argues that his sentence must be vacated and his case remanded for sentencing. Appellant's Opening Brief at 6-7. The basis for his argument is State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

Bashaw concerned a special verdict where the jury was instructed to unanimously agree on whether the specific site of a drug transaction was within 1000 feet of a school bus stop. The State's witnesses estimated that the transaction occurred anywhere from between 528 feet to 1,320 feet from a school bus stop. Id. at 139. The State succeeded on appeal by arguing that any error in the instruction was harmless because the trial court polled the jury and they affirmed the verdict. Id. at 147. But the Washington Supreme Court reversed, concluding that this unanimity had been inappropriately formed. Id. The Supreme Court went on to say that the error was reversible because "[w]e cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the error was harmless." Id. at 148.

By contrast, this court can conclude beyond a reasonable doubt that the error in Stacy's case was harmless because there was no alternative conclusion that a reasonable juror could have reached.

On review, courts use the same standard for the sufficiency of the evidence of an aggravating factor as it does to the sufficiency of the evidence of the elements of a crime. State v. Yarbrough, 151

Wn.App. 66, 96, 210 P.3d 1029, 1044 (2009). If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition, courts give a term its plain and ordinary meaning ascertained from a standard dictionary. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002).

a. The arson was a major economic offense

RCW 9.94A.535(3)(d)(ii) declares that a jury may find an offense to be a major economic offense if the “offense involved attempted or actual monetary loss substantially greater than typical for the offense.” The jury was properly instructed on this point. [CP at 51].

The State's first expert witness to address the economic effect of the offense was Lt. Brian Schenk of the Olympia Fire Department. Schenk testified that the original estimate for the cost of repairing the scorched city building was \$900,000, but that estimate soon jumped to somewhere between \$2.5 and \$3 million. [Vol.1 RP at 96]. At trial, the official estimate, according to Schenk, was \$1.8 million. [Id.] Schenk went on to testify that this was the second most destructive fire he had seen in more than 26 years of

firefighting, and that comparable two alarm fires in Olympia over the previous decade had never caused more than \$850,000 in damage. [Vol. 1 RP at 100 & 107]. His data showed that the median two-alarm fire caused only \$142,000 in damage, making this arson exceptionally expensive. [Id. at 101].

The State's second witness to address this subject was Richard Dougherty, a project manager for the City of Olympia. Dougherty testified that his office had originally estimated that the fire caused as much as \$3.5 million in damage, before dropping to somewhere around \$2 million. [Vol. 2 RP at 226-227]. Dougherty testified that he thought the final bill would probably be higher than the estimate at trial. [Id.]

Having found Stacy guilty of arson in count III, it is unfathomable that a reasonable juror could have concluded that the damage caused by the fire was not a major economic offense. On the contrary, it was a historic record-setting offense that could only warrant an enhanced sentence. Anything short of a unanimous verdict is so unlikely that the incorrect instruction made no difference.

b. The arson had a destructive and foreseeable impact on persons other than the victim.

Because the crime was a major economic offense, a juror could only reasonably conclude that it would have a destructive and foreseeable impact on entities other than the building itself.

The victim of this crime was a symbolic seat of government that represents the municipal democracy of Olympia. Subsequent victims included the insurance company which got stuck with the cost of repair, the municipal government which suffered the \$35,000 deductible, an unknown number of policy holders whose monthly premiums would only increase to assist the insurance company in absorbing its losses, and finally, some 260 city employees who were delayed from using the space to do the people's work for several months longer than their schedule had originally required. [Vol. 2 at 228-229, 264-265.] City planners therefore had to divert time, money and other limited resources making alternative arrangements to keep the municipal government operating during the delay.

Again, no reasonable juror would have found that these were not foreseeable destructive impacts on persons other than the victim. The instruction was therefore harmless error.

c. Stacy's crimes were committed shortly after being released from incarceration.

An exceptional sentence is warranted when the circumstances show “a greater disregard for the law than otherwise would be the case” based on the “especially short time period between prior incarceration and reoffense.” State v. Saltz, 137 Wn. App. 576, 585, 154 P.3d 282, 286 (2007). Stacy was released from incarceration on May 11, 2011. [Id. at 265]. These crimes transpired from July 6 to July 8, 2011. [Id.].

The law does not explicitly define what it is to reoffend “shortly” after being released from prison, but as one court observed, the definition of “shortly” varies “with the circumstances of the crime involved.” State v. Williams, 159 Wn. App. 298, 320, 244 P.3d 1018, 1029 (2011)(assaulting a police officer within 24 hours of release is a “short time” for the purposes of the special verdict). See also State v. Combs, 156 Wn App. 502, 506, 232 P.3d 1179, 1181 (2010)(six months after release is not a “short time” to commit the crime of drug possession); State v. Saltz, 137 Wn. App. 576, 585, 154 P.3d 282, 286 (2007)(committing the crime of malicious mischief on the one month anniversary of defendant’s release from prison was a sufficiently “short time” to justify an enhanced sentence, especially considering that the nature of the crime was similar to the crime for which defendant was previously

incarcerated). While a statutory definition for “shortly” is absent, it is hard to imagine that a reasonable juror, in the context of the crime in question, would not conclude that less than two months after being released from incarceration is a relatively short time to commit two counts of burglary and one count of arson against a municipal government building.

It is important to remember that not every aggravating factor cited must be valid to uphold an exceptional sentence. Saltz, 137 Wash. App. at 585. Furthermore, it is worth noting that the issue of the improper jury instruction was not raised at trial and as Justice Rosellini once observed:

We have, with almost monotonous continuity, recognized ... and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken.

State v. McHenry, 88 Wn. 2d 211, 217, 558 P.2d 188, 192 (1977). An appellant may raise an issue for the first time on appeal only if the error is both manifest and of a constitutional dimension. There is no express constitutional rationale cited in the Bashaw decision, and therefore no reason for this court to review the issue.

Stacy had his trial, and it was fair under any reasonable definition. The possibilities for differences of opinion on the crucial questions which inspired the ruling in Bashaw were not present in Stacy's case. There was no possibility, based on the evidence and the jurors' common sense and experience, that anyone would have found that \$1.8-2.2 million dollars in damage is not a major economic offense. Similarly, no juror could have concluded that the crime would have a foreseeable destructive impact on persons other than the victim. Finally, it is hard to imagine that a juror might have felt that 56 days of relatively good behavior upon release was sufficient to spare Olympia's most destructive arsonist from an enhanced sentence. Again, however, not every aggravating factor cited must be valid to uphold an exceptional sentence. Saltz, 137 Wash. App. at 585.

3. Considering the facts of Stacy's case, his attorney's failure to object to the court's instruction did not constitute a denial of effective counsel such that his special verdict should be reversed and remanded. While the instruction was admittedly in error, it was harmless and did not ultimately affect the verdict.

Stacy claims that, were it not for his attorney's failure to object to the court's instruction, individual jurors with reservations on the special verdict might have prevented the enhanced

sentence. Appellant's Opening Brief, at 11. He therefore claims that he was denied effective assistance of counsel.

For an appellant to prevail on a claim of ineffective assistance of counsel, it must first be shown that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. 716, 722, 158 P.3d 1238, 1241 (2007). Here there was an instructional error, but as has already been argued, the error was harmless and could not possibly have affected the special verdict in any meaningful way. The jury unanimously concluded that Stacy was guilty of counts I, III, and IV, the latter being arson in the second degree. Given the scale of the damage caused by that arson, no member of that jury could have answered the first two questions of the special verdict any differently than if the instruction had properly been given. The third question is debatable, but ultimately unimportant because the reviewing court need not uphold every aggravating factor to preserve the sentence. Saltz, 137 Wash. App. at 585.

Once the error has been identified, two prongs are considered to assess the performance of defense counsel. The appellant must demonstrate (1) counsel's performance was

deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Stacy therefore has the burden of first showing that his counsel at trial was deficient, meaning that his performance “fell below an objective standard of reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251, 1256 (1995). Stacy argues that there is no tactical or strategic reason for his counsel not to have objected to the instruction, and that his counsel was therefore deficient. Appellant’s Brief at 8. While there may have been no strategic reason for defense counsel to not object to the error, the competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

There is little evidence from the record as a whole to confirm that defense counsel was deficient. On the contrary, defense counsel successfully raised objections and prevented the admission of evidence on multiple occasions, [Vol. 1 RP at 120 & 171]. Defense counsel cross examined every witness, and somehow persuaded the jury to acquit his client of arson in the second degree as charged in count II. [Vol. 2 RP at 290]. He even

had the jury polled, in what was perhaps a last effort to save his client from the special verdict. [Id. at 290-296].

If, however, Stacy could show that his counsel was deficient, he still has the burden of showing prejudice, meaning that “there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” McFarland, 127 Wn.2d at 335. Stacy argues that the prejudice is self-evident, quoting Bashaw in arguing that “when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” Appellant’s Opening Brief at 9.

Nevertheless, this argument ultimately fails because as has already been noted, appellant does not point to a plausible alternative outcome to his trial. If defense counsel had objected, the court would have provided the correct instruction and the outcome would ultimately have been the same. No reasonable juror, having heard the projected damage estimates, would have voted that the crime was not a major economic offense. Likewise, no reasonable juror would have voted that such a fire did not involve a destructive and foreseeable impact on persons other than the victim. Again, the reviewing court need not uphold every

aggravating factor to preserve the sentence. Saltz, 137 Wash. App. at 585.

D. CONCLUSION.

First, there was sufficient evidence presented at trial to persuade a rational trier of fact that the elements of count 1, burglary in the second degree, were proved beyond a reasonable doubt. Even though the State failed to prove that Stacy was guilty of arson in the second degree as charged in count II, count II was not inclusive of all the crimes committed in count I. The State established Stacy's proximity to the construction site at the understood time of both the July 6-7 and July 8 incident. Stacy admitted to his history of trespassing and of illegally entering the construction site on July 8. The graffiti that vandalized city hall on July 8 was in the same style of graffiti that vandalized the modular on July 6-7. The only way the graffiti could have been sprayed on the sides of the modular in such detail is if someone climbed over the fence to do it. Stacy admitted to lying to law enforcement to avoid responsibility for his criminal trespasses and only admitted to trespassing on July 8 after Officers Johnstone and Herbig made him aware that his GPS ankle bracelet had given him away. It was therefore reasonable for the jury to conclude that Stacy had

unlawfully entered the construction site on July 6-7 and that he was therefore guilty of count I, burglary in the second degree.

Second, the court's jury instruction was, under the circumstances of this particular trial, a harmless error and therefore distinguishable from Bashaw. Having found Stacy guilty of arson in count III, it is unfathomable that a reasonable juror could have concluded that the damage caused by the fire was not a major economic offense with foreseeable destructive impacts on persons and entities beyond the building itself. On the contrary, it was a historic record-setting offense that could only warrant an enhanced sentence. Anything short of a unanimous verdict is so unlikely that the incorrect instruction made no difference. While the absence of a statutory definition for "shortly" does provide some room for disagreement, it is important to remember that not every aggravating factor cited must be valid to uphold an exceptional sentence. With two aggravating factors proved beyond all possibility of rationale disagreement, this court should uphold the special verdicts and affirm the exceptional sentence.

Finally, in consideration of the facts of his case and defense counsel's overall performance at trial, there is no basis for this court to conclude that Mr. Stacy was denied effective assistance of

counsel. While the instruction was admittedly in error, it was harmless and could not have ultimately affected the verdict.

Respectfully submitted this 17th day of June, 2011.

Carol La Verne

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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

Dated this 17th day of June, 2011, at Olympia, Washington.


Chong McAfee