

No. 41416-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BENJAMIN RIVAS, JR.,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
11 JUL 21 AM 11:55
STATE OF WASHINGTON
BY  DEPUTY

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the First Amended Information include all of the essential elements of the crimes charged, and the Affidavit of Probable Cause put Rivas on notice of the specific facts alleged in the case against him, making the charging documents legally sufficient?
- B. Was the "to convict" instruction, which did not include an element relating to a common scheme or plan, accurate when the State did not allege a common scheme or plan?
- C. Was defense counsel's representation of the defendant effective where, even though a witness was not called to testify, there was no showing that defendant was actually prejudiced?

II. STATEMENT OF THE CASE

On August 18, 2010, the state filed an Information charging Rivas with one count of Assault in the Second Degree, Malicious Mischief in the Second Degree, and Criminal Trespass in the Second Degree. Supp. CP.

On the same date, the state filed an Affidavit Regarding Probable Cause naming Benjamin Rivas, Jr. as the defendant in a case in which he was alleged to have assaulted Cassady Dane Bailey with a crowbar on or about and between the late evening and early morning hours of August 4, 2010. Supp. CP. The Affidavit also alleged that Rivas admitted to smashing out the windows of two motor vehicles. Law enforcement observed the

damaged vehicles and estimated that the damage would be well in excess of \$750. Supp. CP.

On September 1, 2010, the State filed a First Amended Information alleging Rivas committed the crime of Assault in the First Degree, or in the alternative, Assault in the Second Degree, Malicious Mischief in the Second Degree, and Criminal Trespass in the Second Degree. CP. 1-4. At no point in the trial did Rivas challenge the sufficiency of the charging documents. RP.

A jury trial was held on October 18, 2010, and October 19, 2010. 1RP 1, 2RP 1. The state called Martha Villanueva who owned the vehicles that were damaged on the night of the crimes. 1RP 31. Villanueva owned both the Honda car and Ford pickup truck. 1RP 32. The Honda sustained damage to two windows and the Ford sustained damage to one window. 1RP 37. The total cost to repair the vehicles was \$757.58. 1RP 43.

Cassady Bailey testified he was awoken by some “hustling...banging” around his front door. 1RP 46. When he went outside to investigate he saw three males at the corner of his property running away. 1RP 47. Bailey was unarmed and in his boxer shorts. 1RP 48. As he chased the three men, they went left onto 5th Street. Once they reached E Street, one of the men went

to the left and the other two men ran to the right. One of those men was carrying a crowbar. 1RP 49. Bailey followed the man that went to the left. 1RP 51. A short time later, the two other men, including Rivas who had the crowbar, ended up coming back to where Bailey and the third man were standing. The men surrounded Bailey. Bailey was yelling at the men not to go anywhere because the police were on the way. He started backing up towards a gravel driveway and the three men started coming at him. 1RP 52-53. As Bailey continued to walk backwards, he turned his head for a split second to yell and when he turned back Rivas had the crowbar in the air and started swinging at Bailey. 1RP 53. Bailey was three to four feet from Rivas the first time Rivas swung the crowbar at him. Rivas swung the crowbar really close to Bailey's head. While Rivas was swinging the crowbar the other two men were kicking gravel and grabbing gravel out of the driveway and throwing it at Bailey. 1RP 54. Rivas continued to swing the crowbar at Bailey's head. Every time Rivas swung the crowbar it felt like it was getting closer and closer to Bailey's head. Rivas swung the crowbar at least five to six times. When Bailey spun around to avoid the crowbar he fell on his back. Rivas was over the top of Bailey with the crowbar up in the air over his

shoulder coming down with the crowbar. 1RP 55. As Rivas started to swing the crowbar down at Bailey, Bailey's fiancé cocked a shotgun and told the men to get back. 1RP 57. The men who were throwing gravel put their arms up in the air. Rivas took off running back the way he had come. 1RP 57-58. Bailey denied being intoxicated or smelling strongly of intoxicants. 1RP 59. Bailey also denied yelling "Shoot the son of a bitch," and having possession of the shotgun. 1RP 62.

Maria Cranston, Bailey's fiancé, was with Bailey when the incident occurred. Cranston heard noises outside the front door and asked Bailey to check them out. They found nothing but a few minutes later heard noises that were louder. It sounded as though someone was try to open the front door. 1RP 76. Cranston saw Bailey run after the men they saw in front of their house and Bailey was not armed. 1RP 77. Cranston owns a pink Mossy Oak 20 gauge shotgun. Once Bailey went after the individuals, Cranston went back into the house to get her gun and a cell phone. She went out the back door of the house in the direction where she heard Bailey yelling. 1RP 78. Cranston brought the shotgun with her because she "didn't know what they had on them and who they were and why they were there." 1RP 78-79. The shotgun was not

loaded. 1RP 79. After running out the back and through a neighbor's yard, Cranston was able to locate Bailey. He was on the ground with three individuals around him. One of those individuals was Rivas. Some of the individuals were throwing rocks. 1RP 80. Rivas was swinging a crowbar at Bailey. 1RP 80-81. When Cranston saw Rivas swing the crowbar at Bailey she cocked her gun and told Rivas to stop. 1RP 81. Rivas started running away and the other two stopped and put their arms up in the air. Cranston then called the police. At no point did Bailey attack, strike, or otherwise be aggressive to Rivas or the other two individuals. 1RP 83. Neither the prosecution or the defense attorney asked Cranston if anyone said, "shoot the son of a bitch." See 1RP.

At the conclusion of the trial the jury returned three verdicts: guilty of assault in the second degree, guilty of malicious mischief in the second degree, and not guilty of criminal trespass in the second degree. This appeal followed.

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III. ARGUMENT

A. THE FIRST AMENDED INFORMATION FILED BY THE STATE CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIMES CHARGED, AND WAS THEREFORE LEGALLY SUFFICIENT.

The State is required by the Sixth Amendment of the United States Constitution and Const. article I, section 22 to include all essential elements of the crime in its charging document. The essential elements include statutory and non-statutory elements which are to inform the defendant of the charge against him or her to allow the defendant to prepare his or her defense. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992), *citing State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.3d 86 (1991). First, the court looks “to the statute because the legislature defines elements of crimes, to determine the elements that the prosecution must prove to sustain a conviction.” *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

A challenge to the sufficiency of the charging document, when brought after the close of the State’s case, requires the reviewing court to strictly construe the information. *State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). The

sufficiency of a charging document is reviewed de novo. *State v. Williams*, 162 Wn.2d at 182.

Rivas alleges that the charging document was deficient because it failed to allege an essential element of second degree malicious mischief by not alleging multiple acts as part of a common plan or scheme. Brief of Appellant 1-2.

RCW 9A.48.080 states: (1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously: (a) Causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars.” Whether a crime was part of a common scheme or plan is not an essential element of Malicious Mischief in the Second Degree.

RCW 9A.48.100(2) allows for aggregation of damages if the damage was the result of a common scheme or plan. It provides: “If more than one item of property is physically damaged as a result of a common scheme or plan by a person and the physical damage to the property would, when considered separately, constitute mischief in the third degree because of value, then the value of the damages may be aggregated in one count. If the sum of the value of all the physical damages exceeds two [sic] hundred fifty dollars,

the defendant may be charged with and convicted of malicious mischief in the second degree.” RCW 9A.48.100 (2)

A common plan or scheme is a specific prior design or system which included committing the act charged. *State v. Lough*, 70 Wn. App. 302, 853 P.2d 920 (1993). A person commits a crime as part of a common scheme or plan when he devises a plan and uses it repeatedly to commit separate but very similar crimes. *State v. Yates*, 161 Wn.2d 714, 751, 168 P.3d 359 (2007).

In this case, a common plan or scheme was not alleged because there was no common plan or scheme. Rivas damaged one person’s property, on one night, at one time. The smashing of Villanueva’s vehicle windows was not part of a plan Rivas had devised and used to repeatedly commit separate but very similar crimes. He committed one crime: he broke out the windows of Villanueva’s vehicles. Therefore, the charging document was not deficient, and Rivas’ conviction should be confirmed.

Rivas argues that the state failed to supply a sufficient factual allegation in the Amended Information, making the charging document insufficient. Brief of Appellant 2. In actuality Rivas is arguing the charging document is vague because it did not allege the specific facts describing Rivas’ conduct. Brief of Appellant 1.

Yet, nowhere does Rivas state that this alleged vagueness prejudiced him in his ability to prepare a defense to the crimes charged.

It is important to remember the primary reason the essential elements rule exists, to ensure the accused has notice of the nature of the crime to allow the accused the ability to prepare his or her defense. *State v. Kjorsvik*, 117 Wn.2d at 101. A state may correct a charging document that is vague via a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989); *State v. Winnings*, 126 Wn. App. 75, 86, 108 P.3d 141 (2005). The court may direct the filing of a bill of particulars upon motion by the defendant or his attorney. CrRLJ 2.4 (e) A defendant who fails to request a bill of particulars at trial has waived any vagueness challenge of the charging document. *State v. Leach*, 113 Wn.2d at 687; *State v. Winnings*, 126 Wn. App. at 86.

The Amended Information included the date the state alleged the conduct occurred; the place, Lewis County; that Rivas knowingly and maliciously caused physical damage to the property of another in an amount exceeding \$750, and stated the applicable statute. Further, the probable cause statement, outlining the alleged facts, was filed on August 18, 2010. Supp. CP. If Rivas

was confused as to the specific facts which led to the allegation, he could have requested a bill of particulars from the trial court. A review of the record reveals no such request. See CP and RP. Rivas' trial counsel did not argue that the Amended Information was factually deficient, thereby not giving Rivas adequate notice as to what conduct the state was alleging violated RCW 9A.48.080(1)(a). Nor did Rivas' trial counsel, or Rivas in his briefing, allege this vagueness prejudiced him in his ability to prepare his defense. Rivas waived any vagueness challenge of the charging document due to his failure to request a bill of particulars from the State. Rivas' conviction should be affirmed.

B. THE "TO CONVICT" INSTRUCTION FOR THE CRIME OF MALICIOUS MISCHIEF IN THE SECOND DEGREE WAS SUFFICIENT BECAUSE THE STATE DID NOT ALLEGE A COMMON SCHEME OR PLAN.

As stated above, RCW 9A.48.100(2) allows for aggregation of damages if the damage was the result of a common scheme or plan. It provides: "*If more than one item of property is physically damaged as a result of a common scheme or plan* by a person and the physical damage to the property would, when considered separately, constitute mischief in the third degree because of value, then the value of the damages *may* be aggregated in one count. If the sum of the value of all the physical damages exceeds two [sic]

hundred fifty dollars, the defendant may be charged with and convicted of malicious mischief in the second degree.” RCW 9A.48.100 (2) (emphasis added.) Aggregation of damages due to a common scheme or plan is not an essential element of the charge of malicious mischief in the second degree.

The statute allows for aggregation when damages result from a common scheme or plan. In this case the state has never alleged that the damages resulted from a common scheme or plan, and therefore, allegations of a common scheme or plan were never put forth in the charging document or the affidavit of probable cause.

Therefore, reference to a common scheme or plan was properly left out of the court’s jury instructions. The court should affirm Rivas’ conviction.

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL THE 911 OPERATOR TO TESTIFY BECAUSE THERE WAS NO ACTUAL PREJUDICE TO RIVAS.

Review of an ineffective assistance claim begins with a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984)). To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) his attorney's representation fell below an objective standard of reasonableness, and (2) the error was so serious as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 104 St.Ct. 2052; *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). The latter element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *Rice*, 118 Wn.2d at 889, 828 P.2d. 1086. If prejudice is not shown, evaluation of the counsel's performance is unnecessary. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

In the case at bar, there was overwhelming evidence that Rivas attacked Bailey. Even if Bailey had said, "shoot the son of a bitch," it does not diminish the evidence that Rivas swung the crowbar at Bailey's head numerous times. In fact, if Bailey had said, "shoot the son of a bitch," it would have bolstered his story that Rivas' attack was so serious that Bailey even considered using deadly force against the attack. If Rivas' attorney had called the 911 operator and the statement, "shoot the son of the bitch" would

have been admitted as evidence, it would not have changed the outcome of the trial and therefore did not prejudice Rivas.

IV. CONCLUSION

For the foregoing reasons, this court should affirm Rivas' convictions for assault in the second degree and malicious mischief in the second degree.

RESPECTFULLY submitted this 19th day of July, 2011.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
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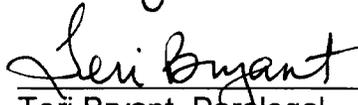
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Ms. Teri Bryant, paralegal for Debra Eurich, Deputy

Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 20, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 20 day of July, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
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