

68031-5

68031-5

NO. 68031-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY C. WOODS,

Appellant.

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUL -2 PM 4:32

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

The Honorable Susan K. Cook, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove the appellant, Jeffrey C. Woods, acted maliciously when he broke a motel office window.

2. The permissive inference portion of the jury instruction defining malice was wrongly included because it was not supported by the necessary rational evidentiary connection.

3. Trial counsel deprived Woods of his constitutional right to effective representation by failing to object to the malice instruction.

4. The trial court exceeded its statutory sentencing authority by imposing certain alcohol-related sentencing conditions that were supported by neither evidence of alcohol use nor by statute.

Issues Pertaining to Assignments of Error

1. Did the State prove beyond a reasonable doubt that Woods acted with malice, an element of the malicious mischief charge?

2. Did the trial court err by instructing the jury it could infer malice from an act done in willful disregard of the rights of others when the necessary evidentiary connection did not support the inference?

3. Was trial counsel ineffective for failing to object to the malice instruction?

4. Did the trial court exceed its statutory sentencing authority by imposing certain alcohol-related community custody conditions that were supported by neither evidence of alcohol use nor by statute?

B. STATEMENT OF THE CASE

As he did several times a shift during his patrol of Sedro-Wooley, officer Paul Eaton drove into the parking lot of the Skagit Motel at about 2:40 a.m. 1RP 36-40.¹ Eaton saw a man who appeared to be intoxicated standing near the front of the motel. He drove up and the man, Jeffrey C. Woods, said he lost his room key. Eaton and Woods briefly chatted, then the officer drove away. 1RP 41-42.²

One of the motel managers gave Woods another key, escorted him out of the office, and went back to bed. 1RP 154-57. Woods rang the office bell a few minutes later. The same manager answered the bell and spoke with Woods through a service window. Woods asked to be let back into the office, but the manager declined because she had already given Woods a spare key. 1RP 157-58, 173. Woods repeatedly tried to open the office door, and also tried to climb in the service window. 1RP 47, 158-

¹ The report of proceedings is cited as follows: 1RP – 10/3-4/2011; 2RP – 10/5-6/2011; 3RP – 10/7/2011; 4RP – 11/23/2011; 5RP – 12/1/2011.

² The jury viewed the officers' interactions with Woods because they were filmed by several motel surveillance video cameras. 1RP 43-45; Ex. 1.

59, 176. The manager's husband then came into the office and told Woods he could not let him into the office. 1RP 158, 173-74. Meanwhile, the manager called police. 1RP 159, 174-76.

Based on that call, Eaton was dispatched to investigate a complaint of Woods acting erratically and trying to climb into the motel through a very small window. 1RP 43-45, 47, 157-59, 173-75. Unlike the first contact, Eaton got out of his patrol car to speak with Woods. 1RP 45-46. Woods did not respond to Eaton's announcement that he had just spoken with him. Instead, Eaton said "it was like he was looking straight through me." 1RP 46.

Woods did not produce an identification card or wallet when asked. 1RP 47. As Eaton spoke, Woods began to turn as if to walk away. Eaton stepped forward and Woods took a swing that Eaton deflected with his arm. 1RP 49. A fistfight ensued with the parties exchanging blows. Wood's colleague, Oscar Vollans, drove up during the melee. 1RP 114. Eaton eventually landed a "very good punch" that caused Woods to stumble to the ground. 1RP 53-55. Eaton immediately jumped on top of Woods. 1RP 53, 55-56.

Vollans tased Woods, immobilizing him for a few seconds. 1RP 56-59, 115. Woods then threw Eaton off of him, jumped up and ran off.

1RP 59-60, 115-16. Eaton chased Woods while Vollans reloaded his taser. 1RP 60, 117. Woods disregarded Eaton's repeated demands to stop and get on the ground. Eaton then shot pepper spray onto Woods' face, but it had no apparent effect. 1RP 60-62, 117.

Woods then began to run back toward the motel. 1RP 62-64. Vollans again tased Woods, causing him to stumble but not fall. 1RP 117-18. Woods ran to the motel breezeway and again asked the manager's husband to let him in. The manager said he could not do that. 1RP 178.

Meanwhile, the officers ran to each side of the breezeway and trapped Woods. 1RP 63-65, 118. When Woods again disregarded Eaton's commands, Eaton fired his taser but the probes did not attach. 1RP 66. Vollans then pepper sprayed Woods, who reacted by jumping sideways through a motel window and landing inside the office. 1RP 68-69, 118-19.

Eaton ran around and entered through the office door. 1RP 69-70, 178-79. He tased Woods, who appeared to feel some effect. 1RP 71-72, 120. But Woods recovered and picked up a rock from a display on the counter in the office. 1RP 73, 94-95, 120-21. Vollans told him to drop the rock or risk being shot. Woods put the rock down. 1RP 73, 121. The

officers got Woods out of the office and face-down onto the ground with his arms underneath his body. 1RP 73-76, 96, 121-22.

Eaton used "distraction strikes" – punches – on Woods' face and shoulders to help gain control of Woods' arms. 1RP 77-78. Woods thrashed about on the ground and used his free legs to kick. 1RP 78. Eaton then used the taser to perform "drive stun[s]" on the back of Woods' neck and shoulders. 1RP 79-80, 122. Meanwhile, a third officer arrived and sat on Woods' legs. 1RP 96, 199, 201-02. The officers eventually forced Woods' arms and hands behind his back, handcuffed him, and restrained his legs. 1RP 80-81, 122-24, 201.

Vollans drove Woods to a hospital, where an emergency room doctor examined him. 1RP 100-01, 124-25. Meanwhile, Vollans searched Woods' clothing and seized a "meth pipe" in his pants pocket. Vollans also collected a cigarette pack that lay on the floor near Woods' bed. He did not search the inside of the pack. 1RP 127-29. Vollans put the pack with Woods' other property to be taken with him to jail. 1RP 128; 2RP 13-15. A toxicology test of Woods' blood revealed the presence of amphetamine. 1RP 102-03.

After more than three hours, Woods was discharged and taken to jail. 1RP 86, 107-08; 2RP 15-16. On the way to jail, Woods became

agitated. He resisted being removed from the car and the escort officer had to pull him out of the car and force him inside. 2RP 19-21. There three jail officers arrived and carried Woods into a special cell. 2RP 5-6, 21-22.

The escorting officer left the bag containing Woods' personal property at the jail. 2RP 8, 22. Upon close inspection of the cigarette pack, a jail officer found a small baggie with a white substance that was later tested and determined to contain methamphetamine. 2RP 9-10, 23-27, 36-39. As well, residue from the pipe was found to contain methamphetamine. 2RP 44-48.

Based on this series of events, the State charged Woods with two counts of third degree assault, one for Eaton and one for Vollans, possession of methamphetamine, first degree criminal trespass, and third degree malicious. CP 1-2. Woods' defense to the assaults was that he was defending himself from the officers' use of excessive force. 1RP 34-35, 2RP 109.

Woods testified he checked into the Skagit Motel at about 10 p.m. following a day of substantial beer drinking and some methamphetamine use. 2RP 60-62, 104-06. He did not buy an "eight ball" of methamphetamine earlier in the day. 2RP 105. He went to the motel

office for another room key. The motel manager gave him a key for the wrong room, but Woods could not explain the problem because the beer affected him. 2RP 63-64. As he stood outside the office, Woods saw Eaton drive up. They had a friendly conversation and Eaton drove off. 2RP 65.

Woods returned to the office and eventually got the correct room key. 2RP 65-68. Eaton drove up as Woods stood outside the motel office. 2RP 67-68. Because of their pleasant conversation only a short time earlier, Woods was "shocked" when he saw Eaton step out and immediately put his gloves on. 2RP 68-69. Eaton quickly approached, asked Woods for identification, and loudly and angrily told him to get to the ground. 1RP 196-97; 2RP 70.

As Woods tried to grab his wallet, Eaton lunged at him and grabbed his wrists. 2RP 70-71, 76. Eaton started "flinging" Woods around and "took a few shots at" him. 2RP 70. Woods tried to cover his face and protect himself. 2RP 70. He was taken to the ground face up and both Eaton and Vollans punched him. Woods continued trying to cover his head. 2RP 73-76. He also rolled over onto his stomach and was tased. 2RP 75. He recalled nothing thereafter until regaining his memory as he lay in the motel parking lot, "seized up and screaming." 2RP 77. He did

not remember swinging or kicking at the officers. 2RP 75. He next remembered waking up in the hospital with a catheter attached to him. 2RP 79, 112.

Woods said he sustained a gash on his forehead, cuts, scrapes and bruises around his eyes, an injured nose and taser burn marks on his neck, chest, back and side. 2RP 81, 100. He felt soreness all over his body. 2RP 100-01.

The trial court gave a lawful force jury instruction designed for instances involving assaults against police officers. CP 81 (instruction 11). A Skagit County jury found Woods guilty of assaulting Vollans, first degree criminal trespass and third degree malicious mischief. The jury did not reach a verdict as to the charges of assaulting Eaton or possessing methamphetamine. CP 102-06. The trial court later dismissed those charges. CP 155. The court imposed a 14-month standard range sentence and 12-month term of community custody for assault and concurrent terms of 364 days for trespass and malicious mischief.

C. ARGUMENT

1. THE STATE FAILED TO PROVE WOODS ACTED MALICIOUSLY WHEN HE JUMPED THROUGH THE MOTEL WINDOW.

Malicious mischief requires a mens rea of malice. RCW 9A.48.090(1)(a). The state failed to prove Woods maliciously caused physical damage to the motel. His malicious mischief conviction should be reversed and dismissed.

Due process requires the State to prove each essential element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In assessing a challenge to the sufficiency of the evidence, a reviewing court views the evidence in the light most favorable to the State. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The question is whether a rational juror could have found the essential elements of the offense beyond a reasonable doubt. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

The State charged Woods with third degree malicious mischief for jumping through and shattering the motel window. CP 1-2; 2RP 151. "A person is guilty of malicious mischief in the third degree if he . . . [k]nowingly and maliciously causes physical damage to the property of another[.]" RCW 9A.48.090(1)(a).

The terms "malice" and "maliciously" mean "an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another[.]" RCW 9A.04.110(12). "Vex" means "to bring trouble or distress to." Webster's Third New Int'l Dictionary 2548 (1993).

The record is devoid of any evidence establishing Woods intended, wished, or designed to vex, annoy, or injure another person. Although the motel managers repeatedly denied him entry to the office, Woods did no damage in response to the refusals. Indeed, he did not break the window until he was cornered by two officers who had already chased him, punched him, thrown him to the ground, tased and pepper-sprayed him. Officer Vollans testified Woods "immediately jumped through the window" after being pepper-sprayed on the left side of his face and shoulder. 1RP 118-19. Eaton testified to the effect of pepper spray because he got some of the spray on himself during the incident. Eaton said the spray caused his eyes to "immediately shut," his nose to start running, and phlegm to collect in his throat. 1RP 62.

The timing of Woods desperate act of jumping through the window indicates the act was an automatic response to danger rather than one designed to vex or annoy the motel owners. In short, the State failed to

prove malice and Wood's malicious mischief conviction should be reversed and dismissed.

2. THE TRIAL COURT ERRED BY INCLUDING THE PERMISSIVE INFERENCE LANGUAGE IN THE DEFINITION OF MALICE.

The trial court defined malice as follows:

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 93 (instruction 23). The second paragraph of this pattern instruction is optional, as shown by the brackets in WPIC 2.13.³

The second paragraph creates a permissive inference. State v. Ratliff, 46 Wn. App. 325, 330, 730 P.2d 716 (1986), review denied, 108 Wn.2d 1002 (1987). A permissive inference does not relieve the State of its burden of persuasion because it must still persuade jurors the suggested conclusion (here, malice) should be inferred from the basic facts proved. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S.

³ WPIC 2.13 provides:

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.]

919 (1994). "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, 46 Wn. App. at 330-31 (quoting County Court of Ulster County. v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)).

This Court reviews an alleged jury instruction error de novo. State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897 (2010). The rational connection between the facts proven at Woods' trial and the inferred fact of malice does not exist. Malice does not flow more likely than not from Woods' leap through the motel window; i.e., his willful disregard for the property of another. It is much more likely Woods was trying to escape from the officers' aggressive actions and to wipe the pepper spray from his face. In fact, Eaton testified that as he tried to talk Woods out of the office after he broke through the window, Woods appeared from the motel security video as if he was trying to wipe the spray away. 1RP 73.

It is just as likely Woods was desperately trying to defend himself, as evidenced by Eaton's testimony that Woods appeared to be grabbing shards of glass to stab the officers with. 1RP 67-68. Once completely inside the office, Woods found himself behind the counter, which caused

Eaton to fear he would be able to grab scissors or a letter opener to use as a weapon. 1RP 69-70.

These facts show Woods did not break the window to vex or annoy. Cf. Ratliff, 46 Wn. App. at 331 (defendant testified he continued to pull police van's radio wires loose after failing to drag radio toward him because he was frustrated). There was thus no rational connection between Woods' willful disregard and malice. The trial court erred by giving this optional portion of the malice instruction.

Instructional errors are presumed prejudicial. State v. Weaville, 162 Wn. App. 801, 815, 256 P.3d 426, review denied, 173 Wn.2d 1004 (2011). An instruction that misstates an element of a crime is, however, subject to harmless error analysis. Id. 162 Wn. App. at 815. Such error is harmless only if the misstated element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

For the reasons set forth in Argument (1) above, the misstated element of malice was not supported by uncontroverted evidence. There were several likely reasons, other than malicious ones, for Woods' leap through the motel window. The State thus cannot rebut the presumption that the permissive inference portion of instruction 23 caused prejudice.

This Court should therefore reverse Woods' malicious mischief conviction and remand for retrial.

3. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S ERRONEOUS MALICE INSTRUCTION.

Defense counsel did not object to the malice instruction. If this Court concludes counsel waived the challenge by failing to object, it should nevertheless reach the merits because counsel's failure deprived Woods of his constitutional right to effective representation.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); see State v. Davis, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992) (court reviewed defense counsel's failure to object to aggressor instruction under ineffective assistance theory).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland,

466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

a. Counsel's failure to object was deficient.

Reasonable attorney conduct includes an obligation to investigate pertinent law. State v. Woods 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). Therefore, proposing an incorrect instruction, even when it mirrors a pattern instruction, may constitute ineffective assistance. Id. The same is true of a failure to object to an improper instruction. State v. Howland, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992) (counsel deficient for failing to "notice" inaccurate jury instruction), review denied, 121 Wn.2d 1006 (1993).

Woods' trial counsel failed to object to the trial court's malice instruction, which contained an unsupported permissive inference that

made it easier for the State to prove an essential element of malicious mischief. Counsel's failure was thus not based on a legitimate tactic. The evidence did not support the permissive inference language. Counsel's failure to object to the erroneous instruction was deficient performance. State v. Carter, 127 Wn. App. 713, 718, 112 P.3d 561 (2005).

b. Counsel's deficient performance prejudiced Woods.

Prejudice is established where it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is one that is sufficient to undermine confidence in the jury's verdict. Strickland, 466 U.S. at 694.

Woods makes that showing here. As stated, there was no rational connection between Woods' willful destruction of the motel window and malice. There is a reasonable likelihood jurors could have improperly relied on the challenged inference to find the malice element. Indeed, during deliberations, the jury sent the court the following request: "We the jury need to understand the meaning and or definition of malicious." CP 66-67. The court referred the jury to instruction 23. Id. Counsel's deficient performance therefore caused prejudice. This Court should reverse the malicious mischief conviction and remand for a new trial.

4. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY.

As conditions of community custody, the trial court ordered Woods not to "possess or consume alcohol" or to "frequent establishments where alcohol is the chief commodity for sale." CP 166. The prohibitions on alcohol possession and frequenting bars and liquor stores are unauthorized because they are neither crime-related nor specifically authorized by law.

A sentencing court is authorized by statute to require an offender to "[r]efrain from consuming alcohol." RCW 9.94A.703(3)(e). However, it may not prohibit the mere possession of alcohol unless alcohol is related to the crime. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

Woods testified he had been "drinking quite a few beers" during the hours leading up to the incident with the officers. 2RP 62, 108. The prosecutor, however, elicited evidence that the urine test was negative for alcohol. 2RP 107-08. This scientific evidence definitively establishes Woods had not been drinking alcohol. Alcohol therefore played no role in commission of the offenses. The trial court's order prohibiting possession of alcohol should thus be stricken because it exceeds the sentencing court's statutory authority.

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Sentencing courts may impose only sentences the legislature has authorized by statute. Id. Unauthorized conditions of a sentence may be challenged for the first time on appeal. Jones, 118 Wn. App. at 204; see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

RCW 9.94A.703 lists mandatory and waivable conditions of community custody. Among the waivable conditions is a requirement that the offender “[r]efrain from consuming alcohol.” RCW 9.94A.703(3)(e). The statute also permits “any crime-related prohibitions.” RCW 9.94A.703(3)(f). The court has interpreted the prior version of RCW 9.94A.703 as permitting the court to impose a prohibition on consuming alcohol regardless of whether the crime involved alcohol.⁴ Jones, 118 Wn. App. at 207; former RCW 9.94A.700(5). However, other alcohol-related conditions, such as treatment, are authorized only if related to the offense. Jones, 118 Wn. App. at 207-08.

⁴ Jones considered the Sentencing Reform Act as it existed in 2001. However, like the current law, the 2001 law permitted the court to impose a condition of community custody that the offender “shall not consume alcohol” without mention of possession. 118 Wn. App. at 206.

Like the Jones court, this Court should strike the condition of Woods' community custody prohibiting him from possessing alcohol. Id. at 212. The court went beyond what was authorized by statute despite the lack of evidence alcohol played any role in his offense. Under this condition, Woods could be arrested for legal possession of alcohol by a member of his household or a guest in his home.

The same reasons apply to that portion of the condition prohibiting Woods from "frequent[ing] establishments where alcohol is the chief commodity for sale." CP 166. Because alcohol was not related to commission of Woods' offenses, the court exceeded its statutory sentencing authority by imposing this prohibition. It, too, should be stricken.

D. CONCLUSION

For the aforesaid reasons, this Court should reverse Woods' malicious mischief conviction and remand for dismissal with prejudice or, alternatively, for a new trial. This Court should also strike the community custody conditions challenged above.

DATED this 2 day of July, 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68031-5-1
)	
JEFFREY WOODS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF JULY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE
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[X] JEFFREY WOODS
P.O. BOX 218
SPINGDALE, WA 99173

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF JULY 2012.

x Patrick Mayovsky