IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TARA ROSE FENNEL, Appellant.	No. 41753-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Tara Rose Fennel appeals her conviction of first degree malicious mischief, arguing that the evidence was insufficient to support the conviction, that she received ineffective assistance of counsel when her attorney failed to propose an instruction cautioning the jury about an accomplice's testimony, and that the trial court erred in entering a no-contact order concerning that accomplice. Finding no error, we affirm.

Facts

On August 9, 2008, Kelly Rothwell drove her 2001 black BMW to her evening shift as the bar manager of the Silver Star Sports Bar and Grill. She parked in a bank parking lot behind the Silver Star.

Meanwhile, Fennel and Lindsey Divine were drinking at Fennel's house. Laura Quigley was present but was not drinking; she was to be the designated driver. Quigley drove Fennel and Divine to the Silver Star in Fennel's Mitsubishi Montero. Quigley and Fennel were 21 and older, but Divine was only 20 years old.

After Fennel and Quigley entered the Silver Star, Fennel left and gave Quigley's identification to Divine, who was waiting outside. When Fennel and Divine entered the bar, a security guard asked for identification. Divine presented Quigley's identification and a discussion ensued over whether the identification truly belonged to Divine.

When bartender Chris Moon notified Rothwell about the identification issue, she recognized Divine. Because she doubted Divine was 21, Rothwell told Moon to double check her identification. Moon and the security guard decided that the identification did not belong to Divine and told her to leave.

Fennel saw what was happening and approached the bar to argue with Rothwell. When Rothwell told her that Divine had presented a false identification, Fennel cursed at Rothwell and called her names. Rothwell told Fennel that she needed to leave as well, and the three friends walked out just after midnight.

When Rothwell got off work a few hours later, she went to her car and found that it had been keyed. The word "whore" was scratched across the trunk, and the words "whore," "bitch," "fuck," and "ha-ha" were keyed along the passenger side. Law enforcement officers responded and took photographs of the damage. An insurance adjuster estimated the cost of repair at $1,516.56.

An officer took custody of surveillance videos taken inside and outside the Silver Star just before and after midnight on August 9. The video taken inside showed Fennel going up to the bar and then following Divine and Quigley outside. The outside video showed the three getting into the Montero, with Fennel sitting in the front passenger seat. The vehicle left and drove over to the bank parking lot. Fennel and Divine then got out, with Fennel leading the way, and walked up

to Rothwell's car. They bent down by its side before returning to the Montero.

The State charged Fennel with one count of first degree malicious mischief. At trial, Rothwell and Moon testified to the facts cited above, and Rothwell described the contents of the surveillance videos as the State played them for the jury. State Trooper Jason Cuthbert testified about the damage to Rothwell's car, and the trial court admitted his photographs of that damage. Officer Michael Berndt testified about obtaining the videos from the Silver Star and also described their contents. According to Berndt, the outside video showed Fennel leading Divine to Rothwell's car and then leaving after a minute. During his investigation, Rothwell confirmed those identifications.

Divine also testified for the State. She explained that when she and her friends left the Silver Star, they discussed damaging Rothwell's car. She said that she did not want to participate but got out of the Montero to keep watch as Fennel keyed the car. She said that after they left, they returned to do more damage while she stayed in the car. When Quigley and Fennel returned from Rockwell's car, they were laughing.

Insurance adjuster Claudio Sanchez testified about the vandalism damage to the BMW's trunk, quarter panel, and right rear door. He identified a different type of scratching that Rothwell had described as pre-existing damage, and he subtracted the cost of repairing that damage from the repair costs. The estimate total was $1,552.56. Minus the cost of repairing the pre-existing damage, the estimated cost of repair was $1,516.56.

The trial court instructed the jury on first degree malicious mischief, which requires damage exceeding $1,500, and on the lesser included crime of second degree malicious mischief, which requires damage exceeding $250. The jury found Fennel guilty of the first degree malicious

mischief charge.

The trial court sentenced Fennel under the first offender option. At Divine's request, the sentence included a no-contact order preventing Fennel from having any contact with her for 10 years. This was in addition to the no-contact order restricting Fennel's contact with Rothwell.

Fennel now appeals both her conviction and sentence.

Discussion

Sufficiency of the Evidence

Fennel argues that the evidence was insufficient to support her conviction because the insurance adjuster's damage estimate included repairs to Rothwell's vehicle that were not related to her offense. Specifically, she contends that despite the absence of any damage to the BMW emblem and model numbers on the back of the trunk, these items were replaced at a cost of $53.96, and that without this replacement cost, the total repair estimate was less than $1,500.

Evidence is sufficient if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *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." *Salinas*, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To prove that Fennel committed first degree malicious mischief, the State had to prove that she knowingly and maliciously caused physical damage to the property of another in an amount exceeding $1,500. Former RCW 9A.48.070(1)(a) (1983).[1] The ordinary measure of

damages includes the reasonable cost of repairs to restore injured property to its former condition. *State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995). The insurance adjuster testified that minus the pre-existing damage, the estimated cost of repairing and repainting Rothwell's vehicle was $1,516.56. His written estimate, admitted as Exhibit 5, shows that the cost of replacing the BMW emblem and model numbers was included in that amount. As the State argues, it is reasonable to conclude that removing and replacing these items was required to repaint and fully repair the damage that Fennel inflicted. The jury heard the adjuster testify, reviewed Exhibit 5, and concluded that the repair costs exceeded $1,500. Viewed in the light most favorable to the State, the evidence was sufficient to support the jury's finding that Fennel committed first degree malicious mischief.

Ineffective Assistance of Counsel

Fennel argues here that her trial attorney's performance was ineffective because he failed to propose a jury instruction cautioning the jury about Divine's testimony. To succeed on a challenge of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficiency was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Stenson*, 132 Wn.2d at 706.

Fennel contends that his attorney should have requested an instruction based on 11 *Washington Practice: Washington Pattern Jury Instruction: Criminal* 6.05, at 184 (3d ed.

[1] In 2009, the legislature increased the damage amount to $5,000. Laws of 2009, ch. 431, § 4.

2008) (WPIC), which provides as follows:

> Testimony of an accomplice, given on behalf of the [State] [City] [County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

A cautionary accomplice testimony jury instruction is not necessary where an accomplice's testimony is substantially corroborated. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Corroborating evidence is sufficient if it fairly connects the defendant with the crime, and independent evidence is not needed to corroborate every part of the accomplice's testimony. *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975).

Here, Divine's testimony was substantially corroborated by independent testimony and circumstantial evidence. Rothwell and Moon supported her description of what happened inside the Silver Star, as did the inside surveillance video. The outside video corroborated the first part of her testimony concerning Fennel's first attempt to damage Rothwell's car. The brevity of that contact and the extent of the damage, as shown by the video and photographs, support Divine's testimony that a second trip to the car was necessary to inflict the final damage. Finally, Rothwell's testimony about her argument with Fennel before ejecting her from the Silver Star, combined with the video footage placing Fennel at Rothwell's car directly afterward, is circumstantial evidence that Fennel inflicted the damage to Rothwell's car.

Given this evidence, a cautionary accomplice testimony instruction based on WPIC 6.05 was not necessary. Furthermore, as the State points out, such an instruction would have undermined the defense strategy that Fennel did not participate in damaging Rothwell's car and,

thus, was not an accomplice to the offense. *See State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (defendant claiming ineffective assistance of counsel must show that no legitimate strategy supported challenged conduct). In addition, the defense was able to question Divine's credibility even without the instruction, arguing in closing that she was "loose with the truth." 2B Report of Proceedings at 336. We see no reasonable probability that the result of the trial would have differed had the cautionary instruction been offered, given the substantial evidence of Fennel's guilt. We reject Fennel's claim of ineffective assistance of counsel.

No-Contact Order

Finally, Fennel challenges the sentencing condition barring her from all contact with Divine for 10 years. She contends that the trial court exceeded its authority under RCW 9.94A.703 by restricting her contact with a witness.

In addressing sentencing challenges, we apply the sentencing statutes in effect at the time of the offense. *State v. Jones*, 118 Wn. App. 199, 203, 76 P.3d 258 (2003). Fennel committed her offense in 2008, which was before RCW 9.94A.703, which addresses community custody conditions, took effect. Laws of 2008, ch. 231, § 9, eff. Aug. 1, 2009. RCW 9.94A.703 is therefore irrelevant to Fennel's sentence.

We instead address RCW 9.94A.505(8), which was in effect when Fennel committed her offense. This provision of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, allows trial courts to impose crime-related prohibitions as part of a sentence independent of any other SRA provision. RCW 9.94A.505(8); *State v. Armendariz*, 160 Wn.2d 106, 112-13, 156 P.3d 201 (2007). Through such crime-related prohibitions, the trial court may prohibit conduct that relates directly to the circumstances of the crime for which the offender has been convicted. *State v.*

Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), *abrogated on other grounds*, *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). We review sentencing conditions for abuse of discretion, and we usually uphold conditions that are reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009).

Crime-related prohibitions may include orders prohibiting contact with witnesses. *Armendariz*, 160 Wn.2d at 108; *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001). Because Divine participated in Fennel's offense and testified against her, the no-contact order was reasonably related to the circumstances of the crime. *See Armendariz*, 160 Wn.2d at 113 (SRA authorizes orders prohibiting conduct directly related to circumstances of offender's crime, and such orders reasonably include no-contact orders regarding witnesses). The trial court neither exceeded its authority nor abused its discretion in ordering Fennel to refrain from contacting Divine for a period of 10 years.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

JOHANSON, A.C.J.