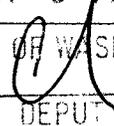


NO. 37108-1

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

FLOYD LEA SAXTON, JR., APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 06-1-03412-2

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State comply with its pretrial discovery obligations when it provided the defense with Ms. Martin's photographs months before trial?

2. Did the State commit a *Brady* violation regarding the Lally photographs when: the photographs are neither exculpatory nor impeaching; the state did not suppress discovery of the photographs; and defendant cannot show prejudice?

3. Did the prosecution present sufficient evidence for a rational trier of fact to convict the defendant of first degree malicious mischief?

B. STATEMENT OF THE CASE.

1. Procedure

On July 24, 2006, Pierce County Prosecuting Attorney's Office charged Floyd Lea Saxton Jr., hereinafter "defendant," with the crimes of residential burglary and first degree malicious mischief, contrary to RCW 9A.52.025 and RCW 9A.48.070(1)(a). CP 1-2; RP 5. On October 25, 2007, the matter proceeded to trial before the Honorable Frederick W. Fleming. RP 1. On November 6, 2007, the jury found defendant guilty of residential burglary and malicious mischief in the first degree as charged. CP 12-13. On November 9, 2007, defendant was sentenced to the

standard sentence range of six months confinement on each count to run concurrently and twelve months community custody. RCW 9.94A.589. CP 36-37, RP 499. Defendant was ordered to pay \$1,200.00 in court fines and costs. CP 36-37, RP 500. On December 7, 2007, a timely notice of appeal was filed. CP 52. On March 11, 2008, defendant was ordered to pay restitution in the amount of \$12,138.35. CP 71-72.

## 2. Facts

Having previously been married and divorced, Heather and Floyd Saxton were remarried on June 3, 2004. RP 156. The couple separated in May of 2006. RP 157. Ms. Saxton stayed in the house in which the couple had resided during their marriage at 1101 East 54<sup>th</sup> St., in Tacoma, while defendant moved out. RP 157-158. Defendant took all of his personal property except some clothing and boxes of papers. RP 160. After defendant moved, Ms. Saxton changed the locks. RP 164. Defendant did not have a key to the house nor did he have her permission enter the home. RP 163.

On the morning of June 29, 2006, defendant was preparing to assist his mother, Jeanette James, with her move from Washington to Kansas. RP 342. During direct examination, defendant testified that on June 29, 2006, he drove his red Trans Am to his mother's house at 3101

East D Street in Tacoma around 10:30 or 11:00 a.m. RP 343. However, after a morning recess, defense counsel asked his client, “could you remember anything about what time you got there (referring to his mother’s house) that was different than what you said earlier.” RP 355. Defendant then changed his testimony and said that after going over his thoughts, he remembered that he got to his mother’s later in the afternoon around 1:00 p.m. RP 355.

Later that day, Ms. Saxton and a co-worker drove to Ms. James’ residence. RP 161. Ms. Saxton left her house clean and in order. RP 163. The distance from Ms. Saxton’s residence to Ms. James’ house was less than three miles and took approximately eight minutes to drive. RP 161, 234. Around 2:00-2:30 p.m., Ms. Saxton waited in the car while her co-worker served defendant with divorce papers and a restraining order. RP 160, 162, 208, 303, 326. Upon serving defendant, Ms. Saxton picked up her children from a family friend’s home. RP 162. Ms. Saxton then checked into a hotel because she was afraid of defendant’s response to being served and she “didn’t think it would be a good idea to be found.” RP 163.

Prior to this, Ms. Saxton had not indicated to defendant that she was seeking a divorce. RP 206. Until defendant was served with divorce papers, he believed Ms. Saxton would be accompanying him on the trip to

Kansas. RP 233. Despite talking with defendant twice that morning, Ms. Saxton failed to mention that she would not be accompanying him on the trip to Kansas. Ms. Saxton also did not mention that she would be serving defendant with divorce papers. RP 342. Defendant said he was very surprised to get served with the divorce papers and restraining order. RP 343. Defendant's mother, Jeanette James, testified that defendant's reaction to being served divorce papers was "shock." RP 328.

Ms. James testified that she and defendant talked and prayed for about half an hour or 45 minutes "or so" after defendant was served with divorce papers. RP 318. Defendant testified that he left Ms. James' house around 3:20 or 3:30 p.m. to pick up his SUV from his house in Midland. RP 318.

Ms. James testified that it would take 20 to 25 minutes to drive from defendant's house to her house. RP 329. Ms. James estimated that defendant was gone approximately 45 minutes and returned to her house at 4 p.m. RP 319-320. However, there was a discrepancy between the declaration Ms. James had written in July 2006, and Ms. James' testimony. RP 330. In her declaration, Ms. James noted that her friend, Bertina Bell, saw defendant in Ms. James' driveway at 4 p.m., when Ms. Bell was leaving Ms. James' house. RP 330. However, at trial Ms. James testified that was incorrect, rather Ms. Bell had come after 4 p.m. that day

and after defendant was already back at her house. RP 330-331. Ms. James testified that the declaration she wrote was wrong. RP 331. Ms. James also testified she was not positive regarding the date of this occurrence because she didn't have her calendar. RP 324. Additionally, Ms. James was not sure what time defendant arrived at her house originally on that day. RP 325-326.

On June 29, 2006, at approximately 2:30 p.m., Douglas Byrn, was doing yard work when he noticed a car pull up and park in front of Ms. Saxton's house. RP 32, 34. Mr. Byrn described the car as a red Camaro with a black convertible top. RP 33. Defendant drives a red Trans Am with a black convertible top. RP 161-162. Mr. Byrn saw a black male get out of the car and proceed to Ms. Saxton's house. RP 33. Mr. Byrn noted that the man was carrying a "yellow-handled tool" and was "moving with a purpose." RP 33. Mr. Byrn testified that he did not know the people that lived in the house at 1101 East 54<sup>th</sup> St., nor was he familiar with the parties in this case. RP 35-36.

Ms. Saxton's alarm company had called the police at 3:18 p.m. on June 29, 2006. RP 249. That same day, at 4:14 p.m., Tacoma Police Officers, Reginald Gutierrez and Young Song, were dispatched to Ms. Saxton's residence. RP 46, 58, 135. There was no answer at the front door when the officers arrived at the house. RP 135. Officer Song looked

through the window and saw that the inside of the house appeared to have been ransacked. RP 135. The officers were unable to open the front door as something appeared to have been blocking it. RP 47. The officers gained entry into the house through the shattered sliding glass door. RP 47, 136.

Once inside, the officers did not find anybody inside the home. RP 49. The officers found damage done to all three levels of the house. RP 49. Officer Gutierrez noted the house was “completely trashed.” RP 47. There were large holes in the walls. RP 47, 136. Officer Gutierrez and Officer Song both testified that it appeared as if someone had produced these holes with a crowbar or a tire iron, noting that some of the holes had the exact shape of a crowbar. RP 47, 50, 51, 139. The furniture in the residence was destroyed and “thrown all over the house.” RP 47. There were broken windows and broken mirrors. RP 47. Water was left running on the faucets in the kitchen, the bathrooms, and the laundry room. RP 47, 136, 138. The basement was wet from the overflowing water. RP 138. RP 51. The coffee table in the den had been broken up into pieces. RP 187. The desk in the family room was overturned and paper and debris were scattered everywhere. RP 188-189. The basement door was off its hinges. RP 192-193. A lamp shade was broken and there was glass in the stairwell. RP 195.

A significant amount of damage was done in the kitchen. The refrigerator had been knocked over onto the range and the door to the fridge had been removed. RP 48, 136, 172, 185. RP 172, 185. Kitchen drawers had been ripped out and broken apart. RP 172. Food, dishes, glass, and debris were scattered all over the floor. RP 172, 185. The front panel of the oven had been ripped off with its insulation exposed, while the microwave had been "smashed." There were also burn marks above the oven. RP 185. Because the house smelled like it had been set on fire, the officers called Tacoma Fire Department. RP 48, 137, 172. One of the range tops on the stove had been left on and there was a burned bible lying either on the burner or beside it. RP 48, 137.

The master bedroom and both bathrooms were also damaged. The vanity in the lower level bathroom had been knocked over and glass was shattered on the counter and floor. RP 175, 186. The vanity in the upstairs bathroom had been ripped off the wall and glass from the mirror was on the floor. RP 176, 196. The glass shower door was shattered. RP 176, 196. In Ms. Saxton's master bedroom, clothes had been thrown across the floor and jewelry racks had been taken off the wall, broken, and the jewelry scattered. RP 176. The bedroom door had been ripped of its hinges. RP 176.

Objects with sentimental value had been damaged. Ms. Saxton's

grandmother's dining set was broken apart. RP 174. A picture of Jesus had been ripped apart. RP 174-175. A sleigh bed in the basement had been keyed in addition to having holes punched in the footboard and headboard. An antique screen that Ms. Saxton's mother had given to her had been broken. RP 178.

Although extensive damage was done to the house, and Ms. Saxton's personal property, none of the children's personal property nor defendant's personal property was destroyed. RP 180. The children's bedrooms were left completely intact and the only apparent differences in the rooms were a couple objects had been moved. RP 48, 177. Defendant's clothes remained undisturbed in boxes in the basement. RP 178. Ms. Saxton testified that nothing from her residence was missing or stolen. RP 179-180.

Ms. Saxton returned home the next day, at approximately 11:30 a.m. RP 165. Ms. Saxton noticed that the basement door was open. RP 169. The first thing Ms. Saxton saw as she entered the house was the washing machine knocked over. RP 169. Ms. Saxton also noticed that the alarm panel had been ripped out of the wall and was hanging by its cords. RP 169. Upon seeing the damage, Ms. Saxton left her house and went to her work where she called the police. RP 170. Ms. Saxton returned to the house with the police. RP 171.

Officer Gutierrez testified that he estimated the total damage to the house as “better than \$50,000.” RP 51. Ms. Saxton testified that based on insurance estimates, the damage to the structure of the property was approximately \$11,000. RP 203. Ms. Saxton testified the damage to her personal belongings was approximately \$4,000. RP 204.

On June 29, 2006, Toni Martin, a forensic specialist, was called to Ms. Saxton’s residence, to photograph the home and process the scene for latent fingerprints. RP 70- 72. In the family room, Ms. Martin photographed what appeared to be a smoke detector that had been removed and damaged in the family room. RP 88. Photographs in the bottom level of the house depicted a messy, wet basement. RP 92. Ms. Martin noted that the carpet was “soaking” and she predicted that the water damage in the basement was likely caused from overflowing water from the bathtub. RP 92-93. A second smoke detector had been removed from the upstairs hallway. RP 98. Ms. Martin attempted to recover latent fingerprints from the broken alarm box and the frame to the sliding glass door, however, no prints were recovered. RP 104.

Ms. Saxton did not notice blood on the property when she came back to the residence on the 30<sup>th</sup>. RP 181. However, the following Monday, Ms. Saxton returned to the residence with a co-worker who noticed blood in the home. RP 181. Ms. Saxton testified there was a

blood spatter beside a hole in the wall. RP 181. Ms. Saxton noted that the blood was not there when she left the house on the 29<sup>th</sup> to serve defendant with divorce papers. RP 181. Ms. Saxton did not touch the blood spatter. RP 182. Subsequently, Ms. Saxton informed the detective on the case about the blood. RP 182.

Detective Coulter went to the residence on July 20, 2008.

Detective Coulter testified that what struck her the most “was the fact that the blood spatter was in the very areas where a crowbar or a hammer, some tool with a claw, had been used to rip at the walls and tear them down.” RP 242. Detective Coulter testified because there was a blood spatter on a light fixture in the ceiling, she believed the blood spatter occurred when someone raised a crowbar to destroy the walls. RP 243. Detective Coulter testified that she collected a blood sample from defendant. RP 246. The vial was sent to Washington State Crime Lab. RP 246.

On July 20, 2006, Tacoma Police Department Forensic Services Supervisor, Mary Lally, was called to Ms. Saxton’s home. RP 119. Ms. Lally was called to the scene to take photographs and collect additional evidence. RP 120, 225. Ms. Lally collected four suspected blood swabs as well as a control swab. RP 120, 267. She photographed suspected blood on top of the washing machine, the east dining room wall, the east

living room wall, and the south living room wall. RP 121, 256. Ms. Lally noted that the blood spatters were located within a foot or less of the damaged areas. RP 256.

James Currie, a forensic scientist from Washington State Patrol Crime Lab, testified that he analyzed the four swabs and the blood vial that was sent to him for this case. RP 291. He found that all four swabs had the same profiles. RP 291. He also found that the profile from the blood vial matched the profile from the four swabs. RP 291. Mr. Currie noted that statistically, the chances of another person's DNA coming up with the same profile is one in 4.7 quintillion. RP 292. The two vials submitted to Mr. Currie contained only the blood of defendant. RP 304.

Defendant testified that a couple weeks prior to moving out of Ms. Saxton's residence, he had been doing house work and cut himself while pulling tacks out of the floor. RP 371-372. Defendant could not recall the specific locations where he bled in the house. RP 73.

C. ARGUMENT.

1. THE PHOTOGRAPHS TAKEN BY MS. MARTIN WERE PROPERLY DISCLOSED BY THE STATE DURING PRETRIAL DISCOVERY.

CrR 4.7 governs the discovery process in criminal proceedings.

CrR 4.7(a)(1) provides, “the prosecuting attorney shall disclose to the defendant the following material and information *within the prosecuting attorney’s possession or control* no later than the omnibus hearing.”

(emphasis added). The rule makes it clear that the “prosecuting attorney’s obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(4).

The trial court’s decision in dealing with violations of a discovery order is discretionary. *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992); *State v. Bradfield*, 29 Wn. App. 679, 630 P.2d 494, *review denied*, 96 Wn.2d 1018 (1981). The court’s power to dismiss is reviewable only for a manifest abuse of discretion. *Smith* 67 Wn. App. at 851 (citing *State v. Laureano*, 101 Wn.2d 745, 762, 682 P.2d 889 (1984), *overruled on other grounds* in *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). An abuse of discretion exists when the trial court’s decision is exercised on untenable grounds or for untenable reasons, or is manifestly

unreasonable. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

CrR 8.3 likewise is discretionary and reviewed for a manifest abuse of discretion. CrR 8.3(b) requires a showing of governmental misconduct. *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993). Misconduct need not be evil or dishonest; simple mismanagement is sufficient. *State v. Coleman*, 54 Wn. App. 742, 749, 775 P.2d 986 (1989). Although simple mismanagement of the case may be sufficient, dismissal remains an extraordinary remedy, to which the trial court may resort in only “truly egregious cases of mismanagement or misconduct by the prosecutor.” *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993). The burden is on the defendant to establish that the error was prejudicial. *State v. Linden*, 89 Wn. App. 184, 190, 947 P.2d 1284 (1997). There is no prejudice unless the prosecution’s action materially affects the outcome of the trial. *Id.* Absent a showing of actual prejudice, the appellate court will not interfere with the trial court’s exercise of its discretion in denying sanctions pursuant to CrR 4.7(h). *Bradfield*, 29 Wn. App. At 682.

In the instant case, appellant’s brief alleges a discovery violation of failing to provide pretrial discovery of the photographs taken by Ms. Martin and Ms. Lally. Specifically, appellant’s brief notes that “the State

had the photographs by Martin and Lally in its possession months before trial,” however, the allegation is without merit. (*See* Appellant’s Brief page 10).

The record does not support defendant’s allegations. In fact, the record demonstrates that the State produced photographs in compliance with its discovery obligations. The record supports that photographs taken by Ms. Martin were properly disclosed during pretrial discovery. CP 68-70. Defendant’s trial counsel acknowledged that the photographs taken by Ms. Martin were properly disclosed.

Defense counsel: “My concern really isn’t about that first set (referring to Ms. Martin’s photos), my concern is about the other set of photos (Ms. Lally’s photos) that we didn’t receive ahead of time but were taken by a person who is going to testify, I believe today, a witness Toni Martin—

Prosecution: Mary Lally, actually.

Defense counsel: -- Mary Lally – I keep switching it –

RP 68. Thus, appellant’s allegation as to photographs taken by Ms.

Martin is without merit as it is unsubstantiated by the record.

Furthermore, the State was unaware of the photographs taken by Ms. Lally

until Ms. Lally appeared in court to testify, whereby the State immediately

provided defendant with copies of those photographs in compliance with

CrR 4.7(h)(2). RP 66.

2. THE STATE DID NOT VIOLATE THE MANDATE OF **BRADY V. MARYLAND** AS THE PHOTOGRAPHS TAKEN BY MS. LALLY ARE NOT EXCULPATORY NOR IMPEACHING; THE STATE DID NOT SUPPRESS DISCOVERY OF THE PHOTOGRAPHS; AND DEFENDANT CANNOT SHOW PREJUDICE.

The State has an affirmative duty, upon request, to provide to a criminal defendant exculpatory evidence that is in its possession. **Brady v. Maryland**, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

We now hold that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

*Id.* at 87.

**Brady** is grounded in the due process rights of a criminal defendant under the United States Constitution, made applicable to the States through the 14th Amendment. *Id.* at 86. By its very holding, however, this ruling applies only to exculpatory evidence, not any evidence in a criminal case. The evidence must be “material either to guilt or to punishment.” *Id.* at 87. Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” **United States v. Bagley**, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); **In re Pers. Restraint of Benn**, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). The State

must disclose any favorable evidence known to others acting on its behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). While the State cannot avoid *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to search for exculpatory evidence. *State v. Judge*, 100 Wn.2d 706, 717, 675, P.2d 219 (1984).

In order to show a *Brady* violation a defendant must prove: (1) the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have occurred. *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (2002) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). In the instant case, appellant fails to satisfy the *Brady* elements.

- a. The Lally photographs are not favorable to defendant as they are neither exculpatory nor impeaching.

The photographs at issue, hereinafter “Lally photographs,” are in no way exculpatory. Rather, the Lally photographs are inculpatory. The Lally photographs, taken on July 20, 2006, depict blood spatters inside Ms. Saxton’s home. RP 120. In addition to taking photographs, Ms. Lally

collected samples of the blood spatters to compare with blood samples taken from defendant. RP 120, 245, 267. Through DNA analysis, the blood spatters were identified as defendant's blood. RP 291. According to Forensic Scientist Currie, the chances of another person's DNA coming up with the same profile is one in 4.7 quintillion. RP 292. It is clear that the Lally photographs are in no way exculpatory.

Additionally, Lally's photographs are not impeaching as they do not bring any new evidence to trial. Prior to the State's discovery and immediate disclosure of the Lally photographs, defendant already knew: (1) the blood spatter was discovered by Ms. Saxton several days after the burglary took place; (2) Ms. Lally went to Ms. Saxton's residence and took samples of the blood spatters; and (3) the blood spatter samples were compared with defendant's blood and were found to match within the dominion of certainty. Thus, the Lally photographs offered no additional impeachment evidence to defense. The photographs are arguably not even "material" as they merely aided Ms. Lally's testimony. Rather, the material evidence is defendant's DNA matching the profile of blood found in Ms. Saxton's home.

b. The evidence was not suppressed by the State.

The State neither willfully nor inadvertently suppressed the photographs. As noted above, the record reflects that the State did not receive the photographs from Ms. Lally until the day she was set to testify, November 1, 2007. RP 66. Until that day, the prosecution was under the assumption that Ms. Lally was going to testify as to another set of photographs. RP 66. Furthermore, upon presentation of Ms. Lally's photographs, the prosecution immediately notified defense counsel and the court of the photographs in compliance with discovery rule CrR 4.7(h)(2). RP 66. This rule requires a party that discovers additional material or information which is subject to disclosure during trial, promptly notify the other party and the court of the existence of the material. CrR 4.7(h)(2).

The State will not be deemed to have violated *Brady* if "the defendant, using reasonable diligence, could have obtained the information" at issue. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). In the instant case, defense counsel could have obtained the photos through reasonable diligence. Ms. Lally was on the State's witness list. CP 66-67. Defendant could have contacted Ms. Lally prior to trial and discovered the photos existence at that time. However,

there is no indication defense counsel made any attempt to interview Ms. Lally before trial.

c. Defendant cannot show he was prejudiced by the Lally photographs.

When determining whether suppression of impeachment evidence is prejudicial, the court looks to the totality of the undisclosed evidence in the context of the entire record. *Benn v. Lambert*, 283 F.3d 1040,1053 (2002) (citing *Agurs*, 427 U.S. at 112). In the instant case, the State adduced overwhelming evidence of defendant's guilt and defendant cannot show he was prejudiced by the Lally photographs.

First, defendant was surprised when he was served with divorce papers on June 29, 2006, at Ms. James' residence. RP 343. Ms. Saxton's home was ransacked on the afternoon of June 29, 2006. RP 249. Second, defendant's DNA matched the DNA from the blood found around the holes in Ms. Saxton's home. RP 291. Third, on the afternoon of June 29, 2006, an eye witness testified he saw a black man, driving a red car with a black top, pull up and park in front of Ms. Saxton's house. RP 32, 34. Defendant is an African American male and drives a red car with a black top. RP 161-162. Fourth, the witness saw the man get out of the car carrying a tool and moving with a purpose in the direction of Ms. Saxton's house. RP 33. Detective Coulter testified that the blood spatter (that

matched defendant's DNA), was in the areas where a crowbar or some tool with a claw, had used to rip the walls. RP 242. Fifth, Ms. James' testimony that defendant was at her house at the relevant time on June 29, 2006, is not credible as her testimony directly contradicted a declaration she had written in July 2006. RP 330. Finally, while extensive damage was done to Ms. Saxton's home and her personal belongings, particularly those items with sentimental value, defendant's belongings and their children's bedrooms remained undisturbed. RP 44, 177, 178. When looking to the totality of the evidence, it is not reasonably probable that timely disclosure of the photographs would have changed the trial's outcome.

Additionally, the mid-trial discovery of the Lally photographs did not prejudice defendant. While the photographs were discovered after the trial had commenced, the record reflects that the court gave defense counsel adequate time to review the photographs and prepare his defense accordingly. On Thursday, November 1, 2007, the court recessed until the following Monday, which gave defense counsel three days to make to make tactical decisions regarding the photographs. RP 125-126. Upon receiving sufficient time to review the photographs, defense counsel declined to pose any objections when the photographs were admitted in to evidence. Defense counsel repeatedly said "no objection" each time Ms.

Lally's photographs offered into evidence. RP 257, 258, 260, 261, 262, 263, 264, 265, 266. Thus, as evidenced by the lack of objections after defendant reviewed the Lally photographs, it is clear defense counsel perceived no prejudice when the photographs were admitted in to evidence the following Monday.

Finally, while the photographs are evidence the State would have turned over to the defense if the State had been aware of its existence, failure to do so does not violate the constitutional requirements of *Brady*. The photographs are not exculpatory; the photographs were not suppressed by the state; and defendant cannot show prejudice.

3. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF FIRST DEGREE MALICIOUS MISCHIEF.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also *Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the

sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must 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 and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To prove a defendant guilty of malicious mischief in the first degree, the State had to convince a jury beyond a reasonable doubt that a person knowingly and maliciously caused physical damage to the property of another in an amount exceeding one thousand five hundred dollars. RCW 9A.48.070(1)(a). In the instant case there is no dispute that property damaged exceeded the amount of one thousand five hundred dollars.

First, without objection, Officer Gutierrez testified that he estimated the damage to the house to be “better than \$50,000.” RP 51. Defense counsel did not object to Officer Gutierrez’s testimony. ER 103. While appellant now asserts that Officer Gutierrez’s estimate was inadmissible lay opinion, this issue is not preserved for appeal because no objection was made during trial. (*See* Appellant’s Brief pg. 17). Washington courts have consistently adhered to the rule that “a litigant cannot remain silent as to a claimed error during trial and later, for the first time, urge objections thereto on appeal.” *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (quoting *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967), *cert. denied*, 475 U.S. 1020 (1986)). Thus, the issue was not preserved for appeal.

Assuming, arguendo this issue was preserved, Officer Gutierrez’s testimony was properly admitted under ER 701. According to ER 701, “if

the witness is not testifying as an expert, the witness' testimony is limited to opinions which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702." Officer Gutierrez does not claim to be an expert in property damage and thus is subject to ER 701. Officer Gutierrez's testimony on the nature and extent of the damage was rationally based upon his own perception; his testimony was helpful to understanding the amount of damage the officer witnessed and; his opinion was not based on specialized knowledge. Therefore Officer Gutierrez's testimony was properly considered by the jury to determine whether the damages exceeded \$1,500.00.

In addition to Officer Gutierrez's testimony, Ms. Saxton testified the damage done to the structure of her property was approximately \$11,000. RP 203. She testified that damage to her personal property was approximately \$4,000. RP 204. While defense counsel objected to Ms. Saxton's estimate of damage done to her property because it was based on the insurance estimate, the court correctly noted that a homeowner or owner of property is always able to testify with reference to the value of her property or the value of damage from her own experience. RP 203-204, 218. It is recognized that the owner of a chattel may testify as to its market value without first being qualified as an expert in such matters. *McCurdy v. Union Pac. R.R. Co.*, 68 Wn.2d 457, 468-69, 413 P.2d 617

(1966); *State v. Hammond*, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972).

The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases, and sales. *Hammond*, 6 Wn. App. at 461. Even defense counsel conceded “I believe she could testify as Your Honor has considered, about her lay person’s opinion.” RP 219. While appellant alleges Ms. Saxton’s testimony based on the insurance estimate constitutes hearsay, the court noted that the insurance estimate was one factor that Ms. Saxton used in coming up with her estimate based on all the information she was privy to. RP 218-219. The court went further and noted that there no insurance documents were produced. RP 219.

Additionally, courts have noted that the weight given to a property owner’s testimony regarding the value of their property is a question that may be dealt with on cross examination in regards to the basis for such knowledge. *Hammond*, 6 Wn. App. at 461. Consistent with this, the court stated defense counsel could cross-examine Ms. Saxton on how she arrived at the \$11,000 estimate and defense counsel responded “okay.” RP 219. However, the record does not reflect that defense counsel followed through by asking Ms. Saxton how she arrived at the estimate.

Finally, the jury was able to view all the photographs admitted into evidence that displayed the extensive damage done to the home. Thus, a reasonable person may have inferred that the damage to the house far exceeded \$1,500.00. The jury heard witness after witness testify as to the nature and extent of the damage to the property; this testimony supports

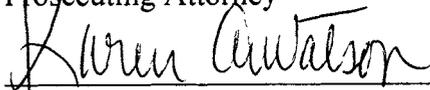
the jury's conclusion that the damage to the house exceeded \$1,500.00. Thus, appellant's argument that the evidence was insufficient to prove malicious mischief in the first degree is without merit.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests this Court affirm defendant's convictions of residential burglary and first degree malicious mischief.

DATED: October 6, 2008.

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Alexis Taylor  
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/06/08

Signature

