

No. 38464-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA D. C. RHOADES,

Appellant.

FILED  
JUL 28 2009  
CLERK OF COURT  
APPELLATE DIVISION  
COURT OF APPEALS  
STATE OF WASHINGTON  
*[Signature]*

---

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

The Honorable Christine A. Pomeroy, Judge  
Cause No. 08-1-00572-4

---

BRIEF OF RESPONDENT

---

Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

pm 7/28/09

**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

    1. The comment made during the State’s rebuttal argument about the conviction of Richard Molina was not flagrant or ill-intentioned; it was an explanation to the defendant’s closing statement in regard to the whereabouts of a potential witness ..... 1

    2. The court heard the argument of both the defense and the State about allowing in the prior criminal history of a juvenile witness; the court properly exercised its discretion to protect the juvenile and exclude the juvenile’s criminal history ..... 5

    3. There was sufficient evidence to support Rhoades’ conviction for malicious mischief in the second degree ..... 7

    4. The instruction defining a violation of a no-contact order contained the mens rea of willfulness; the to-convict instruction under which Rhoades was convicted of violation of a no-contact order contained the mens rea of knowledge. Any further mens rea statement was not necessary ..... 10

    5. Any error that may have been committed in Rhoades’ trial was harmless error and does not require reversal ..... 15

D. CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Decisions**

Neder v. United States,  
527 U.S. 1, 119 S.Ct. 1827 (1999)..... 12

**Washington Supreme Court Decisions**

State ex rel. Carroll v. Junker,  
79 Wn.2d 12, 482 P.2d 775 (1971)..... 5

State v. Belgrade,  
110 Wn.2d 504, 755 P.2d 174 (1988)..... 2

State v. Bencivenqa,  
137 Wn.2d 703, 974 P.2d 832 (1999)..... 8

State v. Brown,  
132 Wn.2d 529, 940 P.2d 546 (1997).....2, 3

State v. Camarillo,  
115 Wn.2d 60, 794 P.2d 850 (1990)..... 7

State v. Delmarter,  
94 Wn.2d 634, 618 P.2d 99 (1980)..... 7

State v. Hoffman,  
116 Wn2d 51, 804 P.2d 577 (1991)..... 2

State v. Russell,  
125 Wn.2d 24, 882 P.2d 747 (1994)..... 3

State v. Salinas,  
119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 7

State v. Teal,  
152 Wn.2d 333, 96 P.3d 974 (2004)..... 14

<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	14
<u>State v. Ziegler</u> , 114 Wn.2d 533, 789 P.2d 79 (1990).....	2

**Decisions Of The Court Of Appeals**

<u>State v. Gerard</u> , 38 Wn. App. 7, 671 P.2d 286 (1983).....	5, 6
<u>State v. Papadopoulos</u> , 34 Wn. App. 397, 662 P.2d 59 (1983).....	4
<u>State v. Sisemore</u> , 114 Wn. App. 75, 55 P.2d 1178 (2002).....	13
<u>State v. Snapp</u> , 119 Wn. App. 614, 82 P.3d 252 (2004).....	11
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	7

**Statutes and Rules**

<u>11 Wash. Prac.</u> , Pattern Jury Instr. Crim. WPIC 36.53 (3d Ed) .....	13
RCW 9A.48.080(1).....	8
RCW 9A.56.68(1).....	8
RCW 10.31.100(2)(a) or (b) .....	11
RCW 10.99.....	11
RCW 26.09.....	11
RCW 26.26.....	11

RCW 26.50.110(1) .....	11, 13
RCW 26.52.020.....	11
RCW 74.34.....	11
Wash. ER 609(d).....	5

A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the comment made during the State's closing rebuttal statement that Richard Molina was convicted, was flagrant or ill-intentioned.
2. Whether the Court correctly used its discretion in choosing not to allow the prior history of a juvenile witness for impeachment purposes.
3. Whether there was sufficient evidence produced at trial to prove to the jury that Joshua Rhoades was guilty of malicious mischief in the second degree.
4. Whether the mens rea that was included in the jury instructions was sufficient, where both willful and knowledge were used to describe the mens rea needed to commit a violation of a no-contact order.
5. Whether any error was committed during the trial, and if there was error committed if it should be considered cumulatively, and if any errors are found, whether they were harmful and affected the outcome of the trial.

B. STATEMENT OF THE CASE.

The State accepts Rhoades' statement of the case.

C. ARGUMENT.

1. The comment made during the State's rebuttal argument about the conviction of Richard Molina was not flagrant or ill-intentioned; it was an explanation to the defendant's closing statement in regard to the whereabouts of a potential witness.

When there are any allegedly improper statements made by the State, the alleged improper statement should be viewed within the context of the State's entire argument, considering the issues of

the case, the evidence that was discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Where there is a perceived improper remark made, the defense must object to the comment. Absent an objection, the defense cannot raise the issue on appeal, unless the misconduct is “so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), (quoting State v. Belgrade, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). The defense has the burden of establishing both the impropriety and the prejudicial effect of the statement. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

When reviewing the comments made during rebuttal argument by the State, it is important to consider the comments as a whole. When the State said that Richard Molina (Molina) was convicted<sup>1</sup>, [RP 300] it was in rebuttal argument to the defense’s

---

<sup>1</sup> Full paragraph: “So Javier Martinez. You heard, well, he said one thing here, one thing here. There’s never been any contradiction that when he testified in court, whether it was here or Mr. Molina’s trial. *Mr. Molina was convicted; he’s not going to be here.* He said the one thing that matters in this case. Joshua Rhoades was the person that took him to Wal-Mart and Joshua Rhoades is the person that bought the spray paint. He’s testified in two trials under oath.” (emphasis added) [RP 300].

closing argument that Javier Martinez (Martinez) had testified against Molina, similar to how he had in this trial, and then pointed to some alleged inconsistencies in Martinez's testimony. [RP 291]. The defense further stated that Martinez denied telling the police that Molina was involved<sup>2</sup>. [RP 291]. The comments from the State were made in rebuttal to these comments, assertions that Molina may have not been involved.

Further, if the State's single comment about Molina being convicted, is found not to be in rebuttal to Rhoades' closing argument, and absent a timely objection from the defense, the defense would then have to prove that the comment was "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wn.2d at 561. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Again in the case at hand, there was

---

<sup>2</sup> "He's [Martinez] put under oath under penalty of perjury in a trial against Richard Molina sitting in the witness chair as he did today for you. Now he doesn't know what store it was or where he went. *He doesn't know that Richard was involved*, Luis wasn't involved at all, Steven was involved, they weren't out together, but he didn't really see him painting. *Denies telling the police that Richard [Molina] was involved.*" (emphasis added) [RP 291]

no objection to the comment, nor was there a request for a curative jury instruction to respond to the comment. [CP 47-71].

During closing statements attorneys are “prohibited from intentionally arguing facts not in evidence, but are permitted a reasonable latitude in arguing inferences from the evidence.” State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983). During the course of the trial Molina was mentioned many times, as being arrested, [RP 23], in an interview in Thurston County Jail, [RP 234-235], and in Molina’s own trial, [RP 57, 70, 177, 196, 197, 212, 216, 242]. With all of the references as to how Molina was involved in this case, a great number of inferences were available to the jury and on the record about Molina. When the State commented that Molina was convicted this should be included within the latitude allowed when “arguing inferences from the evidence.” Id.

When this comment is viewed in it’s entirety, it is clear that this comment was made in rebuttal to the defense’s closing argument; moreover, this comment was not flagrant or ill-intentioned and there was no objection to the comment, nor was there a request for a curative jury instruction. Further, the prosecutor’s statements could be viewed as reasonable inferences from the evidence. There was no reversible error.

2. The court heard the argument of both the defense and the State about allowing in the prior criminal history of a juvenile witness; the court properly exercised its discretion to protect the juvenile and exclude the juvenile's criminal history.

In State v. Gerard, 36 Wn. App. 7, 10, 671 P.2d 286 (1983) the court considered ER 609(d)<sup>3</sup> as quoted by Rhoades' attorney. The Gerard court considered how ER 609(d) applies to the confrontation right, and juvenile criminal history; it held that when "juvenile adjudications are sought to be admitted solely for general impeachment the trial court has broad discretion on admissibility." Id. at 11. Further, the burden is on the defendant "to present reasons other than impeachment to demonstrate that the evidence was 'necessary for a fair determination.'" Gerard, 36 Wn. App. at 12, (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 20, 482 P.2d 775 (1971)).

The defense stated that the testimony of Martinez was the "number one, paramount issue as to Mr. Rhoades' guilt or innocence in this case." [RP 164]. Rhoades presented no evidence why the defense needed the prior juvenile adjudication,

---

<sup>3</sup> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. Wash. ER 609(d).

other than the idea that Martinez was the State's key witness, as the explanation for the impeachment process of Martinez.

However, the State did in fact present other evidence to the jury indicating that Rhoades purchased the spray paint. First, the State presented the video surveillance tape from Wal-Mart showing Rhoades and Martinez enter the store, get cans of spray paint on the paint aisle, go to the cash register and pay for five cans of spray paint, and leave the store with the paint, walking to a car. [State's Exhibit No. 83]. Second, Nadine Chenot also testified that Rhoades and Martinez had purchased the spray paint during the early morning. [RP 32] And lastly, during Tumwater Police Sergeant Patrick Fitzgerald's testimony, he identified Rhoades as the person who purchased the spray paint from the video surveillance tape. [RP 64-65].

The issue to allow in the prior juvenile conviction was thoroughly argued before the Court, [RP 158-165] and the Court found that there was not enough of a showing from the defense to allow in the prior juvenile conviction of Martinez. After hearing both arguments and reading Gerard, the Court used its broad discretion on admissibility, and denied admitting it in the trial. Rhoades has simply stated that this testimony was important, they have not

addressed the other evidence and how the evidence offered by Martinez would have changed the outcome of the trial.

3. There was sufficient evidence to support Rhoades' conviction for malicious mischief in the second degree.

Evidence is sufficient to support a conviction 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 requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the respondent. Id. at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must 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 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be

unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Rhoades was convicted of second degree malicious mischief. [CP 74]. The malicious mischief statute reads, in pertinent part:

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 two hundred fifty dollars.

RCW 9A.48.080(1).

The State proved with the testimony of Chenot that Rhoades left the house during the early morning with Martinez, [RP 28], when Rhoades purchased the spray paint. [RP 32] The State proved that Rhoades was the person captured on the video surveillance at the Lacey Wal-Mart purchasing five cans of spray paint with the video entered as evidence, and the testimony of Fitzgerald. [RP 63-65]. And, Martinez testified that he was with Rhoades when Rhoades purchased the five cans of spray paint at the Lacey Wal-Mart. [RP 173-175].

The night/morning of the malicious mischief, or tagging,<sup>4</sup> five individuals identified as Rhoades, Molina, Luis Martinez-Meza, Martinez, and Steven Romero all drove to Chenot's house. All of the five were either members or wanted to be members of a gang known as Little Valley Locos (LVL). [RP 47-48, 53-55] Rhoades, Molina, and Martinez-Meza were known senior members, while Martinez and Romero both wanted to be admitted into the gang. [RP 53, 56] Fitzgerald testified that one way for someone to gain admittance into a gang is to perform acts for senior members of the gang, and tagging is considered an acceptable act. [RP 56-58].

The State also proved that the cost of the malicious mischief was well above the statutory \$250 dollar requirement. Duane Granacki, who lived in the area tagged, testified to the damage to his Lincoln Town Car, but did not know the cost of the repair to the paint at the time of trial. [RP 131] Marilou Honey, who also lived in the area tagged, testified to the damage to her fence, and the cost to paint over the tagging, at a cost in excess of \$400 dollars. [RP 140-141] Ken Ames, who works for the school district testified that

---

<sup>4</sup> "Tagging" is defined by Merriam-Webster as: to deface with graffiti usually in the form of the defacer's nickname. Merriam-Webster Online Dictionary. *Tag*, <http://www.merriam-webster.com/dictionary/tag> (23 July 2009).

the cost to remove and cover the tagging to the school district's property was \$410.39, [RP 146], and Steve Whalen, who works for Tumwater City, testified that the cost for the city to repair and paint over the tagging on city property was \$281.35. [RP 155]. The State proved beyond a reasonable doubt that the amount of damage from the tagging (above \$1,091.74) was well in excess of the \$250 dollar requirement.

Drawing all reasonable inferences from the evidence in favor of the State and interpreting them most strongly against Rhoades, the evidence was sufficient for the finder of fact to discount Rhoades' theory as unreasonable in light of the evidence. After hearing all of the evidence, the trier of fact properly found that Rhoades knowingly contributed to the malicious mischief in an amount exceeding \$250 dollars, and correctly found Rhoades guilty of malicious mischief.

4. The instruction defining a violation of a no-contact order contained the mens rea of willfulness; the to-convict instruction under which Rhoades was convicted of violation of a no-contact order contained the mens rea of knowledge. Any further mens rea statement was not necessary.

The claim that the to-convict instruction was in any way deficient is incorrect. No alternative instruction was offered to the

court, nor were there any objections from the defense to the instruction in question during the trial.

Looking at the actual statute Rhoades was charged under, it only requires, “[1] an order . . . granted under . . . RCW 10.99 . . . RCW, [2] [the] person to be restrained knows of the order [and] [3] a violation of the restraint provisions.”<sup>5</sup> State v. Snapp, 119 Wn. App. 614, 625, 82 P.3d 252 (2004).

Jury Instruction No. 17<sup>6</sup> included all of the elements required by the statute. [CP 44]. It included the requirement that there be

---

<sup>5</sup> RCW 26.50.110(1)

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring.

<sup>6</sup> Instruction No 17. [CP 44].

To convict the defendant of the crime of violation of a protection order as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 11, 2007, the defendant violated the provisions of a Lewis County District Court protection order #C83828, by having contact with Nadine Chenot;
- (2) That the defendant knew of the existence of the protection order; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

an actual no-contact order in place against Rhoades, which the State proved by admitting into evidence the existing order as Exhibit 80. [RP 28-29]. The State proved that Rhoades knew of the order, first because it was signed by him, and also with the testimony of Chenot, who testified that both she and Rhoades knew that Rhoades was not to be in contact with her. [RP 31-32]. And lastly the State proved that the order was violated again by the same testimony of Chenot, that Rhoades was at her residence in violation of the order [RP 31-32].

In the case at hand, WPIC 36.53 was used. If the use of WPIC 36.53 was done in error, it should be harmless error. The Supreme Court, stated that “the omission of an element is subject to harmless-error analysis.” Neder v. United States, 527 U.S. 1, 10, 119 S.Ct. 1827 (1999).

While the instruction in question did have the necessary element that Rhoades knew of the order, the jury was further instructed in Instruction No. 16, that “[a] person commits the crime of violation of a domestic violence no-contact order when he or she willfully has contact with another when such contact was prohibited by a no-contact order and the person knew of the existence of the no-contact order.” [CP 43].

The State concedes that WPIC 36.53 (Instruction No. 17), was merged into another instruction WPIC 36.51, in July 2008, two months before this trial; the comments to the new instruction indicate that the merger of the instructions was in response to the Legislature consolidating the statute numbers. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.53 (3d Ed).

When the two WPICs were merged, it added an additional knowledge element. In addition to the defendant knowing about the order, it was added that the defendant knowingly violate the order. Id. at WPIC 36.51. The additional knowledge element helped reduce the chance of an accidental violation, “without this information, a jury could convict based upon evidence that a defendant who knew of a no-contact order accidentally or inadvertently contacted the victim.” State v. Sisemore, 114 Wn. App. 75, 78, 55 P.2d 1178 (2002). The instruction as given in the case at hand, contained all of the elements of the offense as charged and contained in the statute RCW 26.50.110(1).

In this case there was no argument or evidence that the contact between Rhoades and Chenot was accidental or inadvertent. Rhoades drove to Chenot’s house twice, the first time when he arrived, then again after his trip to Wal-Mart. [RP 20, 26-

28, 170, 173-176]. Further, Chenot testified that Rhoades was the only person she was familiar with of the five who arrived that night, thus removing the possibility that someone else could have instigated the trip to Chenot's house. [RP 24]. A harmless error is one which is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Because there is no possibility that Rhoades could have been at Chenot's house accidentally or inadvertently, this error did not prejudice Rhoades and should be considered harmless.

In State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004), the Court stated that "the Court of Appeals correctly determined that jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." See also, State v. Wanrow, 88 Wn.2d 221, 238, 559 P.2d 548 (1977) (the general rule, that if the instructions, when considered as a whole, properly state the law, they are sufficient). In the case at hand, Instruction No. 16, included a willful mens rea for violating a no-contact order. [RP 43].

If Instruction No. 16 is considered in the whole with Instruction No. 17, this would cure any deficiency claimed by Rhoades.

Instruction No. 17 was sufficient for the elements required by the statute. The only additional knowledge element possible would be to remove the possibility of an accidental or inadvertent contact, which was not in question in this case. Moreover, if the instructions are read as a whole, the element complained of by Rhoades is present. There was no alternative instruction offered, nor any objection from Rhoades about this instruction during the trial.

5. Any error that may have been committed in Rhoades' trial was harmless error and does not require reversal.

There was no substantial error in this case. The un-objected-to State's closing rebuttal argument was in answer to the defendant's closing argument, and was not flagrant or ill-intentioned. The court, after hearing full argument from both parties, acted within its discretion to exclude the prior convictions of the juvenile witness in this case. There was sufficient evidence to support Rhoades' conviction of malicious mischief presented at trial, where the jury found Rhoades guilty of the charge. And, the jury instructions fully instructed the jury to the law and did not omit any essential element of the statute for violation of a no-contact

order, and even if the second knowledge element was needed it was in the immediate preceding instruction. Finally, if there was error, it was harmless error.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this court to affirm Rhoades conviction.

Respectfully submitted this 28<sup>th</sup> of July, 2009.



---

Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

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

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

\_\_\_\_\_  
TO: THOMAS E. DOYLE  
ATTORNEY AT LAW  
PO BOX 510  
HANSVILLE, WA 98340

BY: [Signature]  
DATE: [Signature]  
[Signature]  
[Signature]

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

Dated this 28th day of July, 2009, at Olympia, Washington.

  
\_\_\_\_\_  
CHONG MCAFEE