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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

40056-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

Scott R. Newcomb
Respondent

40056-1-II

FILED
COURT OF APPEALS
DIVISION III
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STATE OF WASHINGTON
BY  DEPUTY

On Appeal from the Pacific County Superior Court

Cause No. 08-1-00161-8

The Honorable Michael J. Sullivan

BRIEF OF RESPONDENT

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I. **AUTHORITIES CITED**

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II. STATEMENT OF THE CASE.

With all due respect, Newcomb rejects Appellant's Statement of the Case in its entirety. For the purposes of this appeal, the only material facts are as follows: The State of Washington charged Scott R. Newcomb with first degree malicious mischief. CP 1. Without abandoning any available defenses, Newcomb moved pretrial to dismiss the charge under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) (defendant is entitled to a dismissal as a matter of law if the evidence, seen in the light most favorable to the State, is insufficient to prove every element of the crime.) CP 11.

The trial court heard argument on the motion on November 20, 2009. 1RP.¹ To prove the elements the crime, the State offered to prove that Newcomb inflicted damage on a portion of his land that was subject to an easement in favor of a neighboring parcel owned by Kredlo. CP 2; RP 5-6. Newcomb accepted these hypothetical facts solely for the sake of argument on the motion. He asserted that, even if proved beyond a reasonable doubt, the facts alleged by the State were insufficient to support a criminal prosecution for malicious mischief. RP 2-3.

¹ The verbatim report of proceedings consists of a single volume comprising two separately paginated hearings. 1RP refers to the November 20, 2009 hearing. 2RP refers to that of December 4, 2009.

Appellant's Statement of the Case introduces voluminous allegations characterized as "facts on appeal." The sole authority for these "facts" consists of judicial findings entered in the context of ongoing civil litigation to resolve fundamental questions about the existence and scope of the alleged easement. The State also cites the civil court's conclusions of law based on those findings. Appellant's Brief (AB) 4-10.

The State fails to recognize that Findings entered in a civil action are not "facts" in the context of a criminal prosecution, because the burden of proof in a civil proceeding is a mere preponderance of the evidence. *Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995). If this prosecution of Mr. Newcomb ever goes to a jury on theory of malicious mischief to an easement, the State will have to prove every single allegation regarding the existence of an easement, the ownership of the easement, and the damage inflicted upon the easement, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970).

On December 4, 2009, the court issued an oral ruling granting the *Knapstad* motion. The court dismissed the prosecution based on the Information and the evidence and argument presented at the hearing. CP 1, 44; 2RP.

The State assigns error to the trial court's granting of Newcomb's *Knapstad* motion. AB 1. Newcomb responds that, even if the State could prove its hypotheses that the Newcomb property was subject to an easement in favor of Kredlo and that Scott Newcomb caused damage to it, the trial court correctly ruled that these alleged facts are insufficient to support the charge of malicious mischief.

III. ARGUMENT.

A. THERE ARE NO DISPUTED FACTS.

The State complains that the trial court did not enter Findings of Fact in support of its Order of Dismissal. AB 15. Therefore, the State claims this Court must presume the State's alleged facts were proved. AB 17-18. This reflects a basic misunderstanding about the function of the fact-finder and the purpose of written Findings.

The State is correct that the court declined to enter findings of disputed fact. 2RP 2. This was because there *were no* disputed facts. 1RP 2. The court concluded that the undisputed facts as alleged by the State were not sufficient to make out a prima facie case of malicious mischief as a matter of law. CP 44, 45; 2RP 2.

Where a trial court does not make a finding of a disputed fact, it is usual for the reviewing court to presume that the party with the burden of proof – the State in this case – failed to sustain its burden of proof on the

issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). For the purposes of a *Knapstad* motion, however, neither side has any burden to prove any facts. The trial court simply assumes, for the sake of argument, the truth of the facts alleged by the State. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). That is what the trial court did and what this Court also will do.

The State also asserts that the legal basis for the trial court's decision is not apparent from the record. AB 15-16. The record contradicts this claim. The defense argument is unmistakably clear in the report of the hearing, and the court stated that it "agreed with the defendant's argument." 2RP 2; AB 16.

The record on appeal is sufficient for this Court to review the order of dismissal.

B. NEWCOMB DID NOT DEFEAT HIS *KNAPSTAD* MOTION BY DISPUTING ANY FACTS.

The State claims Newcomb did not meet the *Knapstad* criteria because he disputed material facts. AB 16. This reflects the State's further fundamental misunderstanding of the law.

In deciding a *Knapstad* motion, the court accepts the facts alleged by the State as true and gives the State the benefit of all reasonable inferences to be drawn from those facts. *Jackson*, 82 Wn. App. at 608.

This does not mean, however, that a defendant seeking dismissal of a spurious charge abandons all defenses and admits, for all purposes, facts sufficient to establish his guilt. Newcomb accepted the alleged facts hypothetically for the purpose of the motion. In doing so, he did not waive the presumption of innocence and relieve the State of its burden to prove all alleged facts beyond a reasonable doubt in the event of a trial. Contrary to the State's implied claim, a *Knapstad* motion does not relieve the State of the need to prove anything.

Newcomb alleged that, even supposing the truth of the State's alleged facts, the State cannot make out a prima facie case of guilt. RP 1. True, Newcomb was not willing to concede outright the existence of an easement in the event of a trial.² But, for the limited purpose of the *Knapstad* proceeding, Newcomb unambiguously accepted for the sake of argument that the alleged easement existed. 1RP 1, 14. Likewise, Newcomb reserved his right to assert a general denial defense at trial. But, for the purposes of the *Knapstad* motion to dismiss without a trial, he accepted the hypothesis that the State could prove he caused damage to a hypothetical easement.

No disputed facts stand in the way of the trial court's Order of Dismissal. The Court should affirm the Order.

² In the event of a trial, Newcomb would argue that (a) there never was an easement; and (b) if there was an easement, it was abandoned in antiquity. RP 14.

C. THE UNDISPUTED FACTS DO NOT
ESTABLISH THE ELEMENTS OF
MALICIOUS MISCHIEF.

“A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously: Causes physical damage to the property of another in an amount exceeding \$1,500 dollars.” Former RCW 9A.48.070(1)(a) (1983).³ The crux of this case is whether an easement is “property of another.” That is, is an easement the property of the owner of the servient estate or is it the property of the owner of the dominant estate? Newcomb argued, and the trial court correctly found, that the disputed easement here does not satisfy the “property of another” so as to support a malicious mischief charge against him.

The State contends the following facts are sufficient to make out a prima facie case of malicious mischief pursuant to former RCW 9A.48.070:⁴

1. The property at issue is owned by Newcomb’s mother.
2. A valid easement runs through the property benefiting the alleged victim, Kredlo.
3. Kredlo’s predecessor-in-interest built a roadway coextensive with the easement.

³ This was amended effective July, 2009 to increase the amount to \$5,000.

⁴ The pertinent part of the 1983 version is the same as the current version except for the dollar amount (\$1,500 instead of \$5,000). RCW 9A.48.070(1)(a) (1983). Hereafter, the statute is cited simply as RCW 9A.48.070.

4. Kredlo's predecessor had the right to make improvements to the easement and to enjoy access without interference from Newcomb or his mother.
5. Newcomb damaged the roadway by scraping off the gravel, digging holes, and placing obstructions.
6. Newcomb was aware of the court order enjoining him from interfering with the easement.
7. The amount of damage was \$7,263.56.
8. The property is in the State of Washington.

AB 2.

The problem with the State's case is apparent from the first two allegations which are mutually exclusive. If the property belongs to Newcomb's mother, Kredlo is not the victim. If Kredlo is the victim, the State has to prove the property was Kredlo's. If the property was that of Newcomb's mother, the State cannot prove the "malice" element. By definition, "malice" connotes a deliberate intent to harm another person. BLACKS LAW DICTIONARY, Sixth Ed., at page 956. In a prosecution for malicious mischief, that "other person" can only be the person to whom the damaged property belonged. The State has not heretofore and does not now allege that the target of Newcomb's actions was his mother. Rather, the State concedes that the "malice" element applies solely to Kredlo. AB 25.

Throughout the trial court hearing on the motion, the State argued that Newcomb committed mischief against the property of Kredlo. The prosecutor clarified that this is what the admittedly defective Information should allege:

Mr. Bustamante: “[I]n reviewing the charging document, I should say that it will need to be corrected. It doesn’t say “*property of another*”, which it should say. He maliciously caused damage in excess of \$1,500.00 to property of another, to-wit: A road in which Mr. Tim Kredlo had a property interest.”

RP 5-6.

The State should not now be heard to assert that it is immaterial whether Kredlo held an ownership interest in the property because Newcomb really is charged with damaging the property of his mother. AB 19-20, 21-22. (See also, AB 23, 24: The “State is not required to prove who owns the roadway, but only that the defendant has less than an exclusive ownership interest[.]” AB 23. The “State is not required to prove that an easement is an ownership interest[.]” AB 24.) This substitution of the facts allegedly constituting the offense in an effort to strengthen the case on appeal violates the principles of judicial estoppel.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position before the trial court and later taking a clearly inconsistent position. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d

352, 357 (2008). The doctrine applies where, as here: (1) a party's positions are clearly inconsistent; (2) judicial acceptance of the inconsistent position creates the perception that either the first or the second court was misled; and (3) the party asserting an inconsistent position would derive an unfair advantage if not estopped.

Here, the State attempts to cover all bases by asserting two clearly inconsistent positions as to the owner of the easement. This clearly is misleading, either to this Court or to the trial court. And the State would derive a clear advantage if it were allowed to exploit the defective information and switch arguments between the superior court and this Court. The Court should invoke the doctrine of judicial estoppel to preserve respect for judicial proceedings as well as to avoid inconsistency and waste of time. *See, Miller*, 164 Wn.2d at 539.

The trial court based its decision on the facts the State presented and argued. Namely, that Newcomb maliciously caused damage to: "A road in which Mr. Tim Kredlo had a property interest." That is what this Court should review.

D. NEWCOMB DID NOT COMMIT MALICIOUS MISCHIEF TO THE PROPERTY OF ANOTHER.

(1) The State's theory of the case below was that Newcomb maliciously damaged the property of another, namely the property of

Kredlo. The defense argued – and the court agreed – that the State could not prove the “property of another” element, because the damaged property was not Kredlo’s as a matter of law. RP 3-4.

The State claimed, contrary to the statute’s plain language, that ownership is not an element of the charge. RP 6. The prosecutor then vainly tried to distinguish the term “property of another” from “property owned by another.” RP 6. But the prosecutor’s quote from his own pretrial brief defeated this effort: “An easement is ***a property right, albeit distinct from ownership, to use another’s land.***” RP 7 (emphasis added.) Later, the prosecutor argued that an easement under the common law is a bundle of rights including ingress and egress and the right to make improvements. Newcomb was charged with damaging one of the intangible rights in this bundle. RP11; AB 25.

The court correctly concluded that the clear language of the statute required dismissal on these facts. Moreover, defense counsel argued that, even if the statute were not plain, the court must apply the rule of lenity. RP 12.

As applied to *Knapstad* motions, the rule of lenity holds that the court must accept the State’s alleged facts and give the State the benefit of all reasonable inferences to be drawn from those facts. *Jackson*, 82 Wn. App. at 608. But ambiguities in matters of law must always be resolved in

favor of the defendant. “If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). Criminal statutes receive “a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Any part that is susceptible to more than one meaning must be strictly construed against the State and in favor of the defendant. *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

Here, the court had no choice but to rule that the State could not prove the “property of another” element where the prosecutor himself conceded that the property right asserted by Kredlo was limited solely to an intangible right to use the Newcombs’ property.

(2) The State raises the question of the amount of damages. AB 22, 23-24. This would be material to the degree of the offense only after the State proved that Newcomb’s conduct constituted malicious mischief. The trial court quite properly never reached the question of dollars.

E. CIVIL EASEMENT DISPUTES HAVE NO PLACE IN CRIMINAL PROSECUTIONS.

Defense counsel began the *Knapstad* hearing by arguing that this is entirely a civil matter concerning a dispute over an easement. RP 1. The State’s throwaway Issue C at AB 26 encapsulates the reasons this Court

should affirm the trial court's judicial wisdom in adopting that view. The attempted criminal prosecution is defeated at every turn by the civil nature of this litigation.

The State open its brief by asking this Court to consider findings of fact entered in the civil easement dispute. The State concludes by urging – with neither argument nor citation to authority – that the Court not merely apply existing civil law governing easements in a criminal prosecution, but that it create *new* easement law with which to reverse the trial court because that would be “common sense”. AB 26.

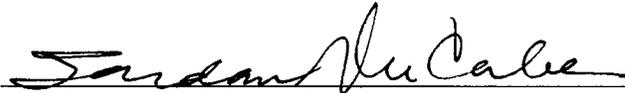
When no authority is cited, the Court presumes that counsel, “after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000). The Court need not address arguments not supported by citation to authority. *State v. Pruitt*, 145 Wn. App. 784, 800, 187 P.3d 326, 334 (2008). While “common sense” should always be a benchmark of sound judicial reasoning, it is not a substitute for analysis. *Township of Cinnaminson v. Bertino*, 966 A.2d 14 (2009).

The reason the State cannot find any case law supporting its arguments is that civil remedies, not criminal prosecutions, are the proper course for incivility regarding an alleged easement.

IV. CONCLUSION

For the reasons stated, the Court should uphold the decision of the trial court dismissing the prosecution. Respondent takes no position on Appellant's waiver of oral argument.

Respectfully submitted this 18th day of February, 2010.



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