

NO. 40787-6-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

COURT OF APPEALS  
DIVISION II  
NOV 14 2014 1:54  
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STATE OF WASHINGTON,

Respondent,

v.

JANNA WOOTEN,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Nelson Hunt, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to support the jury's verdict of guilty of first degree malicious mischief.

2. Prosecutorial misconduct deprived appellant of her right to a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is there insufficient evidence to support Janna Wooten's conviction for first degree malicious mischief where there was no evidence that she engaged in any destruction of property or that she encouraged the destruction of property, and she was merely present in the house which was damaged by her husband, David Wooten? Assignment of Error 1.

2. Did prosecutorial misconduct deny appellant her right to a fair trial where the prosecutor argued that the defense counsel "didn't have a defense" and argued that defense counsel made a statement that was "half true"? Assignment of Error 2.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Appellant Janna Wooten was charged by information filed in Lewis County Superior Court with one count of first degree malicious mischief,

contrary to RCW 9A.48.070(1)(a). Clerk's Papers [CP] 1-2.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

The matter was tried to a jury on April 8 and 9, 2010, the Honorable Nelson Hunt presiding. Defense counsel objected to Jury Instruction No. 2 and Instruction 9. 1Report of Proceedings [RP] at 153.<sup>1</sup> The jury returned a verdict of guilty as charged. CP 54. Ms. Wooten was given a standard range sentence and timely notice of this appeal followed. CP 60, 65-76.

## **2. Testimony at trial:**

Dennis Kohl bought a house located at 303 Hadaller Road, near Mayfield Lake in rural Lewis County, Washington, and lived there for approximately nine years beginning in 1994. RP at 8. The house was approximately 1150 square feet with a detached one care garage. RP at 9. Mr. Kohl entered into a real estate contract with Wooten Primary Care, LLC in 2004 or 2005. RP at 11. Wooten Primary Care is a family medical practice owned by Dr. David Wooten. RP at 130. Under the terms of the contract, Wooten Primary Care paid Kohl \$10,000, and made monthly payments of \$1,577. RP at 11, 14, 15. Mr. Kohl had a purchase and sale

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<sup>1</sup>The record of proceedings consists of four volumes: December 29, 2009, motion hearing; January 7, January 21, March 4, and March 11, 2010, motion hearings; April 7 and 8, 2010, jury trial; April 1, 2010, motion hearing, May 18, 2010, sentencing hearing.

agreement prepared, and the document was subsequently replaced by a real estate contact in November, 2005. RP at 13, 32. Exhibit 2.

Mr. Kohl testified that in October, 2007 the Wooten check bounced, that Wooten Primary Care had not paid taxes on the property, and that the yard was a disaster with high weeds growing in it. RP at 20. Mr. Kohl went to California for work and returned to Washington in May, 2008. RP at 21, 22. When he went to the property he noted there was garbage around the house, floor tiles outside, the steps to the deck were missing, and there was junk on the deck. RP at 23. Inside the house he stated that there were that there was a strong odor, there were torn up mattress, vials of blood, syringes, and one toilet and one sink were missing from one of the bathrooms. RP at 24. In one bedroom there were stained mattresses and in the other bedroom there were children's clothing and books scattered on the floor. RP at 24. Sheetrock, carpeting and tile were missing and Mr. Kohl stated that the house was "a shell." RP at 24. He testified that he purchased the house for \$80,800 or \$80,900, and valued the house at \$295,000. RP 25, 27. He testified that the current home had no value. RP at 27.

Law enforcement went to the house the evening of May 24, 2008 in

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response to a report of damage. RP at 67. At the house, an officer noted damage to the house including missing walls, missing plumbing and fixtures, and the presence of hypodermic needles, blood vials, garbage, and feces. RP at 67. Exhibits 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21. The officer found a note on the front door that stated:

Warning: we still live here and have right to be here until the 22<sup>nd</sup>. As you know from your previous attempt to enter my home, I have three Great Danes and mine will attack, so stay the fuck off my property until the 22<sup>nd</sup>. You are trespassing and I will have my dogs on your ass the moment you try to come in again.

Exhibit 22.

Janna Wooten did not own or have any interest in Wooten Primary Care. RP at 131. Ms. Wooten moved into the house at 303 Hadaller Road in May, 2005, prior to her marriage to David Wooten, and they were married in September 2006. RP at 132. She did not sign any of the documents associated with the purchase of the property. RP at 132. She denied causing any damage to the house. RP at 133. She testified that she came home from work and Dr. Wooten had stated that he was going to remodel the bathroom and he had already torn out the walls. RP at 133. She stated that she did not ask Dr. Wooten to make any changes to the house and he did not discuss it with her in advance. RP at 134. She testified that he did not finish the

project, and that he instead started another project. RP at 134. She stated that she asked to him to finish the project before starting another one, and that it was a continual battle with him. RP at 134. She stated that the fighting between them was so intense that it would start with yelling and eventually he “would get physical” by hitting her in the back of her head and she would be forced to leave the house. RP at 134-35. She testified that they fought about the condition of the house for years and that she “hated living in the house like that.” RP at 135. Ms. Wooten stated that on weekends when she had her children, she would rent a hotel in Longview, Washington because she did not want her children to stay at the house, which was “disgusting.” RP at 136. Other times when she and Dr. Wooten were fighting, she would take the children to friends’ houses to stay, and if she did not have the children, she would sometimes stay longer than the weekend. RP at 136. She eventually left the house on May 17, 2008, and moved to Dublin, Texas. RP at 102, 136, 143, 145. Ms. Wooten testified that the house did not look like the pictures depicted when she left the house on May 17, and that she did not see Dr. Wooten throw garbage in and around the house, but stated that there had been garbage swept into a pile. RP at 137, 145. She stated that she wanted Dr. Wooten to take the piled garbage to the dump, but he said that he did not have enough time or money to do that. RP at 137.

Ms. Wooten stated that she came home from work and that there was a foreclosure notice posted on the gate. RP at 140. She stated that she did not recall missing any payments to Mr. Kohl. She did not know that he owed money to a bank and thought that he owned the house “free and clear.” RP at 138, 141. She stated that after the property was posted with a foreclosure notice, she left the note introduced as Exhibit 22 on the door of the house when she left on May 17, 2008, because someone had tried to break into the house the previous night, and also the previous week, and she did not want the house to be burglarized. RP at 145.

**D. ARGUMENT**

**1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MS. WOOTEN'S CONVICTION FOR MALICIOUS MISCHIEF.**

The State did not present sufficient evidence to support Janna Wooten’s conviction for malicious mischief in the first degree of the house. Therefore, her conviction for malicious mischief should be reversed and vacated.

There was no evidence that Ms. Wooten took part in the destruction of the house. RP at 60-61, 76. Moreover, Ms. Wooten was clear in her testimony that Dr. Wooten was engaged in one remodeling project after another, and that she opposed his projects, that she was not consulted about

any projects, and that they fought about the state of the house to the point of physical violence, and that she would frequently leave the house—particularly on the weekends that she had her children—because of its condition. RP at 133-37.

Contrary to the State's argument to the jury, Ms. Wooten was not guilty as a principal or an accomplice merely because she was married to Dr. Wooten, was present in the house, and that she left the house with on May 17 “with feces all over the house . . . .” RP at 176. Oddly, the State argued that Ms. Wooten’s status as the office manager of Wooten Primary Care was connected with the damage to the house or that position made her an accomplice to the damage. RP at 177. She was not guilty of the offense because she did not “solicit, command, encourage, or request” the others to commit the crime, nor did she aid or agree to aid in planning or committing the crime. RCW 9A.08.020(3)(a)(i), (ii). She neither sought to facilitate the crime nor acted to facilitate it.

The jury was instructed that to find Ms. Wooten guilty of malicious mischief in the first degree, it had to find beyond a reasonable doubt:

- (1) That on or about and between January 1, 2006, and May 22, 2008, the defendant caused physical damage to the property of another in an amount exceeding \$1500; and

- (2) That the defendant acted knowingly and maliciously;  
and
- (3) That this act occurred in the State of Washington.

CP 44.

The court also provided the jury with an accomplice instruction. Instruction 10. CP 50. The accomplice instruction contained the provision that "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 50.

The State failed to establish that Ms. Wooten committed malicious mischief either as a principal or as an accomplice. Due process, under the state and federal constitution, requires that the State prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here, the State failed to prove that Ms. Wooten caused any of the damage to the house; to the contrary, Ms. Wooten's un rebutted testimony was that the damage was caused by Dr. Wooten. RP at 133-37. Moreover, she was clear that when she left on May 17, 2008, the house was not in the condition depicted in the photographs taken by the officer on May 24. The State failed to establish Ms. Wooten's guilt as an accomplice because her mere presence in the house and her knowledge of her husband's unfinished remodeling projects and knowledge of the garbage he generated was insufficient to support her guilt as an accomplice.

An accused person is guilty as an accomplice when, "with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). "It is the intent to facilitate another in the commission of the crime by providing assistance through presence and actions that makes an accomplice criminally liable." *State v. Trout*, 125 Wn. App. 403, 410, 105 P.3d 69 (2005) (citing *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992)). "The State must show that the defendant aided in the planning or commission of the crime." *Trout*, 125 Wn. App. 410 (citing *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003)).

Mere presence at the scene, even with knowledge of the criminal activity, cannot establish accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); *State v. Roberts*, 80 Wn. App. 342, 908 P.2d 892 (1996). "One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed." *In re Wilson*, at 491 (quoting, *State v. R-J Distribs, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 449 (1974)). In fact, "[m]ere presence . . . even coupled with assent to it [the crime], is not sufficient to prove complicity. The state must prove that the defendant was ready to assist in the crime." *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (citing *State v. Rodunno*, 95 Wn. 2d 931, 933, 631 P.2d 951 (1981); *In re Wilson*, *supra*.). "An accomplice must associate himself or herself with the principal's undertaking, participate in it as something he or she desires to bring about and seek by his or her action to make it succeed." *State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994).

The State has utterly failed to present any type of evidence of any type of solicitation or encouragement by Ms. Wooten, agreement to aid or association with the destruction as something Ms. Wooten desired to bring about, or any readiness or willingness on her part to aid in the undertaking.

There is no legal entity known as “the Wootens;” they are individuals and the offenses of Dr. Wooten cannot be assigned to Ms. Wooten, regardless of how much the State wished that to occur. Ms. Wooten’s presence in the home alone was insufficient to establish her guilt as an accomplice. Therefore, her conviction for malicious mischief should be reversed and vacated.

2. **IN THE ALTERNATIVE, PROSECUTORIAL MISCONDUCT DEPRIVED MS. WOOTEN OF HER RIGHT TO A FAIR TRIAL.**

The deputy prosecutor committed misconduct in closing argument by disparaging defense counsel and arguing that counsel’s argument was “half true.” RP at 195.

During his rebuttal, the deputy prosecutor argued:

Beyond that, defense counsel says the state is going for shock value. I submit to you if that were the case, there would be pictures shown through this whole trial. He doesn’t have a defense, so he points out little things like that: The state read profanity. What does that have to do with anything?

Defense counsel said the state was trying to hedge its bet with an accomplice instruction. Well, if it wasn’t the defendant, then she must have been an accomplice.

Well, it’s half true. If you read the instruction together—

RP at 195.

Defense counsel objected, stating that the prosecution was implying

that he was lying. The court overruled the objection. RP at 195.

The prosecutor's disparaging remarks constituted flagrant misconduct depriving Ms. Wooten of her right to a fair trial.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const., art. 1, § 22 (amend. 10). *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant is deprived of a fair trial when there is a "substantial likelihood" that the prosecutor's misconduct affected the verdict. *State v. Belgrade*, 110 Wn.2d 504, 508, 509, 755 P.2d 174 (1988).

Disparaging defense counsel constitutes misconduct. *See e.g. Reed*, 102 Wn.2d at 145-46; *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (it is serious misconduct for the prosecutor to disparage defense counsel's role or to impugn counsel's integrity in closing argument), *rev. denied*, 123 Wn.2d 1030 (1994); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), *cert. denied*, 469 U.S. 920 (1984). The deputy prosecutor disparaged defense counsel in closing argument by suggesting defense counsel "doesn't have a defense" and that what he is telling the jury is only "half true." RP at 195.

Remarks such as these carry "obvious import"—"that all defense

counsel in criminal cases are retained solely to distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes." *Bruno*, 721 F.2d at 1194; *see also, Drummond v. State*, 624 S. W. 2d 690, 694 (Tex. 1981) (error for prosecutor in closing argument to refer to defense tactics as "tricks"); *Dickson v. State*, 642 S.W.2d 185, 187 (Tex. Ct. App. 1982) (improper for the prosecutor to suggest that the defense attorney was trying to "pull the wool" over the jurors' eyes). Such remarks "strike at the core of the right to counsel." *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990).

The prosecutor here sought to ensure Ms. Wooten's conviction by portraying her attorney as having no defense. To the contrary, defense counsel elicited testimony that Ms. Wooten had not signed any of the documents pertaining to the house, had not participated in the damage caused by Dr. Wooten, and that the damage he did to the house caused them to fight to the point of physical abuse. As a result of the prosecutor's closing argument, however, the jury may have wrongly rejected such inferences from the evidence. As an alternative to the argument in Section 1 of this brief, Ms. Wooten submits that the deputy prosecutor's misconduct requires that she receive a new trial.

**F. CONCLUSION**

The appellant respectfully submits that her conviction should be reversed and vacated. Alternatively, this Court should reverse her conviction and remand for new trial.

DATED: November 23, 2010.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
Of Attorneys for Janna Wooten

EXHIBIT A

STATUTES

***RCW 9A.08.020***

Liability for conduct of another — Complicity.

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it;  
or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

***RCW 9A.48.070***

Malicious mischief in the first degree.

(1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding five thousand dollars;

(b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication; or

(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

(2) Malicious mischief in the first degree is a class B felony.

COURT OF APPEALS  
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STATE OF WASHINGTON,	COURT OF APPEALS NO,
	40787-6-II
Respondent,	
vs.	LEWIS COUNTY NO.
	08-1-00856-2
JANNA L. WOOTEN,	
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Janna Wooten, Appellant, and Lori Smith, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on November 23, 2010, at the Centralia, Washington post office addressed as follows:

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