

No. 40787-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JANNA WOOTEN,**

Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY DEPUTY

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Is there sufficient evidence to sustain Wooten's conviction for malicious mischief in the first degree?
- B. Did the deputy prosecutor's statements in closing argument constitute prosecutorial misconduct, and if so did that misconduct deprive Wooten of a fair trial?

## II. STATEMENT OF THE CASE

Dennis Kohl purchased a house and property located at 303 Hadaller Road on Mayfield Lake in Lewis County, Washington. RP 8. Mr. Kohl purchased the property in 1993 or 1994 and lived at the residence for approximately nine years beginning in 1994. RP 8. Mr. Kohl also lived in the house a second time from 2002 to 2003. RP 8-9. The house was approximately 1,150 square feet, three bedrooms and one bathroom with a detached one car garage. RP 9. In 1999 or 2000, Mr. Kohl remodeled the house, converting it into a two bedroom, two bathroom house. RP 9.

Mr. Kohl entered into a real estate contract with Wooten Primary Care for the house located at 303 Hadaller Road. RP 10. Wooten Primary Care is a family medical practice owned by Dr. David Wooten. RP 130. Originally the house was to be sold under a purchase and sale agreement. RP 11, Ex 1. In May 2005 Dr.

Wooten and Janna Wooten<sup>1</sup> moved into the house. RP 11, 132. Wooten was not married to Dr. Wooten at that time but later married him in September 2006. RP 132. As part of the terms of the agreement, Dr. Wooten, through Wooten Primary Care, paid Mr. Kohl \$10,000 in May 2005. RP 10-11. The agreement was modified into a real estate contract in 2006, which required monthly payments of \$1,577.46. RP 14; Ex 2. The real estate contract required the purchaser to pay the taxes and maintain the property. RP 14; Ex 2. The contract had a specific provision regarding waste and willful damage to the property. Ex 2.

The house was in good condition when Mr. Kohl entered into the agreement with Wooten Primary Care. RP 17-18. The house had Berber carpet in the living room, both bedrooms were carpeted, tile in the entry way continuing into the remodeled bathroom and new linoleum in the kitchen. RP 17. The house had two working toilets. RP 18. The walls were mostly wood paneling but the bedrooms were sheetrocked. RP 18. The living room had a ceiling fan and track lights. RP 18. The kitchen had a new ceiling and recessed lights. RP 18. The bedrooms had lights and the bathroom had recessed lights in a tongue and groove ceiling. RP

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<sup>1</sup> Janna Wooten will hereafter be referred to simply as Wooten. David Wooten will be referred to as Dr. Wooten.

18. The yard was manicured, weed free and clean, without any vehicles parked on it. RP 18, 51. There was no trash laying around the house or in the yard. RP 18-19. When Wooten and Dr. Wooten moved into the house it was not furnished and the only appliance left was the refrigerator. RP 19.

According to Gregory Kline, the next door neighbor, the upkeep on the property rapidly deteriorated after Wooten and Dr. Wooten moved in to the house in May 2005. RP 55-56. Mr. Kline called the house an "eyesore" and stated that stuff just started accumulating. RP 56. In 2007, Mr. Kohl left to take a job in California and lived there until December 2007. RP 16. Mr. Kohl made a trip up to Washington to speak to his lawyer in regards to the house. RP 20. In October 2007 a payment check for the house bounced. RP 19. According to Mr. Kohl the taxes on the property were not getting paid and the yard was overgrown and the grass was dead. RP 20. Mr. Kohl returned to California and next visited the house in May of 2008. RP 21.

When Mr. Kohl arrived at the house on May 24, 2008 he was shocked. RP 22. There was garbage and trash everywhere. RP 23. The floor tiles were laying outside, the steps up to the house were missing and there was junk all over the deck. RP 23. The

claw-foot bathtub that was formally in one of the bathrooms was sitting in in the front yard. RP 23.

Lewis County Sheriff's Deputy Susan Shannon arrived at 303 Hadaller and contacted Mr. Kohl. RP 63-64. Deputy Shannon had been to the residence before and spoken to Wooten on January 10, 2006. RP 66. In January 2006 the house appeared normal, with sheetrock and carpeting. RP 66-67. On May 24, 2008 Deputy Shannon observed outside of the house there were bags of garbage piled high, lots of medical garbage, dog fecal matter everywhere and it stunk. RP 65; Ex 3, 4, 5, 6, 21. There was a large burn pile in the backyard. RP 73. There was also an abandoned green minivan in the front yard. RP 73. There was a note on the front door that stated:

←WARNING→ We still live here and have right to be here until the 22nd – As you know from your previous attempt to enter my home – I have 3 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.

RP 75; Ex 22.

Deputy Shannon and Mr. Kohl went inside the house. RP 24, 67. The house appeared destroyed. RP 67. The tiling and carpeting were removed and the floors were down to bare plywood.

RP 24, 67; Ex 10, 11. The walls were down to the two by fours studs. RP 24, 67; Ex 12. The plumbing was gone and the bathroom fixtures were missing. RP 24, 67; Ex 16, 19, 20. The house stunk, there was garbage and dog fecal matter everywhere, lots of beer cans and rotten food in the kitchen. RP 24-25, 67; Ex 14, 15. There were hypodermic needles and vials of blood lying around. RP 24, 67; Ex 13. In one bedroom there was a mattress with feces on it and the other bedroom had children's items scattered all over the floor. RP 24; Ex 17, 18.

William Teitzel, a code enforcement supervisor for Lewis County Public Health and Social Services Department went over to 303 Hadaller and helped with the clean-up of the property. RP 81, 86. Mr. Teitzel stated there were five or six people helping clean up the property. RP 86. In four hours they had filled a four or five cubic yard dump truck full of garbage. RP 86.

Mr. Kohl stated he purchased the house for approximately \$80,800 and valued the house at \$295,000 when he entered into the contract with Wooten Primary Care. RP 25-27. Mr. Kohl stated the house was a total loss but the land was worth about \$160,000. RP 27.

Travis Amundson, a general contractor and building inspector reviewed the photographs of the house. RP 116-118. Mr. Amundson was able to make a rough estimate regarding the cost to clean up and repair the house. RP 118. According to Mr. Amundson it would cost \$500 for a hazardous materials team to come out and access the property. RP 120. It would cost between \$3,000 and \$6,000 to haul off the garbage and pay the dump fees. RP 120. The cost to fix the bathrooms was estimated between \$8,000 and \$10,000. RP 121. At a minimum it would cost between \$10,000 and \$15,000 to get the rest of the house up to code. RP 122.

Wooten admitted she moved into the house at 303 Hadaller in May 2005, prior to marrying Dr. Wooten. RP 132. Wooten stated when she moved into the house it had sheetrock, paneling, working bathrooms and carpeting. RP 133. According to Wooten, Dr. Wooten had taken it upon himself to do some remodeling at the house. RP 133. Wooten said Dr. Wooten would start another project before finishing the one he was working on and this caused them to fight. RP 134-135. Wooten stated the fights got physical, she would get afraid and leave. RP 135. Wooten stated she hated living in the house in the condition it was in and it was disgusting.

RP 135-136. According to Wooten the house was so bad she did not want her children there and stayed at a hotel on the weekends that she had them. RP 136. Wooten said she and Dr. Wooten fought about the garbage because she wanted him to take it to the dump. RP 137.

Wooten testified that they had received foreclosure paperwork and they were to be out of the house by May 22, 2008. RP 145; Ex 22. Wooten admitted to leaving the note on the door when she left on May 17, 2008. RP 145. Wooten stated she was concerned about someone burglarizing the house after they moved out. RP 145. Wooten stated the house did not look like the photographs when she moved out on May 17, 2008. RP 137. Wooten also admitted that the personal items in the photographs belonged to her and Dr. Wooten. RP 146-149. Wooten identified the children's items in the photographs as belonging to her children. RP 148. Wooten and Dr. Wooten moved to Dublin, Texas. RP 102, 150.

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## ARGUMENT

### **A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST WOOTEN FOR MALICIOUS MISCHIEF IN THE FIRST DEGREE.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; *In re Winship*, 397 U.S. 358, 362-65, 25 L.Ed.2d 368, 90 S. Ct 1068 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

In order to convict Wooten of malicious mischief in the first degree the State must prove beyond a reasonable doubt that she caused physical damage to the property of another in an amount exceeding \$1,500; she acted knowingly and maliciously; and the acts occurred in the State of Washington. RCW 9A.48.070; WPIC 85.01; WPIC 85.02; CP 43, 44. The State can prove this either under direct liability or accomplice liability.

A person is an accomplice of another person in the commission of a crime if[,] with knowledge that it will promote or facilitate the commission of the crime, he [or she] solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3); WPIC 10.51; CP 50. Malice is defined as “an evil intent, wish, or design to vex, annoy or injure another person. WPIC 2.13; CP 46. The jury is allowed, but not required, to infer malice “from an act done in willful disregard of the rights of another.” WPIC 2.13; CP 46.

The jury had ample evidence available to convict Wooten of malicious mischief in the first degree, whether by direct or accomplice liability. Wooten points to her own unrebutted testimony as definitive proof that Dr. Wooten was the sole responsible party for any damages to the house. Respondent’s Brief 9. What Wooten fails to remember is, the jury is the sole determiner of credibility of the witness and on appeal the Court cannot substitute its judgment for that of the jury’s. *State v. Myers*, 133 Wn.2d at 38. It is conceivable in this case that the jury decided Wooten’s testimony was not credible and disregarded it due to the inconsistencies.

Wooten, by her own admission, lived at the residence located at 303 Hadaller for three years. RP 132, 137. According to Wooten she moved out of the residence seven days prior to Mr. Kohl and Deputy Shannon’s visit to the property. RP 22, 63-64, 137. Wooten admitted the house was disgusting and in poor

condition when she lived there. RP 135-136. There were also several inconsistencies in Wooten's testimony. Wooten blamed Dr. Wooten for the destruction and the mess, yet she lived there with him, in what she termed as disgusting conditions, for three years. RP 132-136. Wooten stated Dr. Wooten became physical with her, still she moved with him down to Texas. RP 102, 149-150. Wooten state she did not have her children at the house, however her children's clothing and personal items were scattered on the floor in one of the bedrooms. RP 136, 138. They were moving out of the house, which is being foreclosed upon, but Wooten was still concerned that it would be burglarized and that is why she left the note on the front door. RP 145. Wooten denied the house looked like the pictures when she moved out, yet how can that amount of damage be done in just a few days time?

Given the nature of the destruction at the residence, the state of the yard, the amount of dog feces everywhere, piles of garbage, a junk vehicle, the rotting food and medical waste, the specific criminal intent, in this case malice, may be inferred because it is a matter of logical probability. *State v. Delmarter*, 94 Wn.2d at 638. The damage to the house was catastrophic, it was gutted and simply a shell. The jury does not leave its common

sense at the door. Wooten admittedly lived in that house for three years, yet she is somehow not responsible for any of the damage and destruction and she is just somehow an innocent witness to it all? The standard applied in determining whether there is sufficient evidence is, if any rational jury could possibly find all of the essential elements of the crime can be found beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d at 201. In the case at hand any rational jury would have found Wooten guilty, either as a principle or an accomplice to the crime of malicious mischief in the first degree. The evidence is overwhelming and Wooten's conviction should be affirmed.

**B. WOOTEN WAS NOT DEPRIVED HER RIGHT TO A FAIR TRIAL BECAUSE THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS CLOSING ARGUMENT.**

To prove prosecutorial misconduct, the defendant must show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict."

*State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). When there has been an objection to the alleged misconduct, the standard of review is abuse of discretion. *State v. Gregory*, 158 Wn.2d at 809. A trial court abuses its discretion when its “decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997), *citing State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Wooten is arguing the deputy prosecutor disparaged her trial counsel by insinuating he was a liar, committing flagrant misconduct, thereby denying her a fair trial. Brief of Appellant 11-12. The remarks of the deputy prosecutor need to be examined in the context of the entire record. *State v. Hughes*, 118 Wn. App. at 727. The deputy prosecutor stated during his rebuttal closing argument:

Defense counsel said the state was trying to hedge its bet with an accomplice liability 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 195. Wooten's attorney objected, interrupting the deputy prosecutor's complete statement. RP 195-196. Wooten's attorney

told the court that the deputy prosecutor was implying he was lying and the trial court overruled the objection, allowing the deputy prosecutor to finish his statement. RP 195-196. The deputy prosecutor continued:

If you read those instructions together, it doesn't say that No. 4 instruction that I have read about eight times, "on or about, dates, the defendant cause," it only talks about the defendant. It doesn't say the defendant did it or was an accomplice to, because that accomplice instruction means if you're an accomplice, you are the defendant, okay, if you're an accomplice, you're the defendant. There's no hedging of bets. . .

RP 196. These statements by the deputy prosecutor were in rebuttal to argument made by Wooten's attorney during his closing argument:

The state is trying to hedge their bet. They're trying to say: "She did it. Okay, but if we can't convince you that she did it, then she certainly had a part in it." But if you look at the instructions and you look at the facts, they simply have not proven their case.

RP 189. The deputy prosecutor was simply responding to remarks made by Wooten's attorney in regards to what the State was attempting to do with the case and the State's theory of the case. The State is allowed to respond to Wooten's trial counsel's argument.

Wooten relies on a number of federal cases to assert her argument that the deputy prosecutor's remarks demand reversal by this Court. Wooten also relies upon *State v. Reed* for the premise that disparaging remarks regarding defense counsel constitute misconduct. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). In *Reed* the deputy prosecutor made several disparaging remarks regarding defense counsel at defense experts. *Id.* 143-44. The deputy prosecutor, from Pacific County, kept remarking on how defense counsel and experts were outsiders, from the big city and drove fancy, expensive cars. *Id.* The deputy prosecutor also calls Reed a liar, stated the death penalty should be re-enacted just for the Reed and commented that Reed was a cold blooded murderer. *Id.* The court found in *Reed* that the deputy prosecutor's remarks were misconduct, prejudicial due to the substantial likelihood the comments affected Reed's right to a fair trial and reversed Reed's conviction. *Id.* at 145-148.

The alleged misconduct in the current case does not rise to such a standard. While the State is not conceding that any misconduct occurred, for the sake of argument, if misconduct did occur, Wooten has not met the required burden showing prejudice that likely affected the outcome of the trial. While Wooten's

attorney objected to the statement of the deputy prosecutor, he did not request a mistrial or a curative instruction. Defense counsel's failure to ask for such remedies strongly suggests the comments made by the deputy prosecutor were not irreparably prejudicial in the context of the trial. *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). In *Negrete* defense counsel objected to the deputy prosecutor's statements that defense counsel was being paid by Negrete to twist the words of witnesses. The court found that the standard WPIC (currently WPIC 1.02) given to the jury minimized any prejudice from the comment. *Id.* In the current case WPIC 1.02 was given to the jury and a jury is presumed to follow the jury instructions. *State v. Hana*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994); CP 39-41. Wooten cannot show, there is a substantial likelihood that the jury's verdict was affected by the deputy prosecutor's comments, therefore Wooten's conviction should be affirmed.

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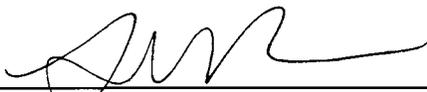
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**CONCLUSION**

For the foregoing reasons, this court should affirm Wooten's convictions for malicious mischief in the first degree.

RESPECTFULLY submitted this 22<sup>nd</sup> day of February, 2011.

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by:   
\_\_\_\_\_  
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

FILED FEB 24 PM 4:10

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
JANNA WOOTEN, )  
Appellant. )  
\_\_\_\_\_ )

NO. 40787-6-II BY  
  
DECLARATION OF  
MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 22, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

DATED this 22 day of 2011, at Chehalis, Washington.

[Signature]  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office