

**NO. 45253-7**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

KEELAN PREDMORE AND MICHAEL PREDMORE, RESPONDENTS

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Appeal from the Superior Court of Pierce County  
The Honorable John McCarthy

No. 12-1-02910-7 and 12-1-02911-5

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**OPENING BRIEF**

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

1. Should the jury verdicts convicting defendants of first degree malicious mischief be reinstated over arrest of judgment granted for insufficient evidence when each verdict is supported by adequate proof after all reasonable inferences are properly drawn in support of the jury's decision?

B. STATEMENT OF THE CASE.

1. Procedure

Respondents, KEELAN PREDMORE and MICHAEL PREDMORE (defendants) were charged as accomplices with malicious mischief in the first degree for causing over \$10, 000.00 worth of damage to a rental home from which they were being evicted. CP 1-2, 114-115. Their cases were called for trial on June 3, 2013. RP (6/3/13) 3. The trial court denied defense pretrial motions that challenged the sufficiency of the State's evidence. RP (6/3/13) 4, 15.

Defendants advanced a defense of general denial at trial. *See e.g.*, RP (6/4/13) 86, 90-100, 121-28. They renewed their motions to dismiss for insufficient evidence when the State rested. RP (6/4/13) 81-82. The trial court found facts sufficient to submit the case to the jury when all the evidence and reasonable inferences were viewed in a light most favorable to the State. RP (6/4/13) 86.

Mrs. Predmore rested without calling witnesses. RP (6/4/13) 86. Mr. Predmore called one witness. RP (6/4/13) 87, 100. Alibi was not advanced as a defense by either defendant. *See e.g.*, RP (6/4/13) 86, 90-100, 121-28. The trial court entertained objections on proposed jury instructions. RP (6/4/13) 102-11. Instructions on accomplice liability were withheld in accordance with defendants' objections. RP (6/4/13) 102, 105-07, 109-10, CP 23-24, 70 (Instruction No. 6), 75 (Instruction No. 11), 76 (Instruction No. 12). There was no objection to the offense-period language included in the court's instructions on the elements. RP (6/4/13) 111.

Mrs. Predmore renewed her motion to dismiss after summations, claiming the State failed to prove the relevant property damage occurred within the charged-offense period. RP (6/4/13) 135. Mr. Predmore did not join in the objection. RP (6/4/13) 135-37. The court denied Mrs. Predmore's motion because it was for the jury to decide whether the crime occurred within the offense period provided in the instruction. RP (6/4/13) 136-37. Mrs. Predmore did not ask the court to amend the offense-period included in the jury instructions. *Id.*

Defendants were determined to be guilty as charged on June 5, 2013. RP (6/5/13) 141-44. The trial court *sua sponte* introduced the topic of timely post-trial motions while scheduling a sentencing date with counsel. (6/5/13) 145-46. Mrs. Predmore quickly responded with a verbal motion for judgment notwithstanding the verdict. RP (6/5/13) 147. The

court told the parties post-trial motions must be timely reduced to writing. RP (6/5/13) 148.

Mrs. Predmore filed a timely motion to arrest judgment on June 10, 2013; a similar motion was timely filed by Mr. Predmore two days later. CP 80, 193; CrR 7.4(b). Defendants maintained there was insufficient proof they caused the relevant property damage or that the damage occurred within the alleged offense period. *Id.* The motions were granted over the State's objection. RP (8/2/13) 2, 6-12, 15-17; CP 99, 213. Findings and conclusions were entered on August 16, 2013. RP (8/16/13) 12-13; CP 100-05, 214-219. The State timely filed a notice of appeal. RP (8/16/13) 12; CP 108, 222.

## 2. Facts

Defendants rented a three bedroom single family home in Bonney Lake, Washington, from Seth Walter in February, 2010. RP (6/4/13) 23-25-26, 60. Defendants purportedly resided in the house with their son and daughter; however, no evidence of the children's physical presence in the house was adduced at trial. *See e.g.*, RP (6/4/13) 26-28, 31-32, 37-38, 66-67, 77-78, 91-95. The record is also silent as to the children's ages and physical capabilities. *See e.g.* RP (6/4/13) 27-28, 31-32, 37-38, 66-67, 77-78, 91-95; RP (8/16/13) 4-5; CP 101, 215. There was no evidence any one other than defendants were present in the house during the time period

relevant to the property damage at issue in their case. *See e.g.*, RP (6/4/13) 26-28, 31-32, 37-38, 66-67, 77-78, 91-95.

The house was in "[e]xcellent condition" without any observable damage when defendants took possession from Walter in 2010. RP (6/4/13) 27-28. Their landlord-tenant relationship was "good" at first, but soured overtime due to defendants' repeated failure to pay Walter the rent on time. RP (6/4/13) 28-29. Late payments persisted despite Walter's best efforts to accommodate defendants' schedule and consistent willingness to refrain from charging them late fees. RP (6/4/13) 29. Walter entered the house in March, 2012, to assess a problem with the refrigerator reported by Mrs. Predmore. RP (6/4/13) 31-32, 37-38. The house was not damaged at that time. RP (6/4/13) 37-38.

Defendants stopped paying rent in April, 2012. RP (6/4/13) 29. Walter posted a "three-day pay rent" notice at the house. RP (6/4/13) 31. Defendants were served notice of eviction near the end of April, 2012. RP (6/4/13) 30. The judgment evicting them was entered May 16, 2012. RP (6/4/13) 30. Defendants did not contact Walter thereafter. RP (6/4/13) 30-31.

Deputy Lessard responded to the house with Deputy Miller on May 17, 2012. RP (6/4/13) 66-67. Lessard spoke with Mr. Predmore in the upstairs dining room as he disassembled a table. *Id.* Mr. Predmore

told Lessard "they" were moving because "they" had been evicted. RP (6/4/13) 67. Mrs. Predmore was in the house at the time. RP (6/4/13) 77. There was no evidence adduced at trial to support an inference either of the defendants' children or any other people were present. *See e.g.*, RP (6/4/13) 27-28, 31-32, 37-38, 66-67, 77-78, 91-95.

Mr. Predmore "was agitated" by the deputies' visit. RP (6/4/13) 73. Lessard observed damage inside the house. RP (6/4/13) 67-68, 73. Mr. Predmore "didn't seem to have any concern over the damage" while talking to Lessard. RP (6/4/13) 67-68, 73. In response to defense questioning, Lessard testified Mr. Predmore did not admit to causing the damage; however, Walter reported his belief defendants were to blame. RP (6/4/13) 72. On redirect, Lessard confirmed Mr. Predmore did not complain about anyone else causing the damage. RP (6/4/13) 73. Deputy Miller observed holes in the walls as he walked upstairs through the hallway to a bedroom where he contacted Mrs. Predmore. RP (6/4/13) 77-78.

Walter entered the house on May 24, 2012, after defendants vacated the premises. RP (6/4/13) 32-33. He observed baseball to hammer sized holes in the interior walls; there were also holes in the doors and cabinets. RP (6/4/13) 33-45; CP 35, 147; Ex. 1-22. It appeared as if nail polish had been poured all over the carpet. *Id.* A previously undamaged

refrigerator inspected in March, 2012, was dented beyond repair. *Id.* The kitchen island appeared as if its electrical box had been broken by an object punched through the paneling. *Id.* A stair railing had been pulled out of the wall. RP (6/4/13) 36; Ex. 3. Four fist or baseball sized holes were punched into a door associated with the master bedroom. RP (6/4/13) 39-40, 44. And the words "Suck my dick" were written on a wall in the downstairs bathroom. RP (6/4/13) 43.

Walter filed a police report on May 24, 2013. RP (6/4/13) 46. Deputy Lessard responded to access the reported vandalism on May 25, 2013. RP (6/4/13) 59. He observed damage throughout the house. RP (6/4/13) 60. Some of the damage was identical to the damage he saw on May 17, 2013. RP (6/4/13) 67-68. Lessard could not discern if all the damage was present on May, 17, 2013, as he did not see the hallway or lower section of the house that day. RP (6/4/13) 68. The damage depicted in Exhibit No. 2 was consistent with someone putting a fist through the wall. RP (6/4/13) 62-63. Ten to twelve holes in the upper landing wall were clustered at head and knee height. RP (6/4/13) 64. Several of them bore a "wedged shape pattern" consistent with someone striking the wall with a "hatchet" or "splitting maul." RP (6/4/13) 65.

Walter employed a contractor to repair the damage. RP (6/4/13) 46. The repair cost \$13,700. RP (6/4/13) 52. Repairs in the kitchen cost

\$5,000. RP (6/4/13) 48-49. They consisted of replacing the refrigerator, cabinets, countertops, and kitchen island. RP (6/4/13) 48-49. It cost \$975 to patch the holes in the living room walls and to replace the carpet. *Id.* Patching holes in the hallway cost over \$300. *Id.* Repairs to the master bedroom cost approximately \$840. They consisted of patching and painting drywall as well as replacing the carpet and two doors. RP (6/4/13) 50. Another \$175 was required to repair the master bathroom. *Id.* Repairs to the second upstairs bedroom cost \$270. *Id.* Stairway repairs cost \$720. *Id.* The family room cost about \$750 to repair. *Id.* Downstairs bedroom repairs cost approximately \$530, with roughly another \$306 to fix the downstairs bathroom. RP (6/4/13) 51.

Mr. Predmore called building-supply representative Roger McElroy as a witness at trial. RP (6/4/13) 90. Mr. Predmore told McElroy he had damaged doors. RP (6/4/13) 92. A document McElroy created provides he gave Mr. Predmore a \$212 replacement estimate for five damaged interior doors on February 9, 2012. RP (6/4/13) 91-92, 94, 96; CP 35, 147, Ex. 25. McElroy also observed damage to a cabinet and the end panel of a kitchen island. RP (6/4/13) 92. Mr. Predmore did not mention that any other part of the house required repair. RP (6/4/13) 94-95. Nor did he ask McElroy to recommend anyone capable of working with drywall, kitchen appliances, or graffiti. RP (6/4/13) 94-95.

McElroy did not recall seeing any other damage inside the house, to include damage to the hallway or stairway he traversed to reach doors he assessed for replacement. *Id.* The damage noted by McElroy was not observed by Walter when he entered the house in March, 2012, and three of the eight doors identified as damaged in May 24, 2013, were not reflected on McElroy's five-door estimate. RP (6/4/13) 33-45, 96-97; CP 35, 147; Ex. 1-22.

C. ARGUMENT.

1. THE JURY VERDICTS CONVICTING DEFENDANTS OF FIRST DEGREE MALICIOUS MISCHIEF SHOULD BE REINSTATED OVER AN ARREST OF JUDGMENT GRANTED FOR INSUFFICIENT EVIDENCE SINCE EACH VERDICT IS SUPPORTED BY ADEQUATE PROOF AFTER ALL REASONABLE INFERENCES ARE PROPERLY DRAWN IN SUPPORT OF THE JURY'S DECISION.

An order arresting judgment is governed by CrR 7.4(a), which provides:

"Judgment may be arrested on the motion of the defendant for ... (3) insufficiency of the proof of a material element of the crime."

Appellate courts review the sufficiency of the evidence underlying a conviction on a State's appeal from arrest of judgment to determine "whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Coleman*, 54 Wn. App. 742, 746, 775 P.2d 986 (1989)(citing *State v. Green*, 94 Wn. App. 216,

220, 616 P.2d 628 (1980); *State v. Randecker*, 79 Wn.2d 512, 515, 487 P.2d 1295 (1971); *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 509 (1979)); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). It is the trial court's function under CrR 7.4 to assess the presence of evidence, but not to evaluate it. *Id.* "A trial court may not *weigh the evidence* to determine whether the necessary quantum has been produced to establish *some proof* of an element of the crime. It may only test or examine the *sufficiency* thereof .... The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses.... In other words, the trial court must concern itself only with the presence or absence of the required quantum." *Id.* at 746-47 (emphasis in original).

Defendants' jury found them guilty as charged after determining the State proved beyond a reasonable doubt that:

"(1) [O]n or about the period between 17th day of May and the 24th day of May, 2012, the defendant[s] caused physical damage to the property of another in an amount exceeding \$5,000; and (2) [T]he defendant[s] acted knowingly and maliciously; and (3) [T]his act occurred in the State of Washington...."

CP 70 (Instruction No. 6), 75 (Instruction No. 11), 76 (Instruction No. 12);

RCW 9A.48.070.<sup>1</sup>

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<sup>1</sup> RCW 9A.48.070 (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 ...."

The trial court's conclusions of law No. 2, 5-8 on arrest of judgment provide the State did not prove defendants: "acted in any way to cause the damage" proved at trial, "individually caused more than \$5,000 in damage to the residence, or caused the damage "on or about the period between 17th day of May and the 24th day of May, 2012. CP 104, 218-19.<sup>2</sup>

- a. The jury's verdicts should be reinstated as there was proof tending to establish circumstances from which the jury could reasonably infer defendants' maliciously caused more than \$5,000 in damage to Walter's rental house in retaliation for his decision to evict them.

"In determining whether the necessary quantum [of proof] exists, the trial court must assume the truth of the state's evidence and view it most strongly against the defendant and in a light most favorable to the state. It must draw all inferences that reasonably can be drawn therefrom in favor of the state's position.... In the same vein, the court is only empowered to determine whether there is 'substantial evidence' tending to establish circumstances on which a necessary element of a crime may be

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<sup>2</sup> Conclusion of Law No. 7 also provides the to convict instructions should not have included the "on or about" language as it was not included in the Information. CP 104, 219. The inclusion of that language was not error as the offense period is not an element of the crime, the offense period provided was consistent with the evidence adduced at trial, and there was no alibi defense presented; furthermore, the given offense period became law of the case when it was included in the court's instructions to the jury without any objection from the parties. See *State v. Hickman*, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998); *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991); *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996); *State v. Fischer*, 40 Wn. App.506, 511, 699 P.2d 249 (1985).

predicated. However, whether the circumstances tending to connect the defendant with the crime, or tending to establish intent exclude, to a moral certainty, every other reasonable hypothesis than that of the defendant's guilt, is, again, a question for the jury..." *Coleman*, 54 Wn. App.747 (citing *Randecker*, 79 Wn.2d at 517).

- i) The trial court impermissibly weighed the evidence of causation to decide it failed to rule out an abstract possibility another suspect committed the crime.

"The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict." *Coleman*, 54 Wn. App.747 (citing *Randecker*, 79 Wn.2d at 517-18). Courts are to "defer to the trier of fact's resolution of conflicting testimony, evaluation of the witness credibility, and generally its view of the persuasiveness of the evidence. *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005). A jury's verdict will be affirmed "if any rational trier of fact could have found the essential elements of the crime." *Id.* (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

The trial court in the instant case correctly concluded the State "proved" defendants "had the motive and opportunity to cause the damage..." to Walter's rental property. *See* CP 104, 219 (Conclusion No. 4). Whereas its conclusion the State failed to prove defendants caused the

relevant damage reflects an impermissible weighing of the evidence tied to a failure to draw all reasonable inferences most strongly in support of the verdicts. The trial court's apparent reason for weighing inferences of potential innocence against inferences that support the verdicts seems grounded in a concern the evidence failed to disprove what the court perceived to be an "alibi situation[.]" RP (8/2/13) 14. Neither defendant pursued "alibi" as a defense at trial; they relied on a defense of general denial. *See* RP (8/2/13) 14; *see also* RP (6/4/13) 86, 90-100. *Black's Law Dictionary*, pg. 79, 8th Ed. (2004)("Alibi" is "a defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time."); *State v. Adams*, 81 Wn.2d 468, 473, 503 P.3d 111 (1972).

The trial court's weighing of the evidence notably appears in its oral ruling on arrest of judgment where it reasoned defendants lived in the house "with other people" that "may have had a motive to cause th[e] damage." RP (8/2/13) 16. That verdict-undermining inference was reiterated when the court "recall[ed]" testimony pertaining to the age of defendant's children, opining one was a "teenager." RP (8/16/13) 4-5. Yet there was no evidence from which to draw any inference about the age of the children, let alone that they possessed any actual opportunity, physical ability, or mental capacity to commit the crime. *See e.g.*, RP (8/16/13) 5; RP (6/4/13) 27-28, 31-32, 37-38, 66-67, 77-78, 91-95. They were never even reported as being seen in the house. *Id.* The record is similarly

devoid of evidence related to potential visitors or intruders. So one would have to speculate to find anyone other than defendants caused the damage. They were observed inside the house one day after their eviction was entered behaving as if they were oblivious to the destruction that surrounded them in a house they were responsible for as they interacted with police while preparing to vacate the premises. RP (6/4/13) 23-25, 31-32, 37-38, 66, 77-78. 91-92. Defendants were also the only people contacted in the residence before the eviction. *Id.*

Even if an inference of an unidentified other suspect could be drawn from the evidence, despite defendants' failure to pursue such evidence at trial,<sup>3</sup> it was for the jury to weigh it against the competing inferences of defendants' guilt. The requirement that all reasonable inferences be drawn in support of the verdicts cannot be reconciled with verdicts being set aside because the court did not find the evidence of defendants' guilt sufficiently excluded the abstract possibility some unidentified other suspect committed the crime. "[I]t is unnecessary for the court to be satisfied of the defendant[s'] guilt beyond a reasonable doubt." See *Randecker*, 79 Wn.2d at 518.

- ii) The court's conclusion there "was no evidence"<sup>4</sup> either defendant caused the damage can only be

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<sup>3</sup> It is defendants' burden to demonstrate the admissibility of evidence that someone other than defendants committed the crime. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986); *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932).

<sup>4</sup> See e.g., RP(8/16/13) 12-13, 16.

explained in terms of a perceived deficiency of direct evidence of causation, but direct evidence is not a prerequisite for conviction.

The necessary quantum of proof to support a conviction may be established through circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). It is for that reason "[a] jury can infer the specific criminal intent of a defendant where it is a matter of logical probability." *Trout*, 125 Wn. App. at 409.

Malicious mischief as perpetrated in this case, *i.e.*, a *clandestine destruction* of rental property by its occupants, is among several categories of crime such as arson, child abuse, and conspiracy that by necessity are particularly dependent on circumstantial evidence as well as the inferences reasonably drawn therefrom. *See e.g.*, *State v. Young*, 87 Wn.2d 129, 137, 550 P.2d 1 (1976); *State v. Johnsen*, 76 Wn.2d 755, 758, 458 P.2d 887 (1969); *State v. Despain*, 152 Wash. 488, 489-91, 278 P. 173 (1929); *State v. Nichols*, 143 Wash. 221, 228, 255 P. 89 (1927); *State v. White Eagle*, 138 Wn. App. 716, 729, 158 P.3d 1238 (2007); *State v. Clark*, 78 Wn. App. 471, 475-80, 898 P.2d 854 (1995); *State v. Pennewell*, 23 Wn. App. 777, 782, 589 P.2d 748 (1979). Their perpetrators would often unjustly go unpunished absent a chance witness or confession if juries were not so entrusted to apply their common sense in drawing reasonable inferences from available circumstantial evidence. *See Id.*

Courts confronted with arson clandestinely committed like the malicious mischief clandestinely perpetrated by defendants have observed it to be "[a]n offense ... most often proved by circumstantial evidence ... It is a crime of particularly secret preparation and commission, and the State can seldom produce witnesses to the actual setting of such a fire.... Still, 'a well-connected train of circumstances may be as satisfactory as an array of direct evidence' in proving the crime ...." *Eagle*, 138 Wn. App. at 729 (citing *Young*, 87 Wn.2d at 137; *State v. Plewak*, 46 Wn. App. 757, 765, 732 P.2d 999 (1987)).

In such cases an adequate quantum of proof is present if the evidence supports *a reasonable inference the defendant possessed the motive, means, and opportunity to commit the crime where the defendant's conduct is inconsistent with innocence or manifests consciousness of guilt or where the circumstances otherwise do not support an innocent explanation*. See *Eagle*, 138 Wn. App. at 721-23, 729 (conviction supported where defendant had motive, opportunity, and means to set intentional fire she attempted to profit from); *U.S. v. Schlesinger*, 438 F.Supp.2d, 76 at 89 (2006) (motive to recover insurance for intentionally set fire and opportunity to commit the crime); *Bustamante v. State*, 557 N.E.2d 1313, 1320 (1990); see also *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982) (burglary proved by possession of recently stolen property accompanied by "slight corroborative evidence of other

inculpatory circumstances" such as an "improbable explanation" or failure to explain).

Courts confronted with cases involving children clandestinely abused by caretakers have responded by finding sufficient proof where evidence shows *control* of the child *at times relevant to a non-accidental injury coupled with conduct inconsistent with innocence*. *Pennewell*, 23 Wn. App. at 792 (control of the child at all relevant times and two explanations irreconcilably inconsistent with medical findings); *Com. v. Roman*, 43 Mass.App.Ct. 733, 735-36, 686 N.E.2d 218 (1997) (injuries not attributable to accident and inconsistent with custodian's explanation); *Thompson v. State*, 262 Ga. App. 17, 17-19, 585 S.E.2d 125 (2003) (both parents convicted where infant suffered non-accidental fractures neither parent could explain); *Warren v. State*, 475 So.2d 1027, 129 (1985).

Proof of defendants' clandestinely committed malicious mischief was adequate to support their convictions because the jury was provided proof of their motive, means, and opportunity to commit the crime combined with concerted conduct inconsistent with innocence that betrayed defendants' consciousness of guilt.

The malicious quality of defendants' crime was manifest in the purposeful nature of the extensive destruction. RP (6/4/13) 32-34, 44-48-52, 62-65; CP 35, 147; Ex. 1-22. A rational trier of fact could reasonably infer purposeful damage intended to vex from the comprehensive destruction throughout the house. *Id.* Malice was more overtly implied by

the demeaning message written on the downstairs wall in a place where Walter was likely to see it upon retaking possession. *See* RP (6/4/13) 43.

Defendants' unifying motive to destroy the house was established through proof of their eviction for non-payment following a landlord-tenant relationship strained over the years by defendants' repeated failure to pay the rent on time. RP (6/4/13) 28-29. Their mutual knowledge of the eviction was evinced through the notice Walter posted at the house, as well as Mr. Predmore's acknowledgment "they" were moving because of eviction when Mrs. Predmore was in the home. RP (6/4/13) 66-68, 73, 77-78. The record does not support assigning a motive to destroy the house to any other person evinced to have access to the house as the children were not factually demonstrated to possess the cognitive capacity to harbor motive.

Defendants were the only individuals with control over the house evidenced to possess the physical means to cause the relevant damage. Evidence of their joint entry into a rental agreement combined with their interactions with Waller, McElroy, and police supports a reasonable inference they were adults physically capable of puncturing walls, destroying appliances, spreading nail polish on carpets and writing obscene messages on a wall. RP (6/4/13) 28-29, 31-32, 37-38, 66-68, 73, 77-78, 92. One would have to speculate to envision the children as capable of non-accidental damage on the scale involved due to the absence

of information about them in the record. *Id.* At the same time the jury was entitled to infer the immense scale of the destruction reflected the concerted effort of two identically motivated adults with control over the premises. An inference of defendants' respective responsibility for the damage could find additional support in the graffiti's reference to its author's male genitalia, logically linking it to Mr. Predmore, while the use of nail polish to destroy the carpets created an plausible link to Mrs. Predmore. Further inferences equally linking defendants' to the damage could be drawn from the substantial destruction focused in the master bedroom and master bathroom, which was second only in cost of repair to the damage done to the kitchen where a major appliance was destroyed. RP (6/4/13) 48-51.

Defendants were the only individuals evinced to have any opportunity to commit the crime. RP (6/4/13) 28-29, 31-32, 37-38, 66-68, 73, 77-78, 92. They were observed alone in the house surrounded by destruction not present when Walter entered on March, 2012, as they prepared to vacate the premises one day after their eviction became final. *Id.* There is no evidence of another person with demonstrated capacity to cause the damage being present in the house during the relevant time period. *Id.* And a reasonable inference of defendants' guilt must be accepted as true despite the plausibility of competing inferences antithetical to the verdicts.

Proof of defendants' exclusive motive, means, and opportunity to collectively commit the crime was reinforced by proof they behaved in a manner inconsistent with innocence. Defendants were jointly responsible for the house as married tenants under the lease agreement, yet the evidence shows neither reported the destruction to Walter before they vacated the house, nor attempted to explain the destruction to him after they left. RP (6/4/13) 30-31. They simply walked away from a ruined house they received in excellent condition without saying a word to Walter about the destruction. The jury was free to infer defendants' concerted conduct betrayed their guilty conscience had it found innocent tenants would have reported or explained such damage if it was caused by another. Conduct inconsistent with innocence could also be inferred from the fact defendants did not report or explain the obvious damage to deputies present in the house one day after the eviction as defendants' prepared to move. RP (6/4/13) 72-73, 79.<sup>5</sup>

The jury could have further inferred Mr. Predmore's agitation at the police presence on May 17, 2013, reflected his concern the damage

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<sup>5</sup> The failure to report the damage to police was first elicited during Mr. Predmore's cross-examination without any objection from Mrs. Predmore. It is not improper to infer guilt from a defendant's pre-arrest silence when the defendant opens the door to it by eliciting information about pre-arrest interaction with police. *See State v. Kendrick*, 47 Wn. App. 620, 631, 736 P.2d 1079 (1987)(citing *State v. Vargas*, 25 Wn. App. 809, 812, 610 P.2d 1 (1980)).

would be more easily attributed to defendants as a result of the deputies' likely observations. *See* RP (6/4/13) 73. Mr. Predmore's seeming disregard for the damage could have been readily interpreted as an attempt to avoid drawing attention to it. The jury was equally free to find Mrs. Predmore betrayed her consciousness of guilt by failing to contact Walter about the damage when her March, 2012, call about a malfunctioning refrigerator showed she alerted Walter to problems with the house when they did not implicate her in a crime. *See* RP (6/4/13) 31-32, 37-38. Mr. Predmore's expressed need to repair five doors in the house combined with Mrs. Predmore's failure to alert Walter to that damage supported additional inferences of their mutual involvement in damaging the house, perhaps on more than one occasion inside the offense period provided in the jury's instructions. *See* RP (6/4/13) 31-32, 37-38, 92.

There was no evidence one defendant was withholding information to protect the other, or anyone else, and they were individually responsible for pursuing evidence another suspect committed the crime, even if the other suspect was a spouse. *See State v. Kendrick*, 47 Wn. App. 620, 631, 736 P.2d 1079 (1987)(citing *State v. Vargas*, 25 Wn. App. 809, 812, 610 P.2d 1 (1980)). And the fact an inference of guilt could reasonably adhere to both defendants does not logically exonerate either one of them. Had other suspect evidence been adduced it would have still been the jury's

province to decide whether the crime was more consistent with defendants' mutual responsibility. Countervailing inferences related to each defendant's role, or innocent explanations for a particular defendant's behavior, have no place in appellate review from arrest of judgment where all inferences are viewed most strongly in support of the verdicts.

- b. The jury's verdicts should be reinstated as there was proof tending to establish the crime was committed during the offense period that became law of the case when it was included in the jury instructions without objection.

An offense period is not a statutory element of malicious mischief in the first degree. RCW 9A.48.070. Modification of an offense period nevertheless included in the Information by adding "on or about" language to it in a jury instruction on the elements is consequently permissible provided a defendant has not raised an alibi defense or made a showing of substantial prejudice. *See State v. DeBolt*, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991). Jury instructions become the law of the case when they are not opposed at trial. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Incorporation of "on or about" language into the offense period component of a crime's elements permits the State to prove the crime was committed anytime within the applicable statute of limitations where a defendant has not raised an alibi defense. *See State v. Hayes*,

81 Wn. App. 425, 432-33, 914 P.2d 788 (1996). A defendant's failure to object to an instruction incorporating "on or about" language under those circumstances waives the right to challenge that language on appeal. *See State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006); *Hayes*, 81 Wn. App. at 432-33; *DeBolt*, 61 Wn. App. at 61-62.; *see also* RCW 9A.48.070; CrR 6.15(c); RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

Malicious Mischief in the first degree must be charged within three years of its commission. RCW 9A.48.070; RCW 9A.04.080(1)(h). Neither defendant advanced an alibi defense at trial. *See e.g.*, RP (6/4/13) 86, 90-100, 121-28. The jury was therefore properly instructed that it could only find defendant guilty if it found the State proved beyond a reasonable doubt that:

"(1) [O]n or about the period between 17th day of May and the 24th day of May, 2012, the defendant[s] caused physical damage to the property of another in an amount exceeding \$5,000; and (2) [T]he defendant[s] acted knowingly and maliciously; and (3) [T]his act occurred in the State of Washington...."

CP 70 (Instruction No. 6), 75 (Instruction No. 11), 76 (Instruction No. 12); RCW 9A.48.070 (emphasis added).

Defendants did not object to the offense-period language included in that instruction when given an opportunity to do so by the court. RP (6/4/13) 111. Each party then argued the case from that instruction. RP

(6/4/13) 112-33. Although Mrs. Predmore renewed her motion to dismiss, claiming the State failed to prove the relevant property damage occurred within the charging period, she did not request a modification to the offense period included in the jury's instructions. RP (6/4/13) 135. Mr. Predmore did not join in the objection. RP (6/4/13) 135-37. The court denied the motion after appropriately finding it was for the jury to decide whether that component of the elements had been proved. RP (6/4/13) 136-37.

The jury could have reasonably decided defendants caused the damage to Walter's house on or about the period between 17th day of May and the 24th day of May, 2012. An inference they caused the damage after March, 2012, was supported by Walter's observation that the damage present on May 24, 2012, was not present when he visited the house in March, 2012. RP (6/4/13) 37-38. Inferences moving the date of occurrence nearer to the time between May 16, 2012, when the eviction was entered and May 17, 2012, when damage was observed by police could be drawn from the fact that period reflected the moment defendants were motivated to retaliate against Walter for following through with their eviction and knew they would not be in the house long enough to be personally inconvenienced by the destruction.

The trial court's weighing of evidence relevant to the offense period is detectable where the court opined it was unknown whether the

five doors McElroy allegedly evaluated for repair in February, 2012, were ever replaced. RP (8/2/13) 14. The court apparently perceived that inference as tending to distance the damage from the offense period. RP (8/2/13) 14. Of course the jury was empowered to interpret the associated evidence differently than the court as there was evidence the damage McElroy noted in February, 2010, was no longer present when Walter entered the house in March, 2012. *See* RP (6/4/13) 33-45, 96-97; CP 35, 147; Ex. 1-22. The jury was equally at liberty to believe McElroy visited the house several months later than he believed as his inability to identify defendant after meeting him suggested a potential for error likely attributable to the thousands of houses he visits in the course of his employment. *See* RP (8/4/13) 90-91; CP 151 (Instruction No. 1: "[I]n considering a witness's testimony, you [the jury] may consider ... the quality of a witness's memory ... [and] the reasonableness of the witness's statements in the context of all other evidence...."). The instruction in McElroy's estimate to "Ship via DO delivery" could also have been interpreted as reflecting the order had been shipped, which would in turn explain why Walters did not observe that damage in March, 2012, and strengthen the inference all relevant damage occurred in the period surrounding May, 17, 2013, and May 24, 2012. *See e.g.*, RP (6/4/13) 130; CP 35, 147; Ex. 25. The trial court's expressed opinion on this issue further demonstrates it weighed inferences against defendants' guilt in

arriving at its decision to arrest judgment instead of drawing all reasonable inferences in support of the verdicts.

Notwithstanding the importance the trial court attached to McElroy's testimony, the jury was free to disregard the \$212 worth of damage McElroy allegedly observed in February, 2012, as irrelevant to the crime as there was evidence of approximately \$13,700 worth of damage on May 24, 2012, when only an amount more than \$5,000 worth of damage was required to convict defendants of first degree malicious mischief. RP (6/4/13) 33-45, 52 , 91-92, 94, 96; CP 35, 147, Ex. 1-22, 25. Aggregation of all damage was nevertheless permissible based on a reasonable inference that the February, 2012, repair request would have been made near in time to when the damage was caused to avoid detection in a rental property Walter had a history of visiting, as those dates would reasonably fall inside the three year statute of limitation. It would have also coincided with tension between defendants and Walter over late payments. The verdicts should be reinstated because a rational trier of fact could find the offense was committed within the offense period provided in the court's instructions as defendants' jury did when it found defendants guilty as charged.

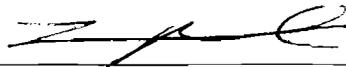
D. CONCLUSION.

The jury's verdicts were supported by sufficient proof as defendants were demonstrated to have exclusive motive, opportunity, and

means to commit the crime. They also behaved in a manner inconsistent with innocence, which could be reasonably interpreted as betraying their consciousness of guilt. It was for the jury to choose among competing inferences where they existed. The trial court correctly ruled at the conclusion of the State's evidence that there were facts sufficient to submit the case to the jury when all the evidence and reasonable inferences drawn therefrom were viewed in a light most favorable to the State. RP (6/4/13) 86. All reasonable inferences must now be drawn in support of the verdicts the jury reached. The fact that "[a] trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict." *Coleman*, 54 Wn. App.747 (citing *Randecker*, 79 Wn.2d at 517-18).

DATED: January 2, 2014.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



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JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>e</sup>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.

1-2-14 \_\_\_\_\_  
Date Signature

# PIERCE COUNTY PROSECUTOR

## January 03, 2014 - 10:26 AM

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