

FILED
Court of Appeals
Division III
State of Washington
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NO. 36389-9-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent

v.

JAMES SCALES,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

The government largely asserts that by establishing Mr. Scales acted with knowledge that it proved the essential elements of malice. Brief of Respondent at 13. This Court should find the government failed to prove malice and reverse Mr. Scales' conviction.

- 1. To prove malicious mischief in the second degree, the government must establish Mr. Scales acted with malice.**

The government is obligated to prove all elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3, § 22. While inferences can be made from the evidence, they “must be reasonable and ‘cannot be based on speculation.’” *State v. Hummel*, 196 Wn. App. 329, 357, 382 P.3d 592 (2016) (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

Malicious mischief in the second degree requires the government to prove Mr. Scales acted knowingly and maliciously when he caused the damaged alleged in the

information. RCW 9A.48.080. Proving only that Mr. Scales acted knowingly is insufficient to satisfy the government's sufficiency requirements. *Id.*

2. The government failed to prove Mr. Scales acted with malice.

The only issue argued at trial was whether the government proved the essential element of malice. RP 147. Malice is only proved where the government establishes Mr. Scales acted with "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110. This is not satisfied by proving knowledge, an element Mr. Scales did not contest at trial or on appeal.

a. Malice is not established by proving Mr. Scales acted with knowledge when he damaged property.

The government asks this Court to find that by proving knowledge, it met its burden of proving malice beyond a reasonable doubt. Brief of Respondent at 12. This interpretation of RCW 9A.04.110 makes meaningless the essential element of knowledge, something this Court has not entertained in the past.

This Court should continue reject this interpretation. Instead, this Court recognizes that when the legislature uses different words in the same statute, they must have different meanings. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000). RCW 9A.04.110 is clear that malicious mischief requires both knowledge and malice. It is insufficient for the government to only establish knowledge, when malice is also required. *See* RCW 9A.04.110.

Sufficient evidence has been found by this Court where the government established patent animosity or disregard for another's property, which is only speculative in this case. *See, e.g., State v. O'Connor*, 155 Wn.2d 335, 338, 119 P.3d 806 (2005) (defendant slashed ex-girlfriend's tires); *State v. Coria*, 146 Wn.2d 631, 634, 48 P.3d 980 (2002) (defendant broke mirror, slashed floor, smashed door, and broke bird cage of home shared with wife); *State v. Schaeffer*, 120 Wn.2d 616, 617, 845 P.2d 281 (1993) (defendant smashed mailboxes with baseball bat); *State v. Lopez*, 105 Wn. App. 688, 692, 20 P.3d 978 (2001) (defendant broke globe in victim's home); *State v.*

Vanvalkenburgh, 70 Wn. App. 812, 814, 856 P.2d 407 (1993) (defendant broke windows in Special Enforcement offices, stating he did it “for the public good”).

Unlike these, there was no evidence Mr. Scales acted with “an evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110. The government incorrectly interprets Mr. Scales’ argument as interpreting the statute to require motive evidence. Brief of Respondent at 10. This is not the case. Instead, this Court should examine the record of evidence of malice, which is absent. Mr. Scales did not have a malicious intent when he caused damage to the Backlin property. He had no relationship with the Backlin’s, whose property he damaged. RP 60. He appeared to be passed out when Ms. Backlin first saw him and was so debilitated that she thought he was an elderly person who needed help, or a person who was going into diabetic shock or having a heart attack. RP 50-51.

The prosecution did not show Mr. Scales acted with malice. Mr. Scales could not explain why he acted the way he

did, as he had no memory of driving onto the Backlin's property. RP 40, 119. No other witness testified Mr. Scales appeared to have any reason for doing what he did. RP 52. There did not appear to be any evidence he acted with malice, even if his actions were knowing. This Court should reject the government's argument that proving knowledge is sufficient to establish the essential element of malice.

b. The government asks this Court to speculate that Mr. Scales damaged property because of his "extreme anger" towards his girlfriend, which the record does not support.

In addition, the government asks this Court to speculate that Mr. Scales may have had an "extreme anger" towards his girlfriend. Brief of Respondent at 11. First, no evidence supports this speculation and it is improper to do so now. At best, the evidence supports that Mr. Scales got into a fight completely unrelated to his driving with his girlfriend, not that he exhibited any extreme anger. *See* RP 118. In addition, this is exactly the sort of speculation, this Court does not do. *Vasquez*, 178 Wn.2d at 16. Such speculation does

not support the government's argument and should not be relied on the find the government met this essential element.

3. Because the government failed to establish the essential element of malice, dismissal is required.

Malicious mischief requires the government to prove both malice and knowledge. The government's contrary interpretation of the statute is at odds with this Court's opinions and the plain language of RCW 9A.04.110. Brief of Respondent at 12. Nor should this Court speculate as to why Mr. Scales caused the damage that he did. *Vasquez*, 178 Wn.2d at 17 (reversing where proof of intent was speculative). The failure to prove Mr. Scales acted with malice requires reversal of Mr. Scales conviction. *Hummel*, 196 Wn. App. at 357. Mr. Scales therefore asks this Court to reverse his conviction.

B. CONCLUSION

Because the government failed to present sufficient evidence Mr. Scales acted with malice when he damaged property, he asks this Court to reverse his conviction for malicious mischief in the second degree.

DATED this 16th day of July, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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DIVISION THREE**

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)	
RESPONDENT,)	
)	
v.)	NO. 36389-9-III
)	
JAMES SCALES,)	
)	
APPELLANT.)	

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