

FILED
Court of Appeals
Division III
State of Washington
4/30/2019 4:24 PM

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

BRIEF OF APPELLANT

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. INTRODUCTION..... 1

B. ASSIGNMENT OF ERROR..... 2

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..
..... 2

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 5

**There was insufficient evidence to support Mr. Scales’
conviction for malicious mischief where the evidence did not
demonstrate an intent to vex, annoy, or alarm..... 5**

 1. The prosecution must prove all elements of the offense
 charged..... 5

 2. The prosecution failed to prove Mr. Scales acted with
 malice. 7

 3. Reversal is required. 11

F. CONCLUSION 12

TABLE OF AUTHORITIES

United States Supreme Court

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368
(1970) 5

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d
560 (1979) 6

Washington Supreme Court

Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 3 P.3d
741 (2000) 10

State ex rel. Pub. Disclosure Comm’n v. Rains, 87 Wn.2d 626,
555 P.2d 1368 (1976)..... 10

State v. Coria, 146 Wn.2d 631, 48 P.3d 980 (2002)..... 9

State v. O’Connor, 155 Wn.2d 335, 119 P.3d 806 (2005) 8

State v. Schaeffer, 120 Wn.2d 616, 845 P.2d 281 (1993) 9

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 6, 12

Washington Court of Appeals

State v. H.Z.-B., 1 Wn. App. 2d 364, 405 P.3d 1022 (2017), *rev.*
denied, 190 Wn.2d 1015 (2018) 8

State v. Hummel, 196 Wn. App. 329, 382 P.3d 592 (2016).....
..... 6, 12

State v. Lopez, 105 Wn. App. 688, 20 P.3d 978 (2001) 9

State v. Vanvalkenburgh, 70 Wn. App. 812, 856 P.2d 407
(1993) 9

Statutes

RCW 9A.04.110 7, 11
RCW 9A.08.010 8
RCW 9A.48.070 8
RCW 9A.48.080 6, 11

Constitutional Provisions

Const. art. I, § 22 5
Const. art. I, § 3 5
U.S. Const. amend. XIV 5

A. INTRODUCTION

There was no evidence presented at James Scales' trial for why he damaged the Backlin's property by spinning his car out in their fields and then driving into a trailer. He had no relationship with the Backlin's and no animosity towards them. Indeed, Mr. Scales could not even explain what happened, acknowledging his intoxication prevented him from remembering anything that happened between speaking to his girlfriend about wanting to go home and waking up in a jail cell.

In order for a conviction to stand, the government must present sufficient evidence to satisfy this Court beyond a reasonable doubt of all of the elements of the crime charged. Malicious mischief requires proof of knowledge and malice. Because the government failed to establish Mr. Scales acted with malice when he damaged the Backlin's property, reversal of Mr. Scales' conviction for malicious mischief in the second degree is required.

B. ASSIGNMENT OF ERROR

The prosecution presented insufficient evidence Mr. Scales acted maliciously when he damaged the property of another.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The prosecution has the burden of proving each element of the offense beyond a reasonable doubt. To prove malicious mischief in the second degree, the prosecution must prove Mr. Scales damaged property in excess of \$750 knowingly and maliciously. Malice requires proof of “an evil intent, wish or design to vex, annoy or injure another person.” Where the evidence did not establish Mr. Scales acted with malice when he damaged property, must this court reverse his conviction for malicious mischief in the second degree?

D. STATEMENT OF THE CASE

James Scales fell off the roof of a two story building two weeks before the government charged him with malicious mischief, driving while intoxicated, and reckless endangerment. RP 118. He suffered a full dislocation of his

shoulder. *Id.* The doctor also put 17 pins into his shin. *Id.* His injuries were so extensive that he required two surgeries. *Id.* The medical staff prescribed a number of medications, including blood thinners and oxycodone. *Id.* His foot remained in a cast at the time of his arrest. RP 30.

The day of this incident, Mr. Scales' girlfriend decided they should go to a friend's house to hang out. RP 118, CP 25. Mr. Scales did not intend to drink, but ultimately gave in to peer pressure, drinking some vodka. *Id.* He did not know how much he drank. *Id.* He did not know how he got behind the wheel of his car, as his girlfriend was supposed to be the driver, given his injury to his leg. RP 124.

Mr. Scales' last memory before his arrest was wanting to get home. RP 121-22. His next memory was waking in a jail cell, having completely blacked out his presence on the Backlin's property or his stay in the hospital. RP 95, 122. He had no memory of the Backlin's or their property and held no ill will towards them. RP 119. He was deeply sorry for his actions. RP 124.

Mr. Scales also loved his car. RP 121. It was a green Chevy Yukon in “dang good condition.” RP 83. Mr. Scales thought of this car as his “baby.” RP 121. He had no desire to wreck his car. *Id.*

Ms. Backlin first saw Mr. Scales driving with his head down, looking like he needed help as he turned on to her property. RP 50. She thought he was in diabetic shock or having a heart attack. RP 51, CP 24. She went into her house to call 911. *Id.* A neighbor saw Mr. Scales pull up to the house and honk his horn several times, while she was inside. RP 75. By the time she returned from the call, Mr. Scales was behind her house, spinning doughnuts with his car. RP 52, CP 11. No one could ever explained why he did this.

The police witnessed Mr. Scales back up and go forwards with his car two to three times striking the Backlin’s trailer each time. RP 27, CP 22. The officer then drove into Mr. Scales’ car, pinning it in place. RP 28. Mr. Scales had spun out his tires and that they had dug into the dirt. RP 34.

Again, no explanation was given for why he drove his car into the trailer several times.

Mr. Scales was incoherent when the police arrested him. RP 92. He had no idea where he was, although at one point he said he was at a buddy's house messing around. RP 40, 89. He was taken to the hospital before he was booked into jail. RP 122. A blood sample was taken, which returned a blood alcohol level of .28. RP 131. His blood also contained hydrocodone, within therapeutic levels. RP 132.

Mr. Scales waived his right to a jury. RP 14. The court convicted Mr. Scales as charged. RP 157, CP 26.

E. ARGUMENT

There was insufficient evidence to support Mr. Scales' conviction for malicious mischief where the evidence did not demonstrate an intent to vex, annoy, or alarm.

- 1. The prosecution must prove all elements of the offense charged.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *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. Proof beyond a

reasonable doubt of all essential elements is an “indispensable” threshold of evidence the government must establish to garner a conviction. *Winship*, 397 U.S. at 364.

For evidence to be legally sufficient, a “modicum of evidence” on an essential element is “simply inadequate.” *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Rational inferences from the evidence “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)).

To convict Mr. Scales of malicious mischief in the second degree, the prosecution was required to prove he “knowingly and maliciously” caused physical damage to the property of another, causing damages exceeding \$750. RCW 9A.48.080. It does not meet its burden by showing only that the accused acted knowingly. The government must also demonstrate a malicious intent. *Id.*

2. *The prosecution failed to prove Mr. Scales acted with malice.*

By statute, “malice” is defined as:

[A]n evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act of omission of duty betraying a willful disregard of social duty.

RCW 9A.04.110.

Mr. Scales may have known he was driving his car satisfying the knowledge element, but without more, his knowledge does not meet the legal threshold of malice. RCW 9A.110. The prosecution presented no evidence Mr. Scales was motivated by malice toward another and offered no explanation for why he committed the acts he did. RP 155. Mr. Scales had no relationship with the Backlin’s and no reason to harbor any malice towards them. RP 120. No evidence showed he harbored malice towards any other persons when he damaged the Backlin’s property. In fact, Mr. Scales told the police he thought he was on a buddy’s property messing around. RP 89.

Malicious mischief requires the person act both “knowingly and maliciously.” RCW 9A.48.070(1). The malice element of malicious mischief demands more than bare knowledge the act is against the law, or the requirement of malice would be superfluous. *See* RCW 9A.08.010(1)(b) (a person acts “knowingly” when “aware” that “facts exist which are described by a statute defining an offense”).

“The court must give effect to all language within the statute so that no portion is rendered meaningless or superfluous.” *State v. H.Z.-B.*, 1 Wn. App. 2d 364, 366, 405 P.3d 1022 (2017), *rev. denied*, 190 Wn.2d 1015 (2018). The legal element of malice exists in addition to the mens rea of knowledge.

The difference between malice and simple awareness a person is committing a crime is apparent from the types of cases where malice is found, involving patent animosity or disregard for another’s property, and no alternate motive. *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").

There was no evidence of Mr. Scales intent. By all accounts he had no relationship with the Backlin's, whose property he damaged. RP 60. When Ms. Backlin first saw Mr. Scales in his car, he appeared to be passed out. RP 50. He 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 51.

There was testimony suggesting Mr. Scales believed he was somewhere else. Before going into the field to spin doughnuts, Mr. Scales pulled up to the house where he

honked his horn several times. RP 75. Mr. Scales indicated to the police when he was arrested that he had no idea where he was. RP 40. There was no suggestion this was hostile or otherwise done with malice.

And while the evidence showed that Mr. Scales hit the Backlin's trailer several times with his car, this also did not establish he did it for malicious reasons. Given his lack of sobriety along with the cast on his leg, hitting the trailer may have been because he was unable to properly control his car. And while the testimony demonstrated he backed into the trailer several times, it was clear his car was stuck when he did this. RP 34. The officer witnessed several skid marks, where his tires became trapped. *Id.*

When the legislature uses different words in the same statute, courts must presume the words have different meanings. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976)). In addition to knowledge, malice requires proof

of an intent to vex, annoy, or injure another person. RCW 9A.04.110. It is insufficient to only establish knowledge.

The prosecution did not show Mr. Scales was trying to vex or injure anyone. 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.

At trial, Mr. Scales challenged whether the government established the requisite mens rea for this crime. RP 147. Mr. Scales may have intentionally driven his car onto the Backlin's property, but without evidence of malice, this is insufficient to establish this essential element. RCW 9A.48.080. This Court should hold that there was insufficient evidence of malicious mischief in the second degree.

3. Reversal is required.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Scales

acted with malice, the judgment may not stand. *Vasquez*, 178 Wn.2d at 17 (reversing where proof of intent was purely speculative). The prosecution's failure to prove Mr. Scales acted with malice against a person means it did not prove all essential elements of malicious mischief in the second degree. Reversal of his conviction for malicious mischief is required. *Hummel*, 196 Wn. App. at 357.

F. 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 30th day of April 2019.

Respectfully submitted,

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

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> GREGORY ZEMPEL, PA [prosecutor@co.kittitas.wa.us] KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5 TH AVE STE 213 ELLENSBURG, WA 98926	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> JAMES SCALES 81 TROON CT CLE ELUM, WA 98922	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2019.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

April 30, 2019 - 4:24 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36389-9
Appellate Court Case Title: State of Washington v. James Floyd Eugene Scales
Superior Court Case Number: 17-1-00223-1

The following documents have been uploaded:

- 363899_Briefs_20190430162249D3637004_0768.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.043019-03.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190430162249D3637004