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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
No. 36389-9-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAMES FLOYD EUGENE SCALES,

Defendant/Appellant

Second Amended Respondent's Brief

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I. IDENTITY OF RESPONDENT

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that this Court deny the Petitioner's request to reverse his conviction for Malicious Mischief in the Second Degree.

III. ASSIGNMENT OF ERROR

- A.** The State presented evidence beyond a reasonable doubt to establish that the Appellant, James Scales, committed the crime of Malicious Mischief in the Second Degree on August 21, 2017.

IV. STATEMENT OF THE CASE

The appellant, James Scales was charged with the crimes of Malicious Mischief in the Second Degree, Driving Under the Influence, and Reckless Endangerment for his actions occurring the afternoon of August 21, 2017, in Kittitas County, Washington. Nickie Darling¹ (Backlin) testified that she had been at her rural

¹ Ms. Darling resided at 5171 West Nelson Road with Mr. Backlin at the time of the incident. Prior to trial, Ms. Darling and Mr. Backlin were married. The State will refer to her hereinafter as Ms. Backlin.

residence of 5171 Nelson Siding Road in Cle Elum when she had observed a green Yukon driving slowly down the road. RP 48-50. She saw the Yukon stop at her parents' driveway across the road, and then turn and drive in a swerving manner up the 100 yard driveway towards her home. RP 50, 51. Ms. Backlin thought that the driver had passed out, so she took a photo of the vehicle and then went inside to call 911. *Id.* She was still speaking to the 911 dispatcher as she went to open the door of the Yukon. RP 52. However, based on the information she received from the dispatcher, Ms. Backlin ran back into her home and locked the door. RP 52. Mr. Scales then began driving the Yukon off onto the back part of the 15 acre property where he began spinning "doughnuts." RP 52, 54. Ms. Backlin observed Mr. Scales perform three to four doughnuts and then proceed to ram a utility trailer parked near the house, repeatedly hitting it, backing up, going backwards and then again driving forward.² RP 53. Mr. Scales' vehicle got stuck on the trailer at least twice, but Mr. Scales was

² The testimony at trial was that Mr. Scales would ram the utility trailer, back up, and then ram it again. RP 34, 53, 76. Deputy Thomas specifically testified that as he pulled up, the vehicle had "just rammed the trailer, and so I pulled my patrol car – behind that vehicle, pinning my bumper against the SUV's rear bumper so that it couldn't back up; so it was basically it was blocked between the trailer and my patrol car." RP 28. Appellant mistakenly asserts that his ramming of the utility trailer occurred as he was backing. BA 10.

able to get unstuck, and resume ramming the trailer. *Id.* Ms. Backlin had a clear view from a window of her home and testified that she believed Mr. Scales hit the trailer some 12 or more times. RP 52, 53. Ms. Backlin testified that Mr. Scales was “flooring it in Drive and Reverse.” RP 65. With 15 acres of property, Ms. Backlin testified that Mr. Scales could have left in any direction. RP 54. Ms. Backlin stated that they had not been able to use the trailer since the incident and that lumber which had been strapped on to the trailer had been knocked off and damaged by being driven over, as had two transmissions that the ramming had knocked off of the trailer. RP 55, 57, 62. As a result of Mr. Scales’ actions, the utility trailer was pushed some 40 to 50 yards from its original position and ended up rotated some 180 degrees. RP 34, 62. Kittitas County Sheriff’s Office (KCSO) Deputy Dave Thomas testified that the neck of the trailer was twisted and banged up, and that there were car parts and lumber scattered all over the place. RP 34.

Ms. Backlin later had a “collision guy” inspect the trailer.

According to her testimony:

He said both of the axles were broken, needed to be replaced. The tongue of the trailer, which was actually attached to the sides of the trailer, were (sic) completely broken. He said every leaf and spring, the tires -- leafs and springs were broken, the tires are

pointing in the opposite direction than the tongue of the trailer. The fenders, every -- he said every inch of it is garbage, it's twisted. RP 63.

Thomas Korfus, a neighbor of Ms. Backlin's testified that he and his uncle were at the mailbox when they heard a vehicle revving its engine, and observed a Blazer stopped in the road. RP 72. The driver (later identified as Mr. Scales) came within 50 to 60 feet of Mr. Korfus and his uncle, and after the two men had moved away, within six inches of the mailbox. RP 73, 74. He testified that he observed Mr. Scales drive into the ditch; run over the telephone box and street sign; exit the ditch; cross the road; and drive approximately halfway into the opposite ditch. RP 78-80. He then saw Mr. Scales drive up towards Ms. Backlin's home, pull in, honk, and then go out towards the field and do three to four donuts. RP 75. Mr. Korfus then saw Mr. Scales' vehicle stop, head toward the trailer, and ram it some four to five times. RP 75, 76.

KCSO Deputy Dave Thomas, who lives approximately one mile from the Backlin property was just logging into duty when he received the call about the incident. RP 25, 26. As he drove towards the area, he observed Thomas Korfus and

another gentleman pointing toward the Backlin residence at Talmadge and West Siding Road. RP 26. Deputy Thomas saw a cloud of dust, and observed a dark colored SUV backing up and driving towards an object, striking it two to three times and moving it as it did so. RP 27, 28. As the deputy pulled up, Mr. Scales was ramming the trailer. *Id.* Because of his observations, Deputy Thomas pinned Mr. Scales' vehicle against the trailer with his patrol car. RP 28. He then went with his rifle to the passenger side of Mr. Scales' vehicle and ordered Mr. Scales to show him his hands. RP 29. Rather than comply, Mr. Scales began swearing at the deputy. *Id.* In response, Deputy Thomas told him "if you don't show me your hands or if you pull something out, you're likely to be shot." *Id.* At that point, Mr. Scales lifted his hands and showed them to the deputy. *Id.* Deputy Thomas told Mr. Scales to turn the car off and exit out the driver's door. *Id.* While he could not recall whether or not Mr. Scales turned the car off, Deputy Thomas testified that Mr. Scales did get of the vehicle out while cursing and swearing at him. RP 29, 30.

While this was occurring, Washington State Patrol Sergeant Bart Olson arrived at the Backlin residence. RP 30, 84. Sergeant Olson also testified that Mr. Scales was cursing and swearing, but stated that he appeared to understand what was going on. RP 31. He testified that Mr. Scales appeared to understand commands, and that his only apparent confusion was that he did not know where he was. RP 85. Sergeant Olson testified that Mr. Scales seemed to have no confusion about having driven to the Backlin property. RP 90. Sergeant Olson observed that Mr. Scales exhibited a strong odor of intoxicants, had glassy, bloodshot, watery eyes, had slurred speech, was cursing and screaming and appeared unsteady. RP 31. When Mr. Scales was told that he was under arrest, he began spitting while cursing and swearing. *Id.* Although he answered a few questions, Mr. Scales soon returned to spitting, swearing, and cursing. *Id.* Mr. Scales' behavior continued to escalate in the back of the patrol car and he was eventually transferred to Deputy Nale's truck. RP 32. According to Deputy Nale, Mr. Scales continued to scream obscenities, but appeared to know who he was interacting

with, and was not confused by the presence of law enforcement. RP 92, 93. Not only did Mr. Scales not exhibit any confusion as to why he had been placed under arrest, but he also threatened Deputy Nale for doing his job. RP 97. Deputy Thomas testified that Mr. Scales exhibited no confusion about being under arrest. RP 141.

Deputy Thomas took pictures at the scene of big marks where he could see that Mr. Scales' vehicle had been spinning vehicles, and doing doughnuts. RP 33.

Mr. Scales was eventually transferred to the hospital for medical clearance and to obtain a warrant for a blood draw. RP 95. Dawn Sklerov, a forensic scientist with the Washington State Patrol Toxicology Lab, testified that the test result of Mr. Scales' blood was .28. RP 128, 138. Mr. Scales was released from the hospital to be booked at the Kittitas County Jail at approximately 9 p.m. that night. RP 101, 119, 142.

V. ARGUMENT

The State proved each and every element of malicious mischief committed by the Appellant on August 21, 2017, in an amount exceeding \$750.

To find the Appellant, James Scales, guilty of the crime of Malicious Mischief in the Second Degree, the Court had to find that:

On or about August 21, 2017, James Floyd Eugene Scales, did knowingly and maliciously cause physical damage to the property of another in an amount exceeding \$750. CP 1.

Appellant does not seem to be challenging that fact that he acted knowingly, but rather contests whether or not the State proved that Mr. Scales acted “maliciously.” BA 6, 7.

The term “malice” in RCW 9A.48.080 is defined in RCW 9A.04.110(12) as follows:

“Malice” and “maliciously” shall import an 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.³ Or an act done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

Appellant mistakenly argues that to sustain the charge of malicious mischief, it is incumbent upon the State to prove a vindictive motive on the part of Mr. Scales, that in essence, he bore the Backlins some ill will. While motive is often helpful in a criminal case, it is rarely, if ever, required. An individual, in a hotel room, who has just had a fight with another, might punch the wall of that

³ Washington Pattern Instruction Criminal 2.13 stops at this point in the definition of “malice” and “maliciously,” noting that the remainder of the statute may permit an impermissible inference, and the potential of reversible error.

hotel room, causing damage to the hotel, with which the individual had no personal relationship, and toward whom, the individual held no animosity. The State anticipates that Mr. Scales would argue that it was the animosity of the one individual towards the other that was transferred to the eventual “victim,” i.e., the hotel room.

However, the testimony in Mr. Scales case also indicated an extreme anger, perhaps towards his girlfriend with whom, according to his testimony, he had had a fight which led to his driving his vehicle after having consumed alcohol, and so soon after his recent surgery. RP 118, 119. His actions in conjunction with his behavior circumstantially support an inference of an intent to injure another.

Even if this were set aside however, his knowing acts in disregard to the rights of another, satisfies the element of “maliciously” having caused the damage. The fact-finder may infer malice from an act done in willful disregard of the rights of another. *State v. Ratliff*, 46 Wn.App. 325, 730 P.2d 716 (1986). An individual who shoots at an apparently abandoned car for target practice and then later learns that the vehicle is not abandoned, has knowingly caused damage by an act done in willful disregard of the rights of another. An individual, who as a passenger in a car, swings a baseball bat at neighborhood mailboxes has done so both

with an intent to injure another, and in willful disregard for the rights of another. It is not incumbent upon the State to prove that the defendant in that case knew the box holders. Graffiti is often committed on public overpasses which are the property of the State, and may be seen by the perpetrators as acts of expressionism. Nevertheless, it is a knowing act done in willful disregard of the rights of another. The law does not require that each of the definitions of malice/maliciously be satisfied, e.g., evil intent, an intent to vex, etc.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* See also *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *State v. DeVries*, 149 Wn.2d 842, 849,

72 P.3d 748 (2003), *State v. Partin*, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977).

In its second paragraph, WPIC 5.01 states that “[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.” Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Mr. Scales did not just strike the Backlins’ utility trailer once, he repeatedly rammed it, sufficiently hard enough to move it some 40-50 yards, dislodge its contents, turn it some 180 degrees, and render it totally useless.

VI. CONCLUSION

The Court found that the Appellant, James Scales, had driven up the Backlins’ drive, honked his horn, knowingly engaged in multiple doughnuts in their field, and then repeatedly rammed their utility trailer over and over until prohibited from continuing to do so by being pinned in place by Deputy Thomas’s patrol vehicle. His acts exhibited an intent to injure another, and were acts done in willful disregard of the rights of another. Appellant does not contest

that his acts were knowing but mistakenly asserts that it was incumbent upon the State to prove the underlying motivation of his acts. The Court found that his repeated actions spoke for themselves. For the foregoing reasons, the State respectfully requests that Appellant's motion to reverse his conviction and remand for dismissal with prejudice be denied, and that Mr. Scales' conviction for Malicious Mischief in the Second Degree be upheld.

Dated this 5th day of July, 2019.



Carole L. Highland WSBA #20504
(Deputy) Prosecuting Attorney

PROOF OF SERVICE

I, Brandi Willett, do hereby certify under penalty of perjury that on 5th day of July, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Second Amended Respondent's Brief, Court of Appeals of the State of Washington, Division III, No. 36389-9-III:

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Comments:

The last line of the argument incorrectly stated the testimony indicated that the trailer had been pushed some 40-50 feet while the actual testimony was that it had been pushed some 40-50 yards. The purpose of the second amended is to correct this inconsistency as well as two typos.

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