

NO. 63359-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MARVIN MALOY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. The invited error doctrine precludes appellate review of jury instructions that the defendant proposed at trial. Here, the defendant proposed both of the instructions he now claims are in error. Does this preclude appellate review of these instructions?

2. Jury instructions are proper when they are supported by trial facts and are not confusing. Here, the facts had a "rational connection" to the instructions given, and the instructions were sufficiently clear. Were the instructions given proper?

2. Evidence is sufficient to show the element of malicious intent if, viewed in a light most favorable to the State, any rational trier of fact could be satisfied beyond a reasonable doubt of this element. Here, the defendant repeatedly rammed into a tow-truck with his repossessed vehicle after previously threatening to damage the tow-truck. Was there sufficient evidence of malice in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Marvin Maloy was charged by information with First Degree Malicious Mischief for maliciously causing over \$1500

in damage to a tow-truck on July 25, 2008. CP 1. A trial began on March 19, 2009, and concluded on March 25, when the jury found Maloy guilty as charged. CP 18; 4RP<sup>1</sup> 62. The trial court imposed a standard range sentence. CP 39-41; 5RP 8. Maloy now appeals his conviction. CP 99.

## 2. TRIAL FACTS

On July 25, 2008, Joel Preston, President of Western Automotive Recovery, received a repossession order from Wachovia bank to retake possession of a Lincoln Navigator. 3RP 8, 68, 74, 81. It was a vehicle he knew, having tried to repossess the same Navigator from Marvin Maloy only two years earlier. 3RP 76. During that previous incident on January 20, 2006, Preston and his partner went to Maloy's house and contacted Maloy's wife at the front door. 3RP 77-78. At that time, the Navigator was in the back of the house, and Preston asked for the keys to the vehicle so it could be repossessed. Id. A vehicle cannot be repossessed unless it is in a driveway or out in the open. 3RP 96-97.

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to as follows: 1RP (03/19/09); 2RP (03/23/09); 3RP (03/24/09); 4RP (03/25/09); 5RP (04/17/09 sentencing hearing).

During this conversation, Marvin Maloy drove a backhoe over to Preston's tow-truck in the driveway and said that he was going to flip the tow-truck with the backhoe if they did not leave. 3RP 79, 97-98. A backhoe is a piece of construction equipment that has a bucket on the front to move materials. Id. Maloy was agitated, and his wife was trying to stop him. 3RP 79-80. After this threat to flip their tow-truck, Preston and his partner left the scene. 3RP 80.

The prior incident with Maloy made them very careful two years later when they received the 2008 repossession order from the bank for the same Navigator. 3RP 77, 81. This prior threat to their property by Maloy affected their plan on how to repossess the Navigator. 3RP 81. Preston told his employees, Joshua and Shane Lee, to be careful, secure the vehicle, and leave. 3RP 17, 81. Normally, they would contact the owner as a courtesy, if a situation was not likely to be hostile or dangerous. 3RP 10-12, 19. Safety of everyone is the priority, and since they are not allowed to carry weapons, they wanted to get in and out as quickly as possible. 3RP 12. Because they were on alert, they scheduled the repossession for the early morning hours. 2RP 44; 3RP 42.

Joshua Lee and his partner arrived at Maloy's house after midnight, backed up their truck, hooked up the Navigator to it, and secured the Navigator's tires with straps. 2RP 44; 3RP 22, 42. As Joshua and Shane Lee were back in the tow-truck getting ready to tow the repossessed Navigator, Joshua Lee could see in his mirrors that Maloy was running out of the house in his underwear. 3RP 23, 63. Maloy jumped into the Navigator and used his keys to start the car as the car was being towed. 3RP 23. Recognizing the hostile situation developing, Shane Lee called the police. 3RP 26.

Joshua Lee towed the Navigator with Maloy in it for about a half-block, parked the tow-truck, and got out to talk to Maloy. 3RP 27. Maloy was rocking the Navigator, putting the car in drive and reverse. 3RP 27. Lee told Maloy that the police had been called and that with the Navigator secure, Maloy would not be able to remove it from the tow-truck. 3RP 28. Maloy continued to drive the car forward and in reverse, breaking the straps to the tow-truck, which caused the Navigator to fall onto the tow-truck. 3RP 28-29. As Maloy continued to drive the Navigator forward and in reverse, he dropped its suspension, ripped its tires, and continued to drive into the hydraulic lift of the tow-truck. 3RP 28-31. Eventually, the Navigator was no longer drivable, but Maloy continued to ram it into

the tow-truck breaking the tow-truck's hydraulic lines and electrical connections. 3RP 29-33. In total, Maloy hit the truck 30 to 40 times. 3RP 30.

As Renton Police Officer Desiree Morley approached the scene, she could hear twisting metal, smell burning rubber, and see the Navigator driving and reversing several times before she activated her lights. 2RP 24-25, 29. When she got to the scene, she asked Maloy to exit the Navigator, which he did. 2RP 25-26; 3RP 34-35. The tow-truck lay there leaking hydraulic fluid. 3RP 65. The total damage to the tow-truck exceeded \$2200. 3RP 85-86, 106.

Maloy told Renton Police Officer Cassidy Steed that he knew the Navigator was being repossessed. 2RP 52. When asked why he was ramming the tow-truck Maloy said, "Because they were taking my vehicle." Id.

C. ARGUMENT

1. THE INVITED ERROR DOCTRINE PRECLUDES REVIEW OF ANY INSTRUCTIONAL ERROR.

Maloy claims that the trial court improperly instructed the jury. He argues that this Court can review this error for the first

time on appeal because it amounts to a constitutional error "that should have been obvious to the trial court." Appellant's Brief at 12. Maloy neglects to point out that he proposed the two instructions he now challenges. Because the invited error doctrine precludes review of any instructional error, even one of constitutional magnitude, when the instruction was proposed by the defendant, his claim fails.

"The invited error doctrine precludes review of any instructional error -- even one of constitutional magnitude -- where the challenged instruction is one that was proposed by the defendant." Id. (citing State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). The defendant invites the error when the trial court gives a jury instruction almost unchanged from what the defendant proposed. State v. Studd, 137 Wn.2d 533, 538-39, 973 P.2d 1049 (1999).

The invited error doctrine applies whenever the defendant at trial proposed the now challenged jury instruction. Id. at 546-47. This doctrine exists so that a defendant may not "request an instruction and later complain on appeal that the requested instruction was given." Id. at 546 (quoting Henderson, 114 Wn.2d at 345). Our Supreme Court has held that this is a strict rule that

does not allow for any flexibility, regardless of the circumstances or the nature of alleged constitutional error. Studd, 137 Wn.2d at 546-48. Even if the error is based on a WPIC<sup>2</sup> instruction or follows a United States Supreme Court determination that a legal presumption is now unconstitutional, the invited error doctrine still applies, and precludes appellate review. Id. at 547-48.

On appeal, Maloy challenges two instructions given by the trial court: (1) jury instruction number 11<sup>3</sup>, relating to the definition of malice, and (2) jury instruction number 14<sup>4</sup>, relating to the use of force as a defense to recover property.

During the trial, Maloy proposed five instructions for the court to consider giving to the jury. CP 12-17. Two of these proposed

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<sup>2</sup> Washington Pattern Jury Instructions: Criminal.

<sup>3</sup> The trial court's jury instruction number 11 states:

Malice and maliciously mean an evil intent, wish or design to vex, annoy or injure another person. Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

Instr. No. 11; CP 33.

<sup>4</sup> The trial court's jury instruction number 14 states:

It is a defense to a charge of malicious mischief that the force used was lawful as defined in this instruction.

The use of force upon or toward the property of another is lawful when used in preventing or attempting to prevent a malicious interference with personal property lawfully in that person's possession, and when the force is not more than is necessary. ...

Instr. No. 14; CP 36.

instructions are the exact two he now challenges.<sup>5</sup> CP 13, 15.

These two proposed instructions are verbatim the same as those given in the trial court's jury instructions 11 and 14. CP 13, 15, 33, 36. Accordingly, Maloy proposed the two instructions he now challenges for the first time on appeal. Any error resulting from these instructions was thus invited by Maloy. The strict rule of the invited error doctrine applies and precludes appellate review of this matter.

## 2. THE JURY INSTRUCTIONS WERE PROPER.

In the event this Court nevertheless reaches the merits of this claim, the instructions were proper. Maloy argues for the first time on appeal that the trial court's jury instructions 11 and 14 were

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<sup>5</sup> The defense proposed instruction number 3 states:

Malice and maliciously mean an evil intent, wish or design to vex, annoy or injure another person. Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

Defense Proposed Instr. No. 3; CP 15.

The defense proposed instruction number 1 states:

It is a defense to a charge of malicious mischief that the force used was lawful as defined in this instruction.

The use of force upon or toward the property of another is lawful when used in preventing or attempting to prevent a malicious interference with personal property lawfully in that person's possession, and when the force is not more than is necessary. ...

Defense Proposed Instr. No. 1; CP 13.

erroneous, because (1) jury instruction 11 allowed for an improper inference of malice, and (2) both instructions were in conflict and confusing to the jury. He is incorrect as to both claims.

a. The Definition Of Malice Was Proper.

The trial court defined malice in jury instruction 11, pursuant to the WPIC instruction.<sup>6</sup> CP 33. This definition provides a permissive inference of malice if an act is "done in willful disregard of the rights of another." Id.; State v. Ratliff, 46 Wn. App 325, 330, 730 P.2d 716 (1986). Such a permissive inference is proper if the inferred fact of malice flows "more likely than not" from the conduct of the defendant. Id. (citing County Court of Ulster Cy. v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); State v. Johnson, 100 Wn.2d 607, 616, 674 P.2d 145 (1983).

There must be a "rational connection" between the proved fact and the inference of malice. Ratliff, 46 Wn. App. at 330. In Ratliff, the situation proved by the facts of the case was more

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<sup>6</sup> See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.13, at 44 (3d ed. 2008); see supra n.2.

consistent with malicious intent than with non-malicious intent. Id. (holding that where a defendant in frustration continues the destructive act even after the goal of the otherwise inoffensive behavior is no longer possible, there is a "rational connection" between the facts and the inference of malice).

The same situation exists here, where Maloy knew that his car was being repossessed, so he rammed the Navigator into the tow-truck 30 to 40 times, continuing the destruction even after the Navigator was no longer drivable. Maloy admitted he was doing this ramming because the Navigator was being repossessed from him. He operated with the same motive to destroy the tow-truck that he harbored two years earlier when he threatened to flip the tow-truck upside down with his construction equipment. These facts are more likely than not consistent with malicious intent.<sup>7</sup> Accordingly, the "rational connection" exists between the inference and the proved facts. Thus, the trial court's jury instruction 11, which defined malice, was proper.

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<sup>7</sup> Maloy's malicious intent is discussed more fully in the next section. See Infra C.3.

b. The Instructions Were Not Confusing.

Instructions are proper if, when read as a whole, they are readily understood, not misleading to the ordinary mind, and are sufficiently clear. State v. Marohl, 151 Wn. App. 469, 477, 213 P.3d 49 (2009). A further test is whether the instructions given allow counsel to satisfactorily argue his case theory to the jury. State v. Hardy, 44 Wn. App. 477, 480-81, 722 P.2d 872 (1986) (quoting State v. Dana, 73 Wn.2d 533, 439 P.2d 403 (1968)).

Jury instructions 11 and 14 are neither in conflict nor confusing.<sup>8</sup> These two instructions complement each other, given Maloy's apparent trial strategy that he was lawfully defending his property from repossession and lacked malice. Defense agreed that in proposing instruction 14, they wanted the jury to decide whether Maloy was preventing a "malicious interference" with his personal property, since he was arguing the Navigator was lawfully in his possession. CP 36; 3RP 160.

Thereafter, Maloy was able to argue his theory to the jury. 4RP 30-55. There is nothing inconsistent with an instruction defining malice to be when a defendant disregards the rights of

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<sup>8</sup> See supra n.2, 3.

another, and Maloy's instruction arguing that he was lawfully entitled to defend his own property rights. Ultimately, it just creates the factual question for the jury as to whose rights were violated.

This issue of who was respecting the property rights of whom was precisely the issue being argued by both counsel in this case. This is likely why Maloy proposed both of these instructions at trial. There is nothing confusing about the instructions. The elements to be proved were sufficiently clear. As a result, the jury was able to resolve these factual questions through its verdict. Accordingly, these instructions were properly given to the jury.

3. SUFFICIENT EVIDENCE SUPPORTS MALOY'S MALICIOUS MISCHIEF CONVICTION.

Maloy argues that there is not sufficient evidence in the record to sustain his First Degree Malicious Mischief conviction because the State did not prove beyond a reasonable doubt that he acted with malice. Because there is substantial evidence in the record establishing that Maloy's actions evidenced a malicious intent, his claim fails.

A person commits First Degree Malicious Mischief if he or she knowingly and maliciously causes physical damage to the

property of another in an amount exceeding \$1,500. RCW 9A.48.070(1)(a). The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. Furthermore, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Maloy challenges only whether there was substantial evidence to prove his malicious intent in this case. “Malice” is defined as “an evil intent, wish, or design to vex, annoy, or injure

another person.” RCW 9A.04.110(12). Malice may be inferred “from an act done in willful disregard of the rights of another. . .” Id.

Malice does not require a showing of specific intent. See State v. Nelson, 17 Wn. App. 66, 69-72, 561 P.2d 1093 (1977) (for purposes of arson, malice does not require evidence of personal ill will toward the owner of the damaged property). Even ancillary damage done intentionally to a car in the commission of another crime can show malicious intent. See State v. Mahoney, 80 Wn. App. 495, 499, 909 P.2d 949 (1996) (evidence of removal of vehicle's rear window and taking of stereo is sufficient to support conviction for theft and malicious mischief).

Maloy's actions show a disdain for the rights of the truck owner in this case. His motive to damage this tow-truck was made clear by ramming the Navigator into the tow-truck a total of 30 to 40 times, continuing even after the Navigator was no longer drivable. Maloy wanted to take out his frustration and resentment over the repossession. After the bank retook possession of the Navigator, Maloy not only successfully ruined the Navigator, but he also damaged the tow-truck responsible for repossessing it from him. After the Navigator's destruction, it served no purpose but to serve as a tool to satisfy Maloy's violent frustration.

Maloy's wish to do damage to the tow-truck was first shown in 2006, when he threatened to flip it over with his construction backhoe. He wanted to injure the property of Western Automotive Recovery at that time even before they connected the tow-truck to the Navigator. Maloy's ability to vex and threaten those from Western Automotive Recovery was enough to get them to leave without the Navigator in 2006, and to force them to be alert and take safety precautions when they returned in 2008. This earlier desire to do damage in 2006 showed Maloy's continued intent to damage the tow-truck in this case; he was finally successful in his effort. As the tow-truck was leaking its hydraulic fluid and its electrical connections were in disarray, Maloy clarified for the police that he rammed the tow-truck because they were taking the Navigator, a vehicle he knew they were repossessing.

The 12 jurors in this case had no problem viewing Maloy's actions for what they were: acts intended to vex, annoy, or injure the property of Western Automotive Recovery. Also, Maloy's malicious intent could easily be inferred from his complete disregard for the rights of the workers, who were simply doing their job recovering Wachovia property. Accordingly, viewed in the light

most favorable to the State, the evidence was sufficient to support a finding of malice for purposes of malicious mischief.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Maloy's conviction.

DATED this 14<sup>th</sup> day of January, 2010.

Respectfully submitted,

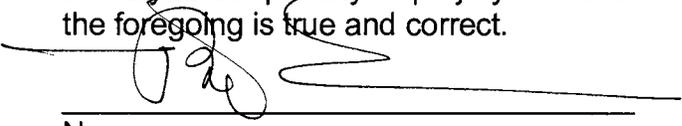
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. MARVIN RAY MALOY, Cause No. 63359-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington

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