

67102-2

67102-2

REC'D

OCT 31 2011

King County Prosecutor
Appellate Unit

COURT OF APPEALS NO. 67102-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

V.

K.R.,

Appellant.

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

The Honorable Christopher Washington, Judge

OPENING BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 OCT 31 PM 4: 28

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. K.R.'S MULTIPLE CONVICTIONS FOR MALICIOUS MISCHIEF VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.	4
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1702 (1998).....	4-5
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	4
<u>State v. Keller</u> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	9
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006).....	6-8
<u>State v. Neher</u> , 112 Wn.2d 347, 771 P.2d 330 (1989).....	9
<u>State v. Tvedt</u> 153 Wn.2d 705, 107 P.3d 728 (2005).....	9
 <u>FEDERAL CASES</u>	
<u>Bell v. United States</u> , 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955)	5

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHERS

Const. article 1, § 9	4
Former RCW 9.35.020(1).....	6
Fifth Amendment.....	4
RCW 9A.48.070	8
RCW 9A.48.080	8
RCW 9A.48.090(1).....	5

A. ASSIGNMENT OF ERROR

Appellant's multiple convictions for malicious mischief violate the prohibition against double jeopardy.

Issue Pertaining to Assignment of Error

Was appellant convicted in violation of his right to be free from double jeopardy where his two convictions for third degree malicious mischief were based on damage he reportedly did to Kent police department property – one count for damage to the police station holding cell and one count for damage to a police car door handle – within an hour or so of his arrest for being drunk in public?

B. STATEMENT OF THE CASE¹

On the night of November 14, 2010, Kent police officers were dispatched to Kent Station to respond to a complaint of disorderly conduct. RP 13, 45-46, 71. A concerned citizen had called in to report a young man who was creating a disturbance and appeared to be severely intoxicated. RP 29-30. When police arrived, the citizen pointed out K.R., who was, indeed, severely intoxicated. RP 14, 30, 61, 64, 72, 74, 80.

¹ The transcripts are contained in one bound volume, consecutively paginated and referred to as "RP."

Police handcuffed K.R. and took him into custody after he refused to "take a seat," appeared as if he wanted to fight the officers and continued yelling racial slurs at passersby, including children. RP 15-18, 47-48, 73. Having taken custody of K.R., however, police weren't sure what to do with him. RP 18-19.

Reportedly, he did not meet the requirements for juvenile detention. RP 77. Nor would K.R. provide the address or telephone number of his mother or father. RP 19, 77. Responding officers nevertheless learned K.R. had an outstanding warrant with the Grant County sheriff's office. RP 19, 77. Kent police officer David Bava spoke with someone from the Grant County sheriff's office, and he or she agreed to meet Bava at Snoqualmie Pass to take custody of K.R. pursuant to the warrant. RP 19, 48, 77.

Police transported K.R. back to the Kent police station to fill out the paperwork and make further arrangements. RP 19-21, 48-49. When officer Matthew Wheeler finished the paperwork and went to retrieve K.R. from the holding cell, he noticed someone had carved the letter "s" into the wall. RP 21. Wheeler testified he checked the walls and floors beforehand and there was no "s." RP 21-22.

On the way to the Pass, K.R. said nonsensical things and spit on his handcuffs to “make them rust.” RP 52, 61. At one point, Wheeler (who was driving) and Bava heard a loud banging noise. RP 23, 25, 52. When the officers looked back at K.R., nothing appeared out of the ordinary. RP 23, 26, 53. The officers thought they might have run over something and continued on to the Pass. RP 26, 53.

At the Pass, Wheeler transferred custody of K.R. without incident. RP 24. However, when Wheeler took K.R. out from the back of the patrol car, he noticed the car’s door handle was on the floor. RP 24-25. Wheeler claimed it had been on the door when they left. RP 28. Wheeler speculated it would take a lot of force to break off the door handle. RP 27.

In total, Police were with K.R. for a period of one-and-a-half to two hours. RP 34, 61.

The defense theory of the case was voluntary intoxication. RP 90-95. The court rejected this defense, however, on grounds K.R.’s actions, particularly his insulting remarks to responding officers, showed deliberateness. RP 100-101; see also RP 111.

K.R. was convicted of two counts of third degree malicious mischief based on damage to the holding cell wall and damage to

the car door handle, both of which are property of the City of Kent.

CP 5, 19-20. This appeal timely follows. CP 21.

B. ARGUMENT

K.R.'S MULTIPLE CONVICTIONS FOR MALICIOUS MISCHIEF VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

K.R.'s reported conduct in damaging property belonging to the City of Kent on November 14, 2010, constituted one count of third degree malicious mischief, not two. This Court should reverse one of the counts.

The United States and Washington State constitutions protect against double jeopardy. U.S. Const. amend. V; Wash. Const. art. 1, § 9. The double jeopardy clause of the Fifth Amendment offers three separate constitutional protections. State v. Adel, 136 Wn.2d 629, 632 965 P.2d 1072 (1998). It protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). The state constitutional rule against double jeopardy offers the same scope of protection as its federal counterpart. Adel, 136 Wn.2d at 632.

The aspect of double jeopardy at issue here protects a defendant from being punished multiple times for the same offense. When a person is charged with violating the same statutory provision a number of times, multiple convictions can withstand a double jeopardy challenge only if each is a separate unit of prosecution. Adel, 136 Wn.2d at 633-34; Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). The proper inquiry for considering double jeopardy challenges is what “unit of prosecution” the Legislature intends as a punishable act under the statute. Adel, 136 Wn.2d at 634.

In making this determination, the courts apply the rules of statutory construction to the statute at issue. Id. If there is any ambiguity, the court must construe the ambiguity in favor of the accused. Adel, 136 Wn.2d at 634-35.

Under RCW 9A.48.090(1), a person is guilty of malicious mischief in the third degree if he or she:

(a) knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree[.]

Emphasis added. Under its plain language, the statute criminalizes damaging *the property of another*. It does not criminalize damaging

a piece of property of another. Accordingly, the plain language supports a reading that the “unit of prosecution” is per person who had his or her property damaged.

A case on point is State v. Leyda, 157 Wn. 2d 335, 138 P.3d 610 (2006). Leyda was convicted of four separate counts of identity theft under former RCW 9.35.020(1), after he allegedly stole a credit card and used it four times. Leyda, 157 Wn.2d at 339. The Supreme Court reversed, holding that former RCW 9.35.020 was ambiguous as to the applicable unit of prosecution. Leyda, 157 Wn.2d at 345.

The statute at issue in Leyda, former RCW 9.35.020(1), provided, in pertinent part:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

Emphasis added.

In attempting to discern the unit of prosecution, the Leyda Court first focused on the enumerated verbs obtain, possess, use, or transfer and the disjunctive word “or:”

As indicated by the use of the word “or,” the proscribed acts are disjunctive. Thus, under the statute’s express language, use is a way to commit identity theft, but it is not the only way. An individual

also commits identity theft when he has either possessed, obtained, used or transferred a means of another's identification or information with the requisite intent.

Leyda, 157 Wn.2d at 345-46. The Court concluded:

[O]nce the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct, such as using the victim's information to purchase goods after first unlawfully obtaining such information.

Leyda, 157 Wn.2d at 345 (emphasis added).

Thus, the Court held that multiple punishments are possible in cases involving multiple victims, but not for multiple uses of a single individual's identity:

Leyda could have been properly charged with multiple counts of identity theft if he had obtained, used, etc., the stolen credit cards of two or more persons. But, that is not the factual scenario here, the record showing that Leyda obtained, possessed, etc., a single credit card of one other individual, Ms. Austin. Thus, the State improperly charged him with multiple thefts of Austin's identity, who, common sense suggests, has only one identity that can be unlawfully appropriated.

Leyda, 157 Wn.2d at 346-47.

Whereas the former identity theft statute criminalized the obtaining, using and/or transferring a means of identity of another person, the malicious mischief statute criminalizes

the damaging of the property of another person. Both statutes focus on the victim to denote the unit of prosecution. Accordingly, just as identity theft is complete once the accused has engaged in any one of the proscribed acts against a particular individual and includes any subsequent proscribed conduct, malicious mischief is complete once the accused has damaged the property of a particular individual and includes any subsequent proscribed conduct against that individual.

This interpretation is supported by the statutory scheme of malicious mischief as a whole because it provides for increased punishment when the physical damage to the particular person's property exceeds a certain amount. RCW 9A.48.070 (malicious mischief in the first degree where physical damage to the property of another exceeds \$5,000.00), RCW 9A.48.080 (malicious mischief in the second degree where physical damage to the property of another exceeds \$750.00); see also Leyda, 157 Wn.2d at 349-50 (the more the accused uses the stolen identification or information of a particular person, the more severe the offense charged).

A contrary reading would lead to absurd results. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989) (statutes should be construed to effect their purpose and to avoid strained, unlikely, or absurd consequences). For instance, if each piece of property equaled a unit of prosecution, an individual could be convicted of an inordinate number of charges for breaking dishes during a fit of anger or domestic dispute. Multiple charges could also be brought against someone who cut off all the flowers of a neighbor's prize rose garden – one count for each bush, or perhaps, each flower. It is unlikely the legislature had this in mind when enacting the malicious mischief statutes.

In any event, K.R.'s interpretation is at least as reasonable as the interpretation given by the state when charging this case. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001) (a statute is ambiguous if it can reasonably be interpreted in two or more ways). If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, this Court resolves any ambiguity in favor of the defendant, "thus preventing the State from turning a single transaction or course of conduct into multiple offenses. State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005). This Court should construe the malicious mischief

statute in K.R.'s favor, to prevent the state from turning a single transaction or course of conduct into multiple offenses.

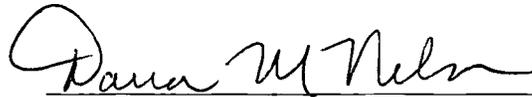
D. CONCLUSION

Because K.R. was convicted of a second count of malicious mischief where the legislature intended only one unit of prosecution, this Court should reverse and dismiss the second count.

Dated this 31st day of October, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 67102-2-1
)	
K.R.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] K.R.
18019 SE 266TH
COVINGTON, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER, 2011.

x Patrick Mayovsky

**FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 OCT 31 PM 4:28**