

62416-4

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No. 62416-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LUCIANO PEREZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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2009 JUL 29 PM 4:53

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A. ARGUMENT.

1. SINCE THE STATE PRESENTED INSUFFICIENT EVIDENCE, MR. PEREZ'S CONVICTION MUST BE REVERSED.

a. The State failed to present sufficient evidence of the element of malice To convict Mr. Perez of first degree malicious mischief, the State was required to prove that Mr. Perez knowingly and maliciously caused physical damage to the property of another, causing damages exceeding \$1,500. RCW 9A.48.070. The State failed to show that Mr. Perez acted with malice in breaking the windows of the police vehicle.¹

The Respondent argues that "He [Perez] was not kicking these windows out because of any shortage of air. If he had, one window would have been sufficient for that purpose." Respondent's Brief at 7. While this argument is interesting, it does not compensate for the fact that the record is lacking any indication that Mr. Perez was motivated by malice, or by any mental state other than by

¹ 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

frustration and agitation when he broke the windows of the patrol car. See, cf, 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”).

Without evidence of malicious intent, the evidence at trial was clearly insufficient as to the element of intent.

b. Reversal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Perez acted with malice, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990) (reversing possession conviction where State produced evidence of fleeting, but not actual, possession). The conviction should therefore be reversed and the charge dismissed.

2. WHERE THE TRIAL COURT IMPROPERLY
INSTRUCTED THE JURY IT COULD INFER MALICE
FROM THE EVIDENCE, REVERSAL IS REQUIRED.

a. The erroneous jury instruction violated Mr. Perez's right to due process. See State v. Johnson, 23 Wn. App. 605, 608, 596 P.2d 1047 (1979); Bellevue v. Kinsman, 34 Wn. App. 786, 790, 664 P.2d 1253 (1983) (both rejecting similar instructions and reversing convictions).

With a permissive instruction such as this one, “presumed facts must follow from proven facts.” Johnson, 23 Wn. App. at 607, citing Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); State v. Odom, 83 Wn.2d 541, 544-45, 520 P.2d 152 (1974); see also State v. Ratliff, 46 Wn. App. 325, 330-31, 730 P.2d 716 (1986) (requiring a “rational connection” between the proven fact and the inferred fact).

Here, the inferred fact (malice), does not flow “more likely than not” from the proven fact (an act done in willful disregard of the rights of another). Ratliff, 46 Wn. App. at 330-31. Although Respondent argues at length about the “more likely than not” standard in a burden-shifting scenario, post- Ulster County,² this serves as a mere distraction. Respondent’s Brief at 9.

Here, in contrast to Ratliff, a case that is on-point, Mr. Perez did not engage in any sort of gratuitous destruction of city property – he was simply struggling for air. Likewise, in contrast to State v. Simmons, there is no evidence that Mr. Perez harbored any specific intent to harm the arresting officers or to inflict economic harm upon

² Respondent discusses the change in Washington law following the United States Supreme Court’s decision in County Court of Ulster Co. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

the city. 28 Wn. App. 243, 247, 622 P.2d 866 (1980). He simply broke the windows of the patrol car in an effort to breathe.

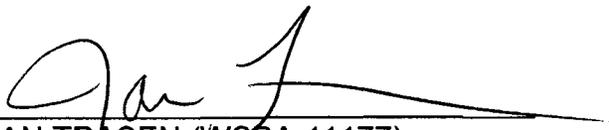
b. Instructional error requires reversal. The trial court erred in giving this instruction; therefore the conviction should be reversed, as a violation of due process. See Johnson, 23 Wn. App. at 608 (holding that a similar instruction violated due process, since it permitted “a conviction under facts which, if believed, could not be used to infer malice”); Kinsman, 34 Wn. App. at 790-91 (rejecting second sentence of same instruction, as at best, confusing, and at worst, contradictory).

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant’s Opening Brief, Mr. Perez respectfully requests this Court reverse his convictions and order a new trial.

DATED this 29th day of July, 2009.

Respectfully submitted,


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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
)	
LUCIANO PEREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2009.

X _____ *[Signature]*

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COURT OF APPEALS
STATE OF WASHINGTON
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