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COURT OF APPEALS
STATE OF WASHINGTON
BY *[Signature]*

NO. 35380-6-II
Cowlitz Co. Cause NO. 03-1-01527-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TYLER EUGENE WORLEY,

Appellant.

BRIEF OF RESPONDENT

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ISSUES PRESENTED ON APPEAL

- I. **WAS THE TRIAL COURT'S ADMISSION OF HEARSAY IN ERROR WHERE TRIAL COUNSEL ELICITED TESTIMONY REGARDING HEARSAY STATEMENTS ON CROSS EXAMINATION THEREBY OPENING THE DOOR TO THE HEARSAY ON REDIRECT EXAMINATION?**
- II. **WAS TRIAL COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF POLICE OFFICER'S INVESTIGATION A PREJUDICIAL ERROR?**
- III. **WAS THERE SUFFICIENT EVIDENCE TO FIND THE APPELLANT GUILTY OF MALICIOUS MISCHIEF IN THE SECOND DEGREE?**

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- I. **TRIAL COUNSEL "OPENED THE DOOR" ON CROSS EXAMINATION TO HEARSAY THAT WAS THEN PROPERLY ELICITED BY THE STATE DURING REDIRECT EXAMINATION.**
- II. **TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE THE OFFICER'S TESTIMONY REGARDING HIS INVESTIGATION WAS NOT AN OPINION PERTAINING DIRECTLY TO THE DEFENDANT BUT RATHER MERELY EXPLAINED WHAT THE OFFICER DID DURING THE COURSE OF HIS INVESTIGATION; FURTHERMORE THE ALLEGED DEFICIENCY OF TRIAL COUNSEL HAS NOT BEEN SHOWN TO PREJUDICE THE APPELLANT.**
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STATEMENT OF THE CASE

The Respondent agrees with the statement of facts presented by the Appellant with the following additions.

The State's witness Aaron Adams testified during direct examination that there was no body in the yard other than the defendant and his girlfriend after the rock had been thrown through Mr. Thomas's window. RP 50. During trial counsel's examination of Mr. Adams, trial counsel asked the following questions of Mr. Adams:

DEFENSE:

Q: Did she [Ms. Turner] say he [the Defendant] did it?

A: No.

Q: In fact nobody claimed responsibility for the rock, did they? Or he or she?

A: No.

Q: What'd she [Ms. Turner] say?

A: Nothing.

RP 52-53.

The State's witness Robert Thomas testified that the defendant was angry, that the defendant's girlfriend (Ms. Turner) was quiet the whole time, and that neither Ms. Turner nor the Defendant's demeanor changed after Mr. Thomas had apologized to the defendant and his girlfriend. RP 64. Trial counsel then asked the following questions of Mr. Thomas:

DEFENSE:

Q: Did—didn't Ms. Turner do some talking?

A: She could've. I think she was like, oh, you did this; you did that...

RP 71.

During the State's examination of Officer Gower, the State elicited testimony regarding who was interviewed during the course of the investigation into who threw the rock. RP 82-83. One of the people interviewed was the defendant's girlfriend Ms. Turner. RP 85. During the State's direct examination no attempt was made by the State to elicit what Ms. Turner had said during the course of Officer Gower's investigation. RP 85. On cross-examination, trial counsel asked the following question:

DEFENSE:

Q: Mister Gower, I don't see anywhere in your statement where you asked Ms. Turner if she threw the rock and denied it. Do you see a place in here where you asked her if she threw the rock and denied it?

A: No. That's not in my report.

RP 85. The State on redirect asked the following questions:

STATE:

Q: What did you ask Ms. Turner about the incident?

A: I asked her if she observed Mr. Worley throw a rock through the window. I asked her if she heard glass breaking.

Q: Did she say whether she had seen the Defendant throw the rock through the window?

A: She said she didn't see him throw it through the window.

Q: She did not respond that he didn't throw it through the window?

OBJECTION: Hearsay.

STATE: He's opened that door Your Honor.

COURT: Overruled.

STATE:

Q: Did she say that he did not throw the rock through the window?

A: No.

RP 86.

The State's closing argument characterized the case as being a question of who threw the rock through the window and how much damage did it caused. RP 98. The State then recounted the testimony of each of the five witnesses called by the State starting with that of Aaron Adam's recollection of the defendant's demeanor when he and Robert Thomas opened the door. RP 98. Mr. Adams testified that Ms. Turner's demeanor was calm, while the defendant was angry, yelling and cursing. RP 98. Mr. Adams then recounted the defendant charging the door and trying to get back into Mr. Thomas's house. RP 98. Robert Thomas testified that he recalled Ms. Turner's demeanor as being calm, and the defendant's demeanor as angry and yelling. RP 100. Mr. Thomas asked the defendant why he (the defendant) threw a rock through

his (Mr. Thomas's) window. RP 100. The State then argued that the defendant did not have to respond to Mr. Thomas's question as to why the defendant had thrown the rock. RP 100. The State further argued that the defendant could have said "I didn't." RP 100. The State argued that what the defendant did say in response to Mr. Thomas's question as to why the defendant had thrown the rock through the window was "because you [Mr. Thomas] f'd with me." RP 100. The State then recounted Mr. Thomas's testimony that the defendant had then charged Mr. Thomas's door, and that these actions on the part of the defendant were entirely consistent with having thrown the rock. RP 100. The State recounted Officer Gower's testimony regarding his investigation and about how Officer Gower had interviewed everyone at the scene, took photos, and asked the defendant's girlfriend if she had seen the defendant throw the rock, and her response was in the negative. RP 100. The State then argued that Ms. Turner's response had not been that the defendant had not thrown the rock but that rather she had not seen the defendant throw the rock. RP 100. The State then argued that all the evidence pointed directly to the defendant because he was by the far the most angry person in this situation and he admitted that he threw the rock when asked by Robert Thomas. RP 103.

In trial counsel's closing statement, trial counsel also characterized the case as being about "who threw the rock?" RP 104. Trial counsel argued specifically, "Forget about damages for a moment, who threw the rock?... Not one person saw who threw the rock testified." RP 104. Trial counsel argued that Mr. Thomas had a motive to draw an unfair conclusion in this case as to who threw the rock, because he had an axe to grind. RP 105. Trial counsel then proposed an alternate version of the events. RP 105. Specifically, trial counsel hypothesized that Ms. Turner had perhaps been the one who threw the rock and that the defendant just backed her up in explaining when Mr. Thomas had asked the question as to why the defendant threw the rock. RP 105. Trial counsel summed up his case with "the doubt is: who threw the rock? Its reasonable doubt." RP 110.

The State then argued in rebuttal that as set forth in the instructions given by the Judge, evidence may be direct or circumstantial and that the law makes no distinction between the two types of evidence. RP 118-119. The State argued that the defendant's demeanor, his statements to the victim, Mr. Thomas, the defendant charging the house following his statements to Mr. Thomas, and the defendant's consistent pattern of inconsistent

behavior all supported a finding of guilt as to the defendant. RP 119-121.

The court found the Appellant guilty of malicious mischief in the second degree. CP 33.

ARGUMENT

A. TRIAL COUNSEL “OPENED THE DOOR” TO HEARSAY ON CROSS EXAMINATION THAT WAS THEN PROPERLY ELICITED BY THE STATE DURING REDIRECT EXAMINATION.

It is a sound general rule that, when a party opens up a subject of inquiry on direct or cross examination, he contemplates that the rules will permit cross examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wash.2d 449, 455, 458 P.2d 17 (1969). The rules of evidence do not supersede this “open door” doctrine. *State v. Brush*, 32 Wash.App. 445, 451, 648 P.2d 897 (1982), *review denied*, 98 Wash.2d 1017 (1983) (emphasis added). Therefore, by voluntarily raising a subject on direct examination, a party may waive any objection to cross examination or rebuttal on that subject, even though the cross-examination or rebuttal on that subject would otherwise be forbidden by the rules of evidence. Similarly, by

raising a subject on cross- examination, a party may waive an objection to later testimony on the same matter. *State v. O'Neal*, 126 Wn.App. 395, 109 P.3d 429 (2005) (Finding that cross examination by defense counsel opened the door to opinion testimony on credibility otherwise forbidden by Rule 608); See *Ang v. Martin*, 118 Wn. App. 553, 76 P.3d 787 (2003) (holding that the introduction of testimony that is arguably hearsay, but ruled to be admissible, may open the door to rebuttal testimony that is clearly hearsay).

In the case at bar trial counsel “opened the door” to hearsay evidence regarding what Ms. Turner, said to Officer Gower in investigating who threw the rock through Mr. Thomas’s window. RP 85. Specifically, on cross-examination trial counsel asked the following question:

DEFENSE:

Q: Mister Gower, I don’t see anywhere in your statement where you asked Ms. Turner if she threw the rock and denied it. Do you see a place in here where you asked her if she threw the rock and denied it?

A: No. That’s not in my report.

RP 85. The State on redirect asked the following questions:

STATE:

Q: What did you ask Ms. Turner about the incident?

A: I asked her if she observed Mr. Worley throw a rock through the window. I asked her if she heard glass breaking.

Q: Did she say whether she had seen the Defendant throw the rock through the window?

A: She said she didn't see him throw it through the window.

Q: She did not respond that he didn't throw it through the window?

OBJECTION: Hearsay.

STATE: He's opened that door Your Honor.

COURT: Overruled.

STATE:

Q: Did she say that he did not throw the rock through the window?

A: No.

RP 86.

Furthermore, the defendant was not prejudiced in light of the fact that the same hearsay testimony elicited by the State during redirect examination from Officer Gower was earlier elicited by trial counsel during cross-examination of Aaron Adams. RP 52-53. During trial counsel's examination of Mr. Adams, trial counsel asked the following questions of Mr. Adams:

DEFENSE:

Q: Did she [Ms. Turner] say he [the Defendant] did it?

A: No.

Q: In fact nobody claimed responsibility for the rock, did they? Or he or she?

A: No.

Q: What'd she [Ms. Turner] say?

A: Nothing.

RP 52-53.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Here the Court should consider the hearsay testimony that defense counsel claims was improperly elicited by the State in combination with the testimony elicited and admitted by trial counsel from Aaron Adams. Even if the Court were to consider the hearsay testimony elicited by the State from Officer Gower improper, it is clear that any effect was insubstantial on the outcome where the same testimony was earlier elicited and admitted by and through trial counsel.

B. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO FACTUAL EVIDENCE REGARDING THE OFFICER'S INVESTIGATION AND THAT THE DEFENDANT WAS ARRESTED BECAUSE THE EVIDENCE OF THE OFFICER'S INVESTIGATION AND ARREST OF THE DEFENDANT WAS FACT, NOT OPINION EVIDENCE.

The defendant argues that his trial counsel failed to object to opinion evidence of guilt when Officer Gower testified that he arrested the defendant and that trial counsel failed to object to inadmissible evidence regarding Officer Gower's investigation and that the defendant was therefore denied the right to effective assistance of counsel. Brief of Appellant, pg. 19-22. The alleged opinion evidence of guilt includes the testimony of Officer Gower that Officer Gower took statements from witnesses, found the defendant, and then the defendant was arrested. Brief of Appellant, pg. 19-21. The alleged irrelevant evidence includes what steps were taken in Officer Gower's investigation. RP 82-86.

a. WHAT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL?

In order to make a claim of ineffective assistance of counsel, a defendant must meet the two pronged standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that the performance of the trial counsel was deficient. *Id.* at 687. This requires a showing that counsel "made errors so serious that counsel was not functioning as 'counsel' as required by the Sixth Amendment." *Id.* Second, the defendant must prove that the deficient performance prejudiced the defense.

Id. This requires the deficiency be serious to the degree of depriving the defendant of a fair trial. *Id.* “Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversarial process that renders the result unreliable.” *Id.*

State v. Thomas, 109 Wn. 2d 222 (1987), held that, “regarding the first prong, scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” *Id.* at 226. Regarding the second prong, the defendant has the burden to prove “that there is a reasonable probability that,” absent error by trial counsel, “the result of the proceedings would have been different.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (emphasis theirs), citing *Strickland* 466 U.S. 668 at 694. Under current case law, the Appellant in this case must show both that the trial counsel was deficient in his performance and that the error, if any, actually prejudiced his defense.

Mistakes or errors of judgment by an attorney do not establish the violation of a constitutional right. The constitution guarantees a defendant a fair trial, not a perfect trial. *State v. Alleck*, 10 Wn. App. 796, 520 P.2d 645 (1974) (holding failure to

object to admission of evidence may have been error of judgment but did not deny fair trial).

An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. *State v. Stockman*, 70 Wn.2d 941 (1967) (holding failure of trial counsel to object to hearsay evidence, failure to make opening statement and alleged failure to properly cross examine witnesses, all of which related to counsel's judgment and trial strategy, did not establish incompetency of trial counsel).

In the case at bar, the defendant failed to establish ineffective assistance of counsel with respect to his trial counsel's failure to object to factual evidence the defendant was arrested, for three alternative reasons: first, the evidence that the defendant was arrested is not opinion evidence of guilt; second, should the Court find this evidence was opinion evidence of guilt, the defendant was not denied effective assistance of counsel for counsel's failure to object to such evidence; and third, should the Court find the defendant was denied effective representation, the defendant failed

to establish he was prejudiced by his trial counsel's failure to object to opinion evidence of guilt or that the testimony was irrelevant.

b. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO FACTUAL EVIDENCE THE DEFENDANT WAS ARRESTED, BECAUSE THE EVIDENCE OF HIS ARREST WAS FACT, NOT OPINION EVIDENCE OF GUILT.

It is true that "[a]n opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wash.App. 698, 701, 700 P.2d 323, 325 (1995), *rev'd on other grounds*, *Seattle v. Heatley*, 70 Wash. App. 573, 854 P.2d 658 (1993), *citing State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v Oughton*, 26 Wash. App. 74, 77, 612 P.2d 812 (1980). However, the defendant cites no criminal cases stating that the fact of an arrest constitutes opinion evidence of the defendant's guilt. Furthermore, the State is not aware of any cases supporting this argument. The defendant cites *Warren v. Hart*, however, this case is not on point. See *Warren v. Hart*, 71 Wash.2d 512, 429 P.2d 873 (1967). *Warren v. Hart* is a civil personal injury case concerning a traffic accident and the non-issuance of citations by law enforcement to the parties involved.

See *Id.* at 514, 429 P.2d at 874. In *Warren*, the defendant argued in closing that the officer's failure to issue a citation was evidence that the officer did not believe him negligent. See *Id.* at 516-17, 429 P.2d at 875-76. The *Warren* court found the plaintiff was entitled to a new trial based solely upon the improper use of this evidence by the defendant in closing argument. See *Id.* at 516-19, 429 P.2d at 875-77. In contrast, in the present case, the State did not argue in closing argument that the defendant was guilty because he was arrested. RP 97-104, 118-125.

"[T]he general rule is that witnesses are to state facts, not inferences or opinions." *Carlin*, 40 Wash. App. At 700, 700 P.2d at 325. Here, in testifying the defendant was arrested, Officer Gower was stating a fact. The State did not ask this witness his opinion as to why the defendant was arrested. RP 82-86. Being arrested is like being charged, and both are mere evidence of facts and not opinion. Therefore, the State requests the Court find the testimony was not opinion evidence of guilt.

- c. **SHOULD THE COURT FIND THE EVIDENCE OF THE DEFENDANT'S ARREST AND CUSTODY WAS OPINION EVIDENCE OF GUILT, THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HE WAS NOT DENIED EFFECTIVE REPRESENTATION.**

The defendant argues that no tactical reason existed for counsel's failure to object to the testimony the defendant was arrested. Brief of Appellant, pg. 22. Accordingly, the defendant argues this failure to object satisfies the first prong of the test for ineffective assistance of counsel, the denial of effective representation.

"In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained go to the theory of the case or to trial tactics." *State v. Emert*, 94 Wash. 2d 839, 849, 621 P.2d 121, 126 (1980). Despite the defendant's argument here, a tactical reason for not objecting to testimony that the defendant was arrested did exist. Trial counsel argued in closing that someone else, other than the defendant had a greater motive to have thrown the rock through Mr. Thomas's window. RP 108-109. Trial counsel may not have objected to testimony that the defendant was arrested because it coincided with trial counsel's theory of the case that the defendant was simply in the wrong place at the wrong time and that the police officer jumped to the conclusion that based on his presence at the scene of the crime that the defendant was guilty. This is only one of

many of the strategies that trial counsel may have contemplated in failing to object to this evidence.

d. SHOULD THE COURT FIND THE DEFENDANT WAS DENIED EFFECTIVE REPRESENTATION, THE DEFENDANT FAILED TO ESTABLISH HE WAS PREJUDICED BY SUCH FAILURE.

If deficiency is proven, the court must undertake the next step under *Strickland* and determine whether the defense was prejudiced as a result of the deficiency. 466 U.S. at 687. Evidence is not prejudicial “unless the result of the proceeding would have been different.” *Allen*, 127 Wn. App. at 951, citing *McFarland*, 127 Wn 2d. at 335. Specifically, the defendant must prove that if his trial counsel had objected to the testimony he was arrested, he would not have been convicted.

Appellant fails to establish that the deficient performance prejudiced the defendant because absent evidence of the defendant’s arrest, there was sufficient evidence for the jury to find the defendant guilty of the charged crime. Specifically, the evidence presented by David Wixon indicated the value of the damage to Mr. Thomas’s house exceeded two hundred and fifty dollars. RP 26. Robert Thomas testified that the Defendant was angry, that Ms. Turner was quiet the whole time, and that neither Ms. Turner nor the Defendant’s demeanor changed after Mr. Thomas had

apologized to the Defendant and his girlfriend. RP. 64. Mr. Thomas testified that he asked the Defendant why he (the Defendant) threw a rock through his (Mr. Thomas's) window. RP 66-69. In response to Mr. Thomas's question as to why the Defendant had thrown the rock through the window was "because you [Mr. Thomas] f'd with me." RP 66-69. Mr. Thomas then testified that the Defendant had then charged Mr. Thomas's door. RP 66. Additionally, Aaron Adams testified during direct examination that there was no body in the yard other than the Defendant and his girlfriend after the rock had been thrown through Mr. Thomas's window. RP 50. Aaron Adams further testified that Ms. Turner did not take responsibility for having thrown the rock nor did she say that the Defendant did not throw the rock. RP 52-53.

Based on the evidence presented to the jury, should the court find the defendant was denied effective representation, the state requests the court find the defendant was not prejudiced as a result.

C. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO FIND THE APPELLANT GUILTY OF MALICIOUS MISCHIEF IN THE SECOND DEGREE.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is sufficient to permit any rational

trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Gentry*, 121 Wn.2d 570, 597 (1995); *State v. Luna*, 71 Wn.App. 755, 757 (1993); *Seattle v. Slack*, 113 Wn.2d 850, 859 (1989); *State v. Green*, 94 Wn.2d 216 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be reasonably drawn therefrom.” *State v. Sanchez*, 60 Wn.App. 687, 693 (1991) (quoting *State v. Porter*, 58 Wn.App. 57, 60 (1990)). All reasonable inferences 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).

The reviewing court must give deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d 553 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980).

In the present case, the court found the Appellant guilty of malicious mischief in the second degree. The elements of malicious mischief in the second degree require proving that the defendant knowingly and maliciously caused damage to the property of another in an amount exceeding two hundred fifty dollars. RCW 9a.48.080(1)(a). There is no disputing the evidence that the crime occurred. The Appellant does not argue that there is insufficient evidence that someone caused damage to the victim's property or the amount of damage caused to the property. The only issue presented is the argument that the State failed to prove that the Appellant was the perpetrator. However, upon review of the evidence presented by the state, defendant's argument is without merit. Mr. Adams testified that Ms. Turner's demeanor was calm, while the defendant was angry, yelling and cursing. RP 98. Mr. Adams later recounted the defendant charging the door and trying to get back into Mr. Thomas's house. RP 39. Robert Thomas testified that he recalled Ms. Turner's demeanor as being calm, and the defendant's demeanor as angry and yelling. RP 64-69. Mr. Thomas then asked the defendant why he (the defendant) threw a rock through his (Mr. Thomas's) window. RP 66-69. The defendant did not have to respond to Mr. Thomas's question as to why the

defendant had thrown the rock, but he did respond and his response amounted to an admission. RP 66-69. The defendant responded to Mr. Thomas's question as to why he had thrown the rock through the window was "because you [Mr. Thomas] f'd with me." RP. 68-69. Officer Gower interviewed everyone at the scene, took photos, and asked the defendant's girlfriend if she had seen the defendant throw the rock, and her response was in the negative. RP 85-86. All the evidence, both direct and circumstantial, offered by the State pointed directly to the defendant. The jury chose not to believe the hypothetical alternative defense theory of who threw the rock, and found the defendant guilty as charged.

It is within the sound discretion of the trier of fact to weigh credibility and determine accordingly the facts that support or refute a finding of guilty. The jury found, based on the above facts, there was sufficient direct and circumstantial evidence that the crime in fact occurred, and there was direct testimony about the defendant's involvement. Furthermore, by admitting the truth of all of the states evidence, the defendant's argument that its findings are unsupported by substantial evidence fails. See *State v. Madarash*,

116 Wn. App. 500, 509; 66 P.3d 682, 687 (Div. II, 2003)(“Here, Madarash’s claim that substantial evidence does not support the trial court’s findings of fact fails because in claiming insufficiency of the evidence, Madarash admits the truth of the states evidence.”); see also *State v. Pineda*, 99 Wn. App 65, 78-9; 992 P.2d 525, 532-33 (Div. II, 2000). A courts findings of fact will not be reversed on appeal if supported by substantial evidence. *Miles v. Miles*, 128 Wn. App 64, 69; 114 P.3d, 671, 674 (Div. II, 2005). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *Id*, citing *State v. Solomon*, 114 Wn. App. 781, 789; 60 P.3d 1215 (2002).

There was sufficient evidence presented to establish the crime of conviction, and this finding should not be disturbed on appeal.

CONCLUSION

The trial court properly found that, based on the evidence presented, the Appellant was guilty of the crime of malicious mischief in the second degree. The testimony of David Wixon, Paula Thomas, Aaron Adams, Robert Thomas, and Officer Gower was weighed by the jury, and sufficient evidence exists from that

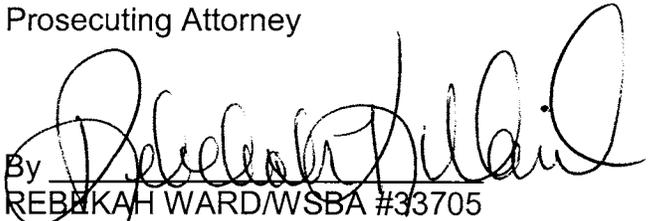
testimony to establish guilt beyond a reasonable doubt as to the crime of malicious mischief in the second degree.

Additionally, there has been no showing that trial counsel was deficient for failing to object to evidence that the Appellant claims was irrelevant and opinion testimony as to the defendant's guilt. And lastly, the Appellant has failed to establish that even if trial counsel was deficient for failing to object to testimony regarding the defendant's arrest, there was some prejudice.

For the above reasons, the relief sought by the Appellant should be denied.

Respectfully submitted this 25th day of May, 2007

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