

NO. 37108-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

FLOYD SAXTON, JR.,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 JUN 24 PM 4: 29

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

The Honorable Frederick Fleming, Judge

BRIEF OF APPELLANT

FILED  
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DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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A. ASSIGNMENTS OF ERROR

1. The State failed to provide material pretrial discovery, violating Appellant's right to due process.

2. The evidence was insufficient to support Appellant's conviction for first degree malicious mischief, because the State presented no competent admissible evidence of the amount of damages.

3. The trial court violated appellant's Sixth Amendment right to confrontation by admitting hearsay.

Issues Pertaining to Assignments of Error

1. Did the State's failure to provide pretrial discovery of photographs taken by two forensic specialists violate due process by preventing Appellant from adequately preparing his defense?

2. An essential element of the charge of first degree malicious mischief is that the defendant caused over \$1,500 in damage. Where evidence of the dollar amount of damage caused is either incompetent or inadmissible, does the evidence only support a conviction for third degree malicious mischief, which only requires proof of damage of no minimum dollar amount?

a. Did the court err in admitting lay opinion evidence regarding the dollar amount of the damage under ER 701 by

misconstruing it as an admissible opinion regarding the market value of a home by the homeowner?

b. Did the court err in admitting another lay opinion regarding the dollar amount of the damage because the opinion was based on hearsay?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecutor charged appellant Floyd Lea Saxton (Saxton) with residential burglary and first degree malicious mischief, allegedly committed by unlawfully entering and ransacking the residence of his estranged wife. CP 1-2; 1RP 5.<sup>1</sup> Saxton was convicted by a jury as charged. CP 12-13. Saxton, who had no prior criminal history, received a standard range sentence. CP 54, 36-37. Saxton appeals. CP 52.

2. Substantive Facts

Saxton and Heather Saxton (Heather) separated in May, 2006, following their second marriage to each other. 4RP 156. Saxton moved out of the family home, while Heather continued living there. 4RP 157-58, 207, 234. The couple's two children alternated one week with Saxton, one week with Heather. 4RP 158. When Saxton moved out Heather

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 10/25/2007; 2RP - 10/31/2007; 3RP - 11/1/2007; 4RP - 11/5/2007; 5RP - 11/6/2007; 6RP - 11/7/2007; 7RP 11/9/2007.

changed the locks and did not give him a key. 4RP 164. The house was equipped with a functioning alarm system. 4RP 164-65.

The Saxtons' house was in a high crime neighborhood and they had been victimized several times. 5RP 321. For example, their truck had been stolen with the house keys in it, one of their vans was vandalized, and the house was tagged with graffiti. 5RP 358. Heather's house keys were stolen out of her van shortly before Saxton moved out. 4RP 232; 5RP 359.

At 2:15 p.m. on Thursday, June 29, 2006, Heather and a co-worker served Saxton with divorce papers at the home of his mother, Jeanette James. 4RP 160-61. Heather and the Saxtons' two children then went to stay in a hotel. 4RP 162. At 3:18 p.m., the home's security alarm went off. 3RP 58. The police were notified and arrived at 4:14 p.m. 3RP 62.

Officers Reginald Gutierrez and Young Song entered through a broken sliding window and did a walk-through. 3RP 45, 48; 4RP 142. Song later wrote up a report from which Gutierrez refreshed his memory when he testified November 1, 2007 (465 days later.) 3RP 61; 4RP 135, 149. Every room had been disturbed except for the children's bedrooms, which were untouched. 3RP 47-48, 53; 4RP 210. Furniture was tipped over, personal effects were strewn around, and the washing machine and refrigerator were toppled. 3RP 48; 4RP 137, 242. Gutierrez assumed

some of the furniture was damaged but did not check. 3RP 57. The main floor appeared to have been sprayed with water. 3RP 55. There was a burnt odor (but no smoke.) 4RP 152. Several holes had been gouged in the walls, possibly with some sort of clawed tool. 3RP 47, 50; 4RP 136, 146; Exhibits 14, 16, 18. Gutierrez thought two people would have needed over an hour to create the mess. 3RP 57. He guessed the damage could have been as much as \$50,000, but did not offer any basis for this opinion. 3RP 51. Song testified there was no blood. 4RP 149.

Also on June 29<sup>th</sup>, forensic evidence specialist Toni Martin processed the scene, identifying and documenting all forensic evidence, such as blood and fingerprints. 3RP 70, 72, 105. She dusted a couple of areas for prints, but with no results. 3RP 72. Martin was not asked directly about blood spatter, but she testified that, if blood had been present, she would have photographed it. 3RP 107.

Martin photographed the living room walls, the holes in the dining room wall, and the overturned washing machine. 3RP 79, 81, 84-85; Exs. 13-33. Martin's photographs were not provided to the defense before trial: Counsel did not see them until moments before Martin testified. 3RP 66.

After concluding their initial investigation, the police made no attempt to close the house or secure the crime scene, but left it open and

unsealed. 4RP 142, 150. The home remained open to all comers until November, 2006. 4RP 225.

The following day, Friday June 30<sup>th</sup>, Heather returned to the house and discovered the break-in. The police came when she called. After the police left, Heather walked through the house observing the damage. 4RP 171. There was no blood. 4RP 171, 181, 182. She returned to the house with a co-worker the following Monday, July 3, 2006. There was now blood spatter on the walls in the vicinity of the holes. 4RP 181, 205. Heather returned with a volunteer cleaning crew consisting of several co-workers "some days after it happened." 4RP 202, 224.

Detective Coulter first visited the house on July 20<sup>th</sup>. 4RP 240, 247. She immediately noticed a blood spot on the lid of the washing machine and drops of blood around the holes in the walls. An overhead light fixture near some of the holes was also spattered with blood. 4RP 243. Coulter surmised the blood was deposited when a clawed tool was swung at the walls by someone who was bleeding. 4RP 242-43.

Coulter had Mary Lally, a forensic services supervisor, document the blood. 3RP 120; 4RP 243. Lally documented blood spatter on the dining room and living room walls and on the washing machine. 3RP 120-21; 4RP 256. The blood on the walls was near the holes. 4RP 256. Lally photographed the blood and took swabs. 4RP 245; Exs. 34-42. She

obtained a sample of Saxton's blood for comparison and sent the blood to the Washington State Patrol Laboratory for analysis. 4RP 246.

Like Martin's, Lally's photographs were not provided to the defense before trial. The prosecutor produced them for the first time during the same recess in which Martin's photographs were revealed. 3RP 68, 119, 121. Defense counsel had never seen them before. 3RP 105.

A Washington State Patrol Crime Laboratory technician testified that the blood on Lally's swabs matched Saxton's with a random chance probability of one in 4.7 quintillion (18 zeros). 4RP 292. The defense stipulated that the blood in the vials was Saxton's and that the evidence swabs were not contaminated. 5RP 304. The State argued in closing that the blood spatter could only have been deposited when the walls were gouged on June 29<sup>th</sup>. 5RP 415.

For most of June 29<sup>th</sup>, Saxton was at the home of his mother, Jeanette James, helping her pack her belongings. 5RP 315. James was a retired teacher and a former bishop of the Pacific Northwest for the Congregation Bible Churches. She was moving to Kansas to assume the duties of bishop for the Midwest states. 5RP 314. Saxton was is a former assistant pastor and had baptized Heather into the church. 4RP 211. He was active in church until he and Heather separated, at which point he stopped attending. 4RP 234.

Until he was served with the divorce papers, Saxton thought Heather and the children were joining him and his mother on the trip to Kansas, where both he and Heather had family connections. 4RP 233. After Saxton was served, he and his mother talked and prayed for about 45 minutes. 5RP 318. Then Saxton drove to his apartment, 15-25 minutes away, in his red Trans Am with black convertible top. 4RP 162-63, 234; 5RP 319, 375-76. Saxton planned to return with his SUV for the drive to Kansas. 5RP 318-19. He was gone about 45 minutes and arrived back at his mother's before 4:00 p.m. 5RP 319-20. He was not bleeding. 5RP 322. Saxton set off that evening with his mother for the two-plus-day drive to Kansas. 4RP 208-09; 5RP 315. He remained in Kansas until July 7. 5RP 333, 336.

Douglas R. Byrn, who lived near the Saxton home, claimed that on June 29, 2006, he saw what looked like a red Camaro with a black convertible top park near Heather's house. 3RP 31-33, 37. The driver, who Byrn had never seen before, walked around to the back of the house carrying what may have been a tool with a yellow handle. 3RP 33. Byrn thought this was around 2:30 p.m. 3RP 34, 37. Byrn also thought the police arrived shortly after 3:00 p.m., when in fact, according to police records, it was 4:14 p.m. 3RP 39-40; 58, 62.

Heather testified she obtained repair estimates from her insurance company. 4RP 203. Over defense objection, Heather was allowed to testify that the insurance company estimate was \$11,000 for structural damage and \$4,000 to damages to personal belongings. 4RP 203-04. The court denied defense counsel's request to reconsider its ruling, concluding that a property owner's lay opinion as to value is admissible, even if it is based on insurance estimates that are not in evidence. 4RP 218.

In closing argument the State urged the jury to find Saxton guilty based on the insurance company estimates, Gutierrez's estimate, and the photographs. 5RP 421. The jury complied. CP 12-13.

C. ARGUMENT

1. THE STATE VIOLATED DUE PROCESS BY FAILING TO PROVIDE PRETRIAL DISCOVERY OF THE MARTIN AND LALLY PHOTOGRAPHS.

The defense did not receive the photographs taken by Martin and Lally until minutes before each witness testified. This made planned and reasoned confrontation and comparative analysis of this evidence by the defense impossible. This deprived Saxton of the opportunity to prepare his defense and therefore denied him of his due process right to a fair trial. This Court should therefore reverse his convictions.

The State has a duty to disclose material evidence that may be favorable to defendant, and failure to do so violates the defendant's

constitutional right to fair trial. State v. Mak, 105 Wn.2d 692, 718 P.2d 407, cert. denied, Mak v. Washington, 479 U.S. 995 , 107 S. Ct. 599 , 93 L. Ed. 2d 599 (1986). Suppression by the State of material evidence favorable to an accused on an issue of guilt or punishment requires reversal, irrespective of whether the prosecution acted in good faith or bad faith. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

A Brady violation occurs when prejudice ensues from the State's failure to provide requested discovery of exculpatory or impeaching evidence favorable to the accused, regardless of whether the suppression was willful or inadvertent. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Evidence is material if it can reasonably be argued the evidence puts the case in such a different light as to undermine confidence in the verdict. Strickler, 527 U.S. at 290. Confidence in the verdict is diminished if there is a reasonable probability the result of the trial would have been different if the defense had received the evidence in a timely manner. Strickler, 527 U.S. at 289.

Here, the Omnibus Order instructs the State to turn over all physical and demonstrative evidence no later than two weeks before trial. CP 63-64. Both Martin and Lally photographed the scene well before the Omnibus order was entered. 3RP 70, 79, 81, 84-85, 120; 4RP 243, 245.

Therefore, the State had the photographs by Martin and Lally in its possession months before trial.

Timely discovery of the photographic evidence would have enabled Saxton to better support his alibi defense. 2RP 15. None of the witnesses who viewed the crime scene on June 29<sup>th</sup> and 30<sup>th</sup> saw any blood. 3RP 44-65 (Gutierrez); 4RP 149-50 (Song); 3RP 107 (forensics expert Martin); 4RP 149; 4RP 181 (Heather). Song was sure everything of importance was included in his report. 4RP 149. Heather was sure the blood was not there before Monday, July 3<sup>rd</sup>, at the earliest. 4RP 171, 181, 182. Heather also testified it was two and a half weeks before the blood appeared. 4RP 236. Heather was sufficiently convinced the blood was a new development – rather than that she simply missed it before – that she reported the discovery to the police. 4RP 182, 236.

Heather's assertion that the blood appeared after the June 29<sup>th</sup> break-in is supported by the record. Martin's photographs, taken the day of the break-in, show no blood on the walls, furniture or appliances. Ex. 13-33. Lally's photos, taken several weeks later, show blood. Ex. 34-42. Had the State provided the defense with the photographs as ordered at omnibus, it would have allowed Saxton's counsel to adequately prepare for cross-examination of the State's witnesses on the issue of how blood could

seemingly be absent on the date of the break-in and then miraculously appear later.

A criminal conviction cannot rest on a jury's speculative hypothesis explaining irreconcilably conflicting physical evidence. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The general rule is that it is the function of the fact-finder to reconcile conflicting evidence. Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 324, 324-25, 646 P.2d 113, 116 (1982), citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959). This is because the trier of fact is better able to assess witness credibility and observe their demeanor. State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

In the case of conflicting circumstantial evidence, the general rule applies. State v. Lewis, 55 Wn.2d 665, 669, 349 P.2d 438, 441 (1960). Conflicting physical evidence is different. A jury may not base a conviction on speculative hypotheses to explain irreconcilably conflicting physical evidence. Hundley, 126 Wn.2d at 421-22.

In Hundley, some vegetable matter tested negative for a controlled substance the defendant was convicted of possessing. The Court of Appeals affirmed, hypothesizing that the material may have been "cut" with inactive ingredients so that one portion possibly could have tested negative while other parts were positive. The Supreme Court rejected this

and reversed the conviction. Hundley, 126 Wn.2d at 421-22. Where the standard is proof beyond a reasonable doubt, speculation does not meet the standard. Id.

Here, to convict Saxton of the charged offenses the jury had to find he unlawfully entered and ransacked the home on June 29, 2006. CP 22, 26. The State's theory of the case was that Saxton's blood was deposited on June 29<sup>th</sup> in the course of ransacking the home. To accept the State's theory, the jury would have had to resort to speculation in order to reconcile the evidence that showed Saxton's blood was not present until days or weeks after the break-in.

Moreover, with the jury's confidence in the reliability of the police's crime scene investigation undermined by the conflicting forensic evidence, Saxton could plausibly have questioned the reliability of the WSP Crime Lab work and argued the evidence swabs likely were contaminated from the two vials of control blood obtained from Saxton for comparison. 4RP 290. Instead, defense counsel stipulated the blood was Saxton's and the swabs were not contaminated, leaving the jury no logical option except to convict.

Because of the State's failure to disclose the conflicting crime scene photographs before the trial, confidence in the guilty verdicts for

both residential burglary and malicious mischief is undermined. Accordingly, reversal is required. Strickler, 527 U.S. at 2891-82.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE MALICIOUS MISCHIEF IN THE FIRST DEGREE.

When degrees of a crime are defined by dollar amounts, a conviction for a higher degree cannot be upheld absent proof of the dollar amount. State v. Sanders, 65 Wn. App. 28, 32, 827 P.2d 354 (1992). The degrees of malicious mischief are defined by dollar amounts. See RCW 9A.48.070-090. The dollar value of the damage caused is an essential element that must be proved beyond a reasonable doubt, because it determines the degree of the offense. State v. Timothy K., 107 Wn. App. 784, 789, 27 P.3d 1263 (2001).

First degree malicious mischief requires proof the defendant caused "physical damage"<sup>2</sup> to property in an amount exceeding \$1,500. RCW 9A.48.070(1)(a). Second degree malicious mischief requires proof of damages over \$250. RCW 9A.48.080(1)(a). Where the State fails to prove the required dollar amount damages for either first or second degree malicious mischief, no more than third degree malicious mischief is established. RCW 9A.48.090(1)(a); CP 31 (to-convict for lesser included

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<sup>2</sup> "Physical damage" means the amount by which the market value is diminished, or the reasonable value of necessary repairs. RCW 9A.48.010(1)(b).

offense of third degree malicious mischief). Here the State failed to present substantial, competent and admissible evidence sufficient to prove damages valued at \$250 or more.

A challenge to the sufficiency of the evidence is of constitutional magnitude and can be raised for the first time on appeal. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is not sufficient to support a conviction unless, viewed in the light most favorable to the State, it would permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). In raising a sufficiency claim, the appellant admits the truth of the State's evidence and all inferences reasonably to be drawn there from. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture. Hundley, 126 Wn.2d at 421-22; State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

In civil litigation, evidence is sufficient to prove damages if the fact of loss is established with sufficient certainty to provide the fact-finder with a reasonable basis for estimating the amount of the loss. Haner v. Quincy Farm Chemicals, Inc., 97 Wn.2d 753, 757, 649 P.2d 828, (1982). The same is true of restitution proceedings. State v. Bush, 34 Wn.

App. 121, 124, 659 P.2d 1127, review denied, 99 Wn.2d 1017 (1983) (evidence of damage is sufficient if it affords reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture.) Even where this lower standard of proof pertains, damages must be supported by competent evidence that is both substantial and credible. Transpac Development, Inc. v. Oh, 132 Wn. App. 212, 221, 130 P.3d 892 (2006); State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426 (2006) aff'd, 161 Wn.2d 517 (2007). Substantial evidence means a sufficient quantity of evidence from which a rational person could conclude the challenged element is proven. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993).

The burden of proof required to support a guilty verdict in a criminal prosecution, however, is higher. State v. Thomas, 138 Wn. App. 78, 84, 155 P.3d 998 (2007). Due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Moreover, guilt must be established beyond a reasonable doubt by probative evidence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Due process requires both that the defendant have an opportunity to refute the State's evidence, and that the

evidence be reliable. State v. Pollard, 66 Wn. App. 779, 784-85, 785, 834 P.2d 51, review denied 120 Wn.2d 1015 (1992).

Where, as here, the amount of damages is an essential element of the charge, the State must produce evidence that affords a reasonable basis for estimating the amount of the damage and does not subject the trier of fact to speculation or conjecture. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984), citing Bush, 34 Wn. App. at 124. The evidence must also be admissible under the Sixth Amendment confrontation clause. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Here, the State failed to meet the reasonable doubt standard. It presented no evidence of the amount of damages that was both competent and admissible.

(a) The State introduced Martin's photographs of the interior of the home taken on June 29<sup>th</sup>. Viewed in the light most favorable to the State, these photographs constitute substantial evidence that damage occurred. Exs. 13-33. They do not, however, give the jury any basis, other than pure speculation and conjecture, by which to put a dollar value on the damage. The photographs are not, therefore, competent evidence sufficient to prove the amount of damages beyond a reasonable doubt, as

required to establish the essential dollar-element of malicious mischief in the first or second degree.

(b) The State also introduced photographs taken by Lally on July 20<sup>th</sup>, after the crime scene was left unsecured in a crime-ridden, vandalism-prone neighborhood for over three weeks. Exs. 34-42. These photographs are not competent evidence of anything that existed on June 29<sup>th</sup>.

(c) Officer Gutierrez guessed the amount of damage exceeded \$50,000. This was inadmissible lay opinion.

Lay opinion should be excluded where, as here, it is the sort of opinion that calls for expert testimony. Ashley v. Hall, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999), citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE, ch. 7, § 282, at 348-49 and 353-54 (3d ed.1989). ER 701 governs the admissibility of opinion testimony by lay witnesses. It requires the opinions of a non-expert to be rationally based on the witness's perceptions and "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." ER 701. Even expert testimony that is merely speculative is not admissible. State v. Warness, 77 Wn. App. 636, 643, 893 P.2d 665 (1995).

Gutierrez provided no foundation supporting any particular damage estimate, let alone “\$50,000.” This was pure lay opinion, supported by no specifics and rationally based on nothing. It was no more than guesswork that subjected the jury to a damage estimate based on mere speculation and conjecture.

Defense counsel did not object to Gutierrez’s damage estimate, so its inadmissibility is not dispositive. State v. Coria, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). Such testimony, however, cannot meet the constitutional test for substantial and credible evidence sufficient to support a criminal conviction. Accordingly, it cannot support a jury determination of damages. Transpac Development, 132 Wn. App. at 221.

In Coria, the Court upheld a conviction for second degree malicious mischief – which requires proof of damages over \$250 – based on the estimate of a police officer who testified without objection that the damage was \$670. Coria, 146 Wn.2d at 641. A valuation of \$670, however, is not a ballpark figure like the \$50,000 offered by Gutierrez. Rather, it indicates a thoughtful appraisal of specific substantive facts. Gutierrez's estimate, by contrast, was sheer guesswork.

(d) Heather Saxton testified, over objection, that she had received insurance estimates that the damage was \$11,000 to the structure and \$4000 to personal belongings. She then expressed her opinion that this

was indeed the amount of damage. 4RP 203-04. This testimony violated ER 701, the rules against hearsay, and the Sixth Amendment confrontation clause.

(i) Inadmissible Lay Opinion: By way of exception to ER 701, a property owner may offer her opinion as to the market value of her own property. Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 268, 23 P.3d 529 (2001), review denied 145 Wn.2d 1020 (2002). This is because owners are presumed to be informed about the value of their property. State v. Wilson, 6 Wn. App. 443, 451, 493 P.2d 1252 (1972). However, the Wilson court recognized that lay opinion is inferior to “relevant and competent methods of ascertaining market value,” ruling the latter is admissible to explain the former. Wilson, 6 Wn. App. at 451.

Market value, moreover, is distinguishable from damages. Market value is the amount a willing buyer with no obligation to buy would pay a willing seller with no obligation to sell. Crystal Chalets Ass’n v. Pierce County, 93 Wn. App. 70, 77, 966 P.2d 424 (1998). The amount of physical damage, by contrast, is the amount by which market value is diminished, or the reasonable value of necessary repairs. RCW 9A.48.010(1)(b); State v. Ratliff, 46 Wn. App. 325, 328-29, 730 P.2d 716 (1986).

Here, Heather's testimony was not a property owner's opinion about market value. Rather, she was asked whether she obtained an estimate of the cost of repairs. She then gave an opinion as to damages based on her memory of estimates she reportedly received from an insurance company. The court erred in admitting this under cover of the market value exception to the lay opinion prohibition.

(ii) Hearsay. The insurance company estimate comprised an out-of-court statement introduced solely to prove the truth of the matter asserted. Neither the estimate nor its preparer was before the court. This was classic hearsay. ER 801(c). It was not offered or admitted under any evidentiary exception. See ER 803 & 804 (setting forth exceptions to hearsay exclusionary rule). As such, it was not 'reliable' evidence of the sort required to support a conviction requiring proof of a dollar amount and should not have been admitted. ER 802.

(iii) Confrontation. The State offered the alleged insurance estimates to establish dollar value as an essential element of first degree malicious mischief. Because the originator of this testimony did not testify, however, Saxton had no opportunity to confront this adverse witness about his or her foundational expertise, reliability of method, or the accuracy of these particular estimates. This violated the confrontation

clause of the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Under Crawford, the admissibility of testimonial statements is conditioned on the defendant's opportunity for confrontation. Crawford, 541 U.S. at 68. A testimonial statement is one made by a declarant who would reasonably expect the statement to be used as evidence in criminal proceedings. Crawford, 541 U.S. at 51.

Here, an insurance company representative would certainly have been apprised by insured of the reason the damages estimate was being sought. The insurance company representative would thus have known the estimate was of damage resulting from a crime. Accordingly, the preparer would reasonably expect the estimate to be used against a defendant in criminal proceedings. Accordingly, this Heather's hearsay testimony regarding the insurance estimate was barred by the Sixth Amendment. Crawford, 541 U.S. at 51, 68.

The erroneous admission of the insurance estimates prejudiced Saxton. Most importantly, it was the only evidence with any possible foundation upon which the jury could have relied in finding the dollar value amount of the damages. Apparently recognizing this, the prosecutor highlighted this evidence in closing argument. 5RP 421. Additionally, by overruling the defense objection to the estimates, the court communicated

to the jury judicial approval of their presumed reliability. Because the essential dollar amount element was not proven beyond a reasonable doubt, the conviction for malicious mischief in the first degree cannot stand.

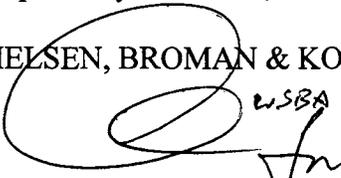
D. CONCLUSION

Because the State deprived Saxton of material evidence constituting the basis for a viable defense, this Court should reverse his convictions for residential burglary and first degree malicious mischief. Alternatively, because the evidence was insufficient to prove Saxton caused damages of \$250 or more, this Court should reverse Saxton's conviction for first degree malicious mischief and remand for entry of a conviction and sentence for third degree malicious mischief.

DATED this 21<sup>st</sup> day of June, 2008.

Respectfully submitted,

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

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 FLOYD SAXTON, )  
 )  
 Appellant. )

COA NO. 37108-1-II

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUN 26 AM 11:52  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**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 24<sup>TH</sup> DAY OF JUNE 2008, 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.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF JUNE 2008.

x Patrick Mayovsky

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STATE OF WASHINGTON  
2008 JUN 24 PM 4:29