

NO. 40056-1-II

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

STATE OF WASHINGTON,

Appellant

v.

SCOTT ROSS NEWCOMB,

Respondent

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CLERK OF COURT
BY [Signature]
COURT OF APPEALS
DIVISION TWO

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

The Honorable Michael J. Sullivan, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iv
I. Remedies Sought.....	1
II. Assignments of Error	1
III. Issues pertaining to assignments of error.....	1
IV. Statement of the Case.....	4
V. Argument.....	15
A. Standards of Review.....	15
B. The court erred in granting the defendant's motion.....	16
1) This case is not appropriate for dismissal under <u>Knapstad</u>	16
2) Because the lower court failed to enter written findings of fact and conclusions of law, the reviewing Court should only consider those alleged defects in the State's case which were complained of in the defendant's <i>Motion to Dismiss</i>	17
3) Comment Regarding a Defect in the State's Information.....	18
a) "Property of another" omitted.....	18
b) The road isn't, and needn't be, property of Kredlo.....	18
4) Elements of the offense.....	21
5) Definitions of "property of another" and "damages".....	21
6) State's responses to defendant's grounds for dismissal.....	22

C. Whether a road constructed coterminously to an easement constitutes "property of another" is one of first impression in the State of Washington26

VI. Appellant waives oral arguments and moves the court to decide this appeal on the briefs alone.....26

VII. CONCLUSION.....26

CERTIFICATE OF SERVICE.....28

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>State v. Gilbert</i> 79 Wash.App. 383, 902 P.2d 182 (1995).....	22
<i>State v. Knapstad</i> 107 Wash 2d 346, 729 P.2d 48.....	16
<i>State v. Missieur</i> 140 Wash.App. 181, 165 P.3d 381 (2007).....	15
<i>State v. O'Meara</i> 143 Wash. App. 638, 180 P.3d 196 (2008).....	15
<i>State v. Ratliff</i> 46 Wn.App. 325, 730 P.2d 716 (1986).....	12, 22
<i>State v. Stritmatter</i> 102 Wn.2d 516, 688 P.2d 499 (1984).....	19

STATUTES, RULES, AND REGULATIONS

LAWS of 2009, ch. 431 § 4 (effective July 26, 2009).....	21
RCW 9A.48.010.....	3, 4, 14
Former RCW 9A.48.070.....	1, 10, 21
RCW 9A.48.100.....	22
RCW 9A.04.110.....	3, 4

I. REMEDIES SOUGHT

In this appeal, the State seeks the following remedy:

A. Reversal of the lower court's decision to grant the defendant's motion to dismiss pursuant to *Knapstad* and remand to the trial court with instructions to reinstate the charge of Malicious Mischief in the First Degree.

II. ASSIGNMENT OF ERROR

1. The court erred in granting the defendant's motion to dismiss pursuant to *State v. Knapstad*.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where an individual is charged with malicious mischief in the first degree pursuant to former RCW 9A.48.070, does the State make out a *prima facie* case sufficient to overcome a *Knapstad* motion when it makes an offer of proof as to the following facts:

- a. A valid easement runs through a subservient estate, the property of defendant's mother, and benefitting the dominant estate of a third party, the alleged victim in the instant case;
- b. A roadway has been built, and improvements have been made to said roadway, co-extensive with said easement, by the

former owners of the dominant estate and by the current owners of the dominant estate;

c. The former owners of the dominant estate, together with their successors in interest, were previously adjudged to have the right to make improvements upon said easement and to enjoy the use of said easement without interference from the defendant in question or his mother;

d. The current owners purchased the dominant estate from the previous owners;

e. The defendant intentionally damaged said roadway by scraping the surface gravel from said roadway with a payloader for a distance of approximately 800 feet; by digging deep holes in the roadway; and by placing obstructions in the roadway, thereby rendering the road impassible;

f. Prior to damaging the said roadway, the defendant acknowledged that he was aware of the court order granting the easement to the dominant estate and enjoining him from interfering with said easement;

g. The cost of restoring the roadway in question is \$7,263.56; and

h. The acts occurred in the State of Washington.

2. Under the facts described in Issue #1, *supra*, was the case properly before the court on a *Knapstad* motion when defense counsel acknowledged, in his declaration, that the easement is in dispute and when the defendant disputes that he was the person who caused the damage to the road?
3. Under the facts described in Issue #1, *supra*, is it necessary for the State to present any evidence as to the value of the easement or the property that the easement serves?
4. Under the same facts, is it necessary for the State to provide any evidence as to the decrease in value of the easement or the property that the easement serves?
5. Under the same facts, is it necessary for the State to provide any evidence of the diminution in value of the dominant estate as a result of defendant's alleged acts?
6. Under the facts described in Issue #1, *supra*, is it necessary for the State to provide any evidence that the value of the gravel itself was diminished as a result of defendant's alleged acts?
7. Under the same facts, is it necessary for the State to be able to prove that the aggrieved party, i.e., the new owner of the dominant estate, held any "ownership" interest in the roadway, within the meaning of RCW 9A.48.010 and RCW 9A.04.110?

8. Does the owner of a dominant estate, benefitted by an easement which burdens a subservient estate, hold an "ownership" interest in the easement within the meaning of RCW 9A.48.010 and RCW 9A.04.110?

IV. STATEMENT OF THE CASE

The defendant's mother, Ms. Eileen Newcomb, owned a parcel of land in Pacific County, Washington, that was subject to an easement. CP 37. Tim Kredlo owned another parcel of land that benefitted from said easement. CP 34; CP 36-39. In order to access Mr. Kredlo's land, it was necessary to go through Eileen Newcomb's property by way of an easement and coterminous driveway, which driveway had been built over Newcomb's property. See Exhibit One to State's *Additional Authority in Support of State's Response to Defendant's Motion to Dismiss*, CP 32. See also, Conclusions of Law, at CP 38. The diagram at CP 32 depicts Tax Lots 9, 10, 15, and 12, owned at one time by Olsen, Newcomb, Richter, and "Stone" (i.e., Peter Stone, Amy Stone, and Ricki Bayne) respectively. As of the time of this writing, and at the time of the alleged criminal offense, the parcel indicated at Tax Lot 15 was and is still the property of Eileen Newcomb, the defendant's mother. The parcels indicated as Tax Lots 12 and 15 were purchased by Mr. Kredlo and his wife in late 2005.

The property formerly belonging to Peter Stone, Amy Stone, and Ricki Bayne, was transferred to the Mr. and Mrs. Kredlo by way of a

Statutory Warranty Deed executed on December 8, 2005. See Statutory Warranty Deed, Exhibit Two of State's *Additional Authority in Support of State's Response to Defendant's Motion to Dismiss*, CP 34.

In 2004, a lawsuit was brought by Peter Stone, Amy Stone, and Ricki Bayne, plaintiffs, against Eileen Newcomb and her son, Scott Newcomb, defendants, over the Stone's right to use the easement in question and over the defendant's alleged interference with said right. See Findings of Fact and Conclusions of Law in Pacific County Superior Court, Cause No. 04-2-00404-9, attached to State's *Additional Authority In Support of State's Response to Defendant's Motion to Dismiss* as Exhibit Three, CP 36-39. In that civil case, the Pacific County Superior Court provided legal descriptions of then-plaintiffs' properties together with the non-exclusive appurtenant easement for ingress, egress and utilization. *Id* (Finding of Fact #1). The court also found that Eileen S. Newcomb owned property that was subject to a non-exclusive easement for purposes of ingress, egress and utilities, 40 feet in width, running over Newcomb's property. *Id* (Finding of Fact #2). Eileen S. Newcomb and defendant Scott R. Newcomb are mother and son. *Id* (Finding of Fact #4). A survey dated August 25, 2004, by W.A. Ruef Company, Land Surveying, is on file with the Pacific County Superior Court which shows plaintiffs' property and Eileen Newcomb's property and shows the

easement by which the plaintiff's access their property through Eileen Newcomb's property over the easement. Id (Finding of Fact #5). Scott R. Newcomb interfered with the plaintiffs' use of the said easement and had made it impossible for the plaintiffs to freely access their property over the said easement, to wit, by felling a tree to block the easement, by piling brush on the easement, by digging out the easement, by tying a rope across the easement, and by threatening plaintiff Amy C. Stone if she attempts to improve the easement. Id (Finding of fact #6). The Pacific County Superior Court concluded that the Stones' property is accessed by a valid and recorded easement which easement, among other lands, goes through the land of Eileen Newcomb. Id (Conclusion of Law #2). The court found that the plaintiffs had a right to improve the easement and use the same for ingress, egress and utilities without interference from either of the defendants. Id (Conclusion of Law #3). The court also held that the plaintiffs were entitled to entry of a permanent injunction. Id (Conclusion of Law #4). The court entered a Decree enjoining Eileen Newcomb and Scott Newcomb "from in any manner whatsoever interfering with Plaintiff's *and/or their successors in interest's* use of the following described easement to benefit the following:

The South 900 feet of the Southwest quarter of the Southeast quarter lying Westerly of the Thread of the South fork of the Palix

River in Section 27, Township 13 North, Range 10 West of W.M., Pacific County, Washington.

TOGETHER WITH an appurtenant non-exclusive easement for ingress, egress and utilities as set forth on deed recorded in Volume 9005 at page 379.

for the purpose of ingress, egress and utilities" [*Italics added*]. See Decree, attached to State's *Declaration of Probable Cause*, CP 8-10. The Decree was signed on November 4, 2005, by the Honorable Judge Michael Sullivan, the same judge that granted the defendant's *Knapstad* motion which is the subject of the instant appeal. *Id.*

As discussed above, Tim Kredlo and his wife purchased the dominant estate, i.e., "Tax Lot 12," from Peter Stone, Amy Stone, and Ricki Bayne on December 8, 2005, approximately a month after Judge Sullivan entered the above Decree conferring upon the Stones' successors in interest the same rights to the easement as the Stones held. In early August, 2006, the Kredlos constructed a road on the easement having a construction value of \$12,000. See State's *Declaration of Probable Cause* (Statement of Timothy Kredlo) at CP 6-7. Sometime in late August or early September, 2006, after the road had been constructed, Mr. Kredlo and his wife encountered Mr. Newcomb on the easement section of Eileen Newcomb's property. *Id.* at 6. Mr. Newcomb represented himself as the agent of the owner. *Id.* He informed Mr. and Mrs. Kredlo that they had

bought a "sour lemon." Id. He informed Kredlo that the easement was for pedestrian traffic only. Id. He informed Kredlo that the county did not have the authority to issue a permit for the road; hence the road was illegal. Id. He informed Kredlo that there was a suit being brought in Federal Court against county officials concerning the issue. Id. Scott Newcomb also said that he contacted the Department of Natural Resources discussing "abandoning the road" and returning it to its original condition. Id.

Timothy Kredlo told Scott Newcomb that he, Kredlo, had a deeded easement, that the county had issued the permit for the road, and that he, Kredlo, had a copy of the Pacific County Superior Court order which told Scott Newcomb to stop interfering with the easement. Id. Scott Newcomb indicated that he was aware of the court order, but that it was invalid because "federal law superseded state and local laws" and added that the situation was currently working its way through the court system. Id. Mr. Newcomb indicated that he was going to return the road to its original condition. Id. Kredlo told Newcomb that he just wanted to be a good neighbor and to have good neighbors, and whatever problems he had with Dan Bayne was between him and Dan, and that Kredlo did not want to be in the middle of any of that. Id. When asked what it would take to

ensure that Kredlo did not have the kind of problems he and Mr. Bayne had, Newcomb suggested that Kredlo should give him \$15,000. Id.

In late September or early October of 2006, Tim Pettit from the PUD came to this property to provide a quote for power installation. He was stopped by Mr. Newcomb and was told that there was no easement for utilities or vehicles across his *[sic]* property. Id at 6-7.

On October 13, 2006, Kredlo returned to the property with a septic system designer, Phil Oman of Long Beach. Id at 7. The two men encountered Scott Newcomb on a payload loader scraping gravel from the surface of the road where the easement crosses Eileen Newcomb's property. Id. Kredlo observed that the majority of the gravel had been removed from about 800 feet of the roadway. Id. After viewing the septic site for about 15 minutes, he returned to the location where Newcomb had been; but the payload loader had been moved to another location on Eileen Newcomb's property and Scott Newcomb was nowhere to be seen. Id.

Timothy Kredlo reported the incident to the sheriff. Id. On October 16, 2006, Kredlo returned to the property and found that the remaining gravel had been dug down and churned up to a depth of two to three feet, and three very large stumps or root balls had been placed where the road had been. Id. The road was now completely impassible, except for a one-to-two foot wide path between the stump and the bank. Id.

There were tire tracks leading from the area where the road had been dug up onto the Newcomb property. *Id.* The gravel pile had not been there on Friday, October 13th, and Mr. Olson informed Kredlo that he had not been aware of any trucks delivering gravel to the area. *Id.*

Deputy Ryan Pearson prepared a report of his investigation, in which he documented the damage to the roadway which he and Mr. Kredlo observed. See attachment to State's *Declaration of Probable Cause*, CP 4. Deputy Pearson also observed the "obvious" tire tracks from a large piece of machinery leaving the area of the damaged roadway and entering the Newcomb property. *Id.* at 4-5. On October 24, 2006, Kredlo provided Deputy Pearson with a written estimate from Lodestone Construction to repair the damaged driveway for \$7,263.56. *Id.* at 5.

On October 8, 2008, the State filed an Information in Pacific County Superior Court accusing Scott Newcomb with one count of Malicious Mischief in the first Degree, committed as follows:

The defendant, Scott Ross Newcomb, on or between October 13, 2006, and October 16, 2006, in Pacific County, Washington, did knowingly and maliciously cause physical damage in excess of one thousand five hundred dollars (\$1,500.00) to wit: did damage a road, belonging to Tim Kredlo, in violation of RCW 9A.48.070(1)(a). CP 1-2.

On September 23, 2009, the defendant filed a motion to dismiss pursuant to *State v. Knapstad*, for insufficiency of the charges. CP 11-14.

The defects in the State's case, alleged in defendant's motion, were as follows:

- a) Whereas the State alleges that Mr. Newcomb damaged a road belonging to Tim Kredlo, Mr. Kredlo does not actually own the road in question. CP 12, line 8.
- b) The State makes no claim as to the value of the easement or the property that the easement serves. CP 12, lines 14-15.
- c) The State makes no claim as to the decrease in value of the easement due to the alleged acts of the defendant. CP 12, lines 16-17.
- d) The State has not provided any information on whether the gravel that was laid had been reduced in value because of the alleged acts of the defendant. CP 12, lines 19-20.
- e) An easement is not an ownership interest, but merely a form of license to use the property for ingress and egress. CP 14, lines 6-8. See also, RP (11/20/2009) 3.¹

The State filed a Response to Defendant's Motion to Dismiss on October 26, 2009. CP 15-25. In its response, the State pointed out that a Knapstad motion requires the court to construe the evidence in a light most favorable to the State. CP 17. The State pointed out that it was not necessary for Mr. Kredlo to own the property in question in order for him to have a property interest in the easement. CP 18. Moreover, the State pointed out that "property of another" means property in which the actor

¹ Newcomb's attorney argued, "The way the malicious mischief statute is put together, that definition does not include easements.... and easement is different from an ownership interest." RP (11/20/2009) at 3.

(i.e., the defendant) possesses anything less than exclusive ownership. Response to Defendant's Motion to Dismiss, CP 19. "Because Mr. Newcomb is not the owner of record, he does not possess any ownership interest in the property." *Id.* The State argued that the value of the easement itself, the roadway, or the property owned by Mr. Kredlo is immaterial. Response to Defendant's Motion to Dismiss, CP 20-21. Instead, the State argued, the State only needed to prove the cost of repairs in restoring the roadway to its previous state. *Id.*, citing *State v. Ratliff*, 46 Wn.App. 325, 328-29, 730 P.2d 716 (1986).

The State filed Additional Authority in Support of State's Response to Defendant's Motion to Dismiss on October 27, 2009. CP 26-40. In this document, the State provided additional background information regarding: 1) the easement appurtenant running through the property of Eileen Newcomb; 2) that Tim and Amy Kredlo are the owners of the properties benefitting from said easement; 3) that the Kredlos purchased the property located at Tax Lot 12 from Peter Stone, Amy Stone, and Ricki Bayne; 4) that as successors in interests, the Kredlo's inherited all of the rights of Peter Stone, Amy Stone, and Ricki Bayne previously held in the easement and roadway which is the subject of the criminal case; 5) that the property previously owned by Peter Stone, Amy Stone, and Ricki Bayne was described in detail by the Pacific County Superior Court in the

prior civil lawsuit; 6) that the Pacific County Superior Court had previously found that the defendant, Scott R. Newcomb has interfered with the Kredlo's predecessors in interest with respect to their use of said easement; 7) that the court had previously found, as a matter of law, that the Kredlos' property is accessed by a valid recorded easement running through the land of Eileen Newcomb; 8) that the court previously found that the former owners of the Kredlo property had a right to improve the easement and use the same for ingress, egress, and utilities without interference from Eileen Newcomb and Scott Newcomb; 9) that it is the Kredlos' legal interest in both the roadway itself, and in the improvements which they made upon said roadway after purchasing the properties from Stone, Stone, and Bayne, which constitutes the "property of another" which is the subject of the criminal case; and 10) outlining the evidence the State expected to show at trial proving that the Defendant knowingly and maliciously damaged the road by digging deep holes in it, by bulldozing the rock and gravel that the Kredlos had laid upon the road surface, and by placing obstructions in the roadway itself, rendering the easement unusable, and resulting in damages in excess of \$5000. Id.

On November 19, 2009, the defendant filed a Supplemental Memorandum Re: Motion to Dismiss in which Newcomb argued that an

easement cannot fit into the definition of property of another as defined by RCW 9A.48.010. CP 41-43.

On November 20, 2009, the court heard oral arguments on the defendant's motion to dismiss. RP (11/20/2009) 2-16. The defendant reiterated the points that he had raised in his two briefs. *Id.* At that hearing, the State acknowledged that its Information contained some erroneous surplusage because it stated that Kredlo owned the roadway in question. RP (11/20/2009) at 5-6. But the State pointed out that "because this will be a bench trial, the court can strike the surplusage in the charging language, but we do have to add 'property of another' which hasn't been alleged, and that's just a scrivener's error. We will be filing a motion to amend prior to trial." *Id.* at 6. Neither the court nor the defense counsel commented on the State's announced intention to correct the wording of the *Information*.

The State argued that the question of ownership, i.e., of who owns the roadway, is not an element of the crime charged. *Id.* The State was required to prove only that the defendant damaged "property of another" and reviewed the definition of "property" as defined in RCW 9A.04.110 as being "anything of value, whether tangible or intangible, real or personal." *Id.* The State went on to argue: "Property of another, as [defense counsel] has correctly pointed out, is, property in which the actor, meaning Mr.

Newcomb, possesses anything less than exclusive ownership. Well, the State wishes to maintain he doesn't possess *any* ownership in the property, but even if he did, it wouldn't be exclusive because an easement means that other people also have property rights. " Id.

On November 23, 2009, the court filed an Order Granting Defendant's Knapstad Motion. CP 44. On December 4, 2009, the Court entered its Order of Dismissal, not specifying whether it was with or without prejudice. CP 45.

The State timely filed this appeal.

V. ARGUMENT

A. STANDARDS OF REVIEW

1) A lower court's decision to dismiss a criminal case pursuant to *State v. Knapstad* is reviewed *de novo*. *State v. O'Meara*, 143 Wash.App. 638, 642, 180 P.3d 196 (2008). On appeal, the reviewing Court must view the facts and all reasonable inferences in the light most favorable to the State. *State v. O'Meara*, 143 Wash.App. 638, 180 P.3d 196 Wash.App. (2008) citing *State v. Missieur*, 140 Wash.App. 181, 184, 165 P.3d 381 (2007).

The Pacific County Superior Court, in granting the defendant's motion to dismiss, deliberately did not enter written findings of fact and conclusions of law, nor did it state any specific reasons, in fact or in law,

for its decision. See RP (12/04/2009) at 2. At the time of the entry of the December 4, 2009, Order of Dismissal, the defense attorney pointed out to the court that he could not draft any findings of fact and conclusions of law "unless there was something from the court as to the basis of the decision." *Id.* Whereupon the court merely stated that it "agreed with the defendant's argument," and that it "would be interested to see what a higher court wanted to say about that." *Id.* Therefore, the reviewing Court must assume that the trial court agreed with each and every contention contained within the defendant's *Motion to Dismiss*, along with the subjoined declaration of counsel (CP 11-14), and also with the defendant's *Supplemental Memorandum re Motion to Dismiss*, CP 41-43.

B. THE COURT ERRED BY GRANTING THE DEFENDANT'S MOTION TO DISMISS.

1) This case is not appropriate for dismissal under

Knapstad. To prevail on a *Knapstad* motion, the defendant must establish that "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." *State v. Knapstad*, 107 Wash.2d at 356, 729 P.2d 48. Yet the defense counsel, in his Declaration in support of the Motion to Dismiss, states that there is a material dispute as to the existence of the

easement. *See Motion to Dismiss*, CP 12, lines 8-10. That is a material disputed fact. Defendant states, "Defendant does not concede that Mr. Kredlo has an easement over the property." CP 14, lines 7-8. *See also Supplemental Memorandum re: Motion to Dismiss*. CP 41. That, too, is a material disputed fact. Defendant also notes, "Mr. Newcomb has entered a plea of not guilty, and that puts into dispute each element of the crime." *Id.*, lines 11-12. This suggests that the defendant is disputing all of the facts in the State's case. Finally, Defendant states, in his Discussion section, "The defense has not conceded that Mr. Newcomb is the one that tore up the road." CP 13, line 22. Clearly, this is yet another material disputed fact within the meaning of *Knapstad*. For these reasons alone, this matter is not the appropriate subject of a *Knapstad* motion.

2) Because the lower court failed to enter written findings of fact and conclusions of law, the reviewing court should only consider those alleged defects in the State's case which were complained of in the defendant's *Motion to Dismiss*.

As stated, the lower court merely asserted, without qualification, that it agreed with the defendant's arguments, and there is nothing in the record to suggest that it considered any other

potential reason for dismissing the State's case. See RP

(12/04/2009) at 2. Those alleged defects are as follows:

a) Whereas the State alleges that Mr. Newcomb damaged a road belonging to Tim Kredlo, Mr. Kredlo does not actually own the road in question. CP 12, line 8.

b) The State makes no claim as to the value of the easement or the property that the easement serves. CP 12, lines 14-15.

c) The State makes no claim as to the decrease in value of the easement due to the alleged acts of the defendant. CP 12, lines 16-17.

d) The State has not provided any information on whether the gravel that was laid had been reduced in value because of the alleged acts of the defendant. CP 12, lines 19-20.

e) An easement is not an ownership interest, but merely a form of license to use the property for ingress and egress. CP 14, lines 6-8. See also, RP (11/20/2009) 3.

3) Comment Regarding Defect in the State's Information.

a) **"Property of another" omitted.** During oral

arguments, the State acknowledged that the charging

document contained an error which the State intended to

correct. RP (11/20/2009) 5. Specifically the State noted

that the *Information* does not include the phraseology,

"property of another," pursuant to the statute. *Id* at 5-6.

The State pointed out that the *Information* should read that

the defendant "maliciously caused damage in excess of \$1500 to property of another, to wit: a road in which Mr. Tim Kredlo had a property interest." Id. [*Italics added for emphasis*] Because the case was scheduled for a bench trial, the court was authorized to strike surplusage in the charging language; and the State planned to file a motion to amend the *Information* prior to trial. RP (11/20/2009) 6, lines 5-10. Factual allegations in the information that go beyond the necessary elements of the offense are surplusage unless the defendant is prejudiced. *See State v. Stritmatter*, 102 Wn.2d 516, 524, 688 P.2d 499 (1984). Neither the defendant nor the court raised any issue as to the State's ability to correct the defect in its *Information* as being the reason for the court's granting the defendant's motion; therefore, this Court should conclude that the defect in the charging language was not material to the lower court's ruling.

b) Whether Kredlo owned the roadway is immaterial.

Furthermore, the State pointed out that the question of who owns the road is not an element of the crime charged. RP (11/20/09) 6, lines 11-13. Therefore it was not necessary to

prove that Kredlo owned the gravel road. More pertinently, the State maintained that the defendant did not possess *any* ownership in the property, and certainly not an *exclusive* ownership interest. RP (11/20/09) 6-7. See also, *State's Response to Defendant's Motion to Dismiss*, CP 19, lines 18-22 ("Because Mr. Newcomb is not the owner of record, he does not possess any ownership interest in the property").

Since it is not necessary for the State to prove that Kredlo owned the roadway, the language in the information describing the road as belonging to Tim Kredlo is mere surplusage which should be stricken or disregarded by the trial court in its entirety. The State should also be permitted to amend the Information prior to trial to correct the inartful language.

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4) Elements of the offense. Pursuant to former RCW

9A.48.070(a), a person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars.²

5) Definitions of "property of another" and "damages."

Pursuant to RCW 9A.48.010(1)(c), "property of another" means property in which the actor possesses anything less than exclusive ownership. "Property" means "anything of value, whether tangible or intangible, real or personal." RCW 9A.04.110(22). Because a gravel driveway or roadway serves an important function in permitting access to land, and because the raw materials, time, and labor necessary to construct a roadway have some value, the roadway and all improvements thereto, as well as the underlying easement, are clearly something of value, and hence, "property" within the meaning of RCW 9A.04.110. And because it was Eileen Newcomb, the defendant's mother, who owned the subservient estate, and not Mr. Newcomb, and because Timothy Kredlo also held a property interest in both the easement and the

² The former version of RCW 9A.48.070, as stated herein, is the version of the statute that was in effect as of October 16, 2006, the alleged date of violation in this matter. The amount in former RCW 9A.48.070(1)(a) was recently raised to \$5,000. LAWS OF 2009, ch. 431, § 4 (effective July 26, 2009).

improvements thereto, the roadway constituted "property of another" within the meaning of RCW 9A.48.010(1)(c).

RCW 9A.48.100(1) defines "physical damage" as used in the malicious mischief statute and states that "in addition to its ordinary meaning," physical damage also includes "any diminution in the value of any property as the consequence of an act." Our courts have held that the ordinary meaning of damages *also* "includes the reasonable cost of repairs to restore injured property to its former condition." *State v. Gilbert*, 79 Wash.App. 383, 385, 902 P.2d 182 (1995). In enacting RCW 9A.48.100, the Legislature did not intend to limit the meaning of damages to the diminution in value alone. *State v. Ratliff*, 46 Wash.App. 325, 328-29, 730 P.2d 716 (1986), *review denied*, 108 Wash.2d 1002 (1987). The cost of repair has long been allowed as an element of damages under certain circumstances. *Id.* Here, the State's Declaration of Probable Cause states that Kredlo obtained an estimate from Lodestone Construction of \$7,263.56 to repair the road. That is more than enough to make out a *prima facie* case that damages exceeded \$1500.

6) State's responses to defendant's grounds for dismissal.

a) Defendant's first ground for dismissal: no proof that Kredlo owns the driveway. Response: The State argues that this is not an essential element of the offense. As noted above, the State is not required to prove who owns the roadway, but only that the defendant has less than an exclusive ownership interest in the roadway.

b) Defendant's second ground for dismissal: the State makes no claim as to the value of the easement or the property that the easement serves. Response: Because the State is able to prove costs of repairing the damage, it is not necessary for the State to prove the value of the easement of the property that the easement serves.

c) Defendant's third ground for dismissal: the State makes no claim as to the decrease in value of the easement due to the alleged acts of the defendant.

Response: Because the State is able to prove costs of repairing the damage, it is not necessary for the State to prove any diminution in the value of the easement as a result of the alleged acts of the defendant.

d) Defendant's fourth ground for dismissal: the State has not provided any information on whether the gravel

that was laid had been reduced in value because of the alleged acts of the defendant. Response: Because the State is able to prove costs of repairing the damage, it is not necessary for the State to prove whether the gravel itself was decreased in value as a result of the alleged acts of the defendant. It is only necessary for the state to show what the cost would be of restoring the roadway to the condition in which it existed immediately prior to the defendant's alleged criminal act.

e) The defendant's fifth ground for dismissal: an easement is not an ownership interest, but merely a form of license to use the property for ingress and egress. Response: Because the State is not required to prove that an easement is an ownership interest, the Court needs not reach this issue. Defendant's argument fails because it focuses on Kredlo's ownership interest in the road, or lack thereof, when it should have focused instead on whether the State is able to make a prima facie showing that the actor, Scott Newcomb, enjoyed "anything less than an exclusive ownership" of the property he destroyed.

Still, the State's position is that an easement is a property right that is relevant in determining whether someone has been harmed as a result of a defendant's act of malicious mischief. It goes to the element of maliciousness. The State expects to show that the defendant's mother, Eileen Newcomb, is the owner of the subservient estate through which the easement and roadway runs, and that Tim Kredlo is the owner of the dominant estate benefitted by said easement. Although Mr. Kredlo does hold substantial property interests in the driveway itself, there is no requirement that the State prove that the easement is an ownership interest *per se*. But the fact that Scott Newcomb was aware of Kredlo's substantial interests amply demonstrates that he acted with malice when he destroyed the gravel road. Such evidence is therefore relevant to the State's case. In order to make out a prima facie case sufficient to overcome a *Knapstad* motion, the State needs only to prove that the defendant knowingly and maliciously damaged "the property of another," and that the amount of the damage was greater than \$1,500.00.

C. THE QUESTION OF WHETHER A GRAVEL ROAD THAT HAS BEEN CONSTRUCTED COTERMINOUSLY TO A VALID EASEMENT CONSTITUTES "PROPERTY OF ANOTHER" IS ONE OF FIRST IMPRESSION IN THE STATE OF WASHINGTON.

1. This is a case of first impression.

A careful search of Washington State case law produced no case directly on point. Despite the fact that there is no published Washington case directly on point, the state maintains that the issue may be satisfactorily resolved by reference to the statutory definitions, common sense, and case law of more general application as described herein.

VI. APPELLANT WAIVES ORAL ARGUMENTS AND MOVES THE COURT TO DECIDE THIS APPEAL ON THE BRIEFS ALONE.

The State's position is that the issues presented herein are best decided on the basis of the briefs filed by each side. In the interest of promoting judicial economy, the State respectfully requests that no oral arguments be heard in this matter.

VII. CONCLUSION

For the reasons stated above, the trial court erred in granting the defendant's motion to dismiss. This Court should reverse the lower court and remand with instructions to reinstate the charges.

DATED this 21st day of January, 2010.

Respectfully submitted,

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY

BY: David Bustamante
DAVID BUSTAMANTE, WSBA #30668

CERTIFICATE OF SERVICE

I, David Bustamante, do solemnly declare and affirm, under penalty of perjury under the laws of the State of Washington, that I personally served the attached Appellant's Opening Brief by mailing a true copy, postage prepaid, to the Respondent, Mr. Scott Ross Newcomb, at the following address of record: P.O. Box 11, Naselle, WA 98638 ; and also, by mailing a true copy to his attorney of record, Jordan Broome McCabe, P.O. Box 40642, Bellevue, WA 98015-4642.

Signed at South Bend, Pacific County, Washington, this 22nd day of January, 2010.

David Bustamante

DAVID BUSTAMANTE
DECLARANT

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