

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

FILED
COURT OF APPEALS
DIVISION II
10 MAR -5 PM 1:06
STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Michael J. Sullivan, Judge

APPELLANT'S REPLY BRIEF

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I. APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF

A. The alleged damage was not to a portion of the defendant's land.

The respondent argues, "To prove the elements the crime [sic], the State offered to prove that Newcomb inflicted damage on a portion of his land that was subject to an easement in favor of a neighboring parcel owned by Kredlo." Brief of Respondent at 1. This mischaracterizes the State's offer of proof. First of all, the damage was not inflicted upon a portion of Scott Newcomb's land because he did not own the land. Newcomb's *mother* was the sole owner of the property wherein the damage is alleged to have occurred. Secondly, the alleged damage is not to the property itself, owned by Newcomb's mother, but to the driveway, and improvements to the driveway, built conterminously to a valid easement on the property, by Kredlo and his predecessors in interest. The State maintains that said improvements to the easement, along with the driveway itself, constitute "property of another" for purposes of the malicious mischief statute.

B. Respondent's attack on the so-called "facts on appeal" is groundless and contrary to the inherent limitations of *Knapstad*.

The essence of a *Knapstad* motion is that, for purposes of the motion, the proponent stipulates that there is no material dispute as to

matters of fact. Mr. Newcomb cannot bring a Knapstad motion and, at the same time, argue about the facts of the case. The respondent fails to identify with specificity which of the "facts on appeal" have been misstated. Every single "fact" presented by the appellant in its statement of the case was documented with reference to declarations, pleadings, exhibits, and argumentation contained in the record below. Appellant cited to the record throughout its Opening Brief. Appellant made no claims as to the facts of the case that were not supported in the record.

Furthermore, the defendant did not challenge any of the so-called "facts" of the case below. Therefore, they are verities on appeal.

C. Although the findings of fact and conclusions of law from the prior civil matter do not constitute proof beyond a reasonable doubt, they nevertheless supply *prima facie* evidence as to the property rights of the parties.

The Washington Constitution provides that the superior court has original jurisdiction in "all cases at law which involve the title or possession of real property...." Const. art. IV, § 6. Once a Superior Court has entered findings of fact and conclusions of law pursuant to an action to quiet title, such findings are admissible in subsequent trials wherein the general history of the property or boundaries are at issue, provided that the same would be provable by evidence of reputation.

See ER 803(a)(23). ER 803(a)(23) applies to judgments in both civil and criminal cases and does not bar the use of a civil judgment in a later criminal proceeding, even though a higher burden of proof applies in the criminal proceeding. Karl B. Tegland. EVIDENCE, 448-449 (2009-2010 Ed.). Therefore, for purposes of a *Knapstad* motion, the prior civil judgment, together with the written findings of fact and conclusions of law, are admissible as *prima facie* evidence of the legal rights of the parties with respect to the land and easement at issue, and also as to the absence of any "claim of right" on the part of defendant.

D. The State did not assign error to the trial court's failure to enter findings of fact and conclusions of law.

The respondent argues: "The State complains that the trial court did not enter Findings of Fact in support of its Order of Dismissal."

Respondent's Brief at 3. The appellant disputes this claim. The appellant merely pointed out that the lower court deliberately did not enter any written findings. Appellant's Opening Brief at 15-16. The appellant further argued that, because the trial court deliberately did not enter written findings, this reviewing Court must assume that it agreed with each and every one of the defendant's contentions, and must therefore examine each and every one of the defendant's arguments in

turn. *Id.* at 16. The defendant made many arguments in support of his *Knapstad* motion, not just one. *Id.* at 11.

E. Respondent's position is self-contradictory with respect to whether there are disputed facts.

In the main part of his brief, the respondent maintains that there are no disputed facts. See Respondent's Brief at 3. Yet the Respondent's Brief starts out by rejecting the appellant's Statement of the Case *in its entirety*. Respondent's Brief at 1. The respondent then goes on to dispute the "facts" contained in the judicial findings cited by the State in connection with its *prima facie* case. Respondent's Brief at 2. Because this Court reviews the decision on a *Knapstad* motion *de novo*, the respondent's position is untenable. The respondent cannot have it both ways; i.e., maintain that he is stipulating that there is no material dispute as to the facts of the case, and at the same time, assail the so-called "facts on appeal." The respondent cannot argue that facts found by a preponderance of the evidence in a prior civil matter do not constitute proof beyond a reasonable doubt. In reviewing a lower court's ruling pursuant to a *Knapstad* motion, the reviewing Court must view the facts and all reasonable inferences in the light most favorable to the State. Appellant's Opening Brief at 15. The standard is not "proof beyond a reasonable doubt."

F. The basis for the court's ruling is not apparent from the record.

The respondent argues that the legal basis of the trial court's decision is "unmistakably clear" because the lower court stated that it "agreed with the defendant's argument." Respondent's Brief at 4. But making a broad, unsupported statement that the court "agrees" with the defendant's argument is not the same as a clear and cogent statement of precisely why dismissal under *Knapstad* was appropriate. The defendant made not one argument, but many.

G. In making out a prima facie case for malicious mischief, it is not necessary for the State to allege the identity of the victim. The

respondent argues that the problem with the State's case is that, if the property belongs to Newcomb's mother, then Kredlo is not the victim. See Respondent's Brief at 7. But in proving its case, it is not necessary for the State to allege or to prove the identity of a victim.¹ It is only necessary for the State to prove that the defendant knowingly and maliciously damaged the property of another, that the damage was greater than \$1500, and that the act occurred in the State of Washington. See Appellant's Opening Brief at 21. The existence of a "victim" is not an element that the State is required to prove. *Id.* As argued previously,

¹ See e.g., *State v. Plano*, 67 Wash. App. 674, 678-9, 838 P.2d 1145 (1992); see also *State v. Johnston*, 100 Wn.App. 126, 134, 996 P.2d 629 (victim's name is not an essential element of a crime), *review denied*, 141 Wn.2d 1030 (2000).

the fact that Kredlo's property interests in the roadway were foreseeably harmed by Mr. Newcomb's actions goes to the element of malice. Newcomb knew, or should have known, that his actions would significantly harm Mr. Kredlo's property interest in the roadway, and for that reason, Newcomb acted maliciously. See Appellant's Opening Brief at 25.

H. There is no "substitution of facts" as alleged by the respondent.

The respondent alleges that the State committed a "substitution of facts" in order to strengthen its case on appeal. Respondent's Brief at 8. We disagree. The State has argued all along that it is not necessary to prove that Kredlo owned the roadway. Appellant's Brief at 12. The facts argued on appeal are the same facts that were argued at the trial level. Appellant made no claims as to facts which are not supported in the record below.

I. Judicial estoppel does not apply to the case at bar because the State is not taking an inconsistent position on appeal.

The State has argued the same facts on appeal that it did at the trial level. The verbatim transcript of proceedings makes clear that the State argued at the trial level that it was not necessary for the State to allege or to prove that Kredlo owned the roadway in question. Appellant's Opening Brief 14-15, citing RP (11/20/2009) at 5-6.

J. The lower court did not conclude that the clear language of the statute required dismissal on these facts.

The Respondent argues that the lower court "...concluded that the clear language of the statute required dismissal on these facts."

Respondent's Brief at 10. The court concluded nothing of the sort.

Because the court did not enter findings of fact and conclusions of law, and made no specific pronouncements on the record, it is highly improper for the respondent to assert that the court concluded that the language of the statute was clear.

K. The rule of lenity does not apply to this case.

As the respondent correctly pointed out, the rule of lenity comes into play where a statute is ambiguous. Respondent's Brief at 11. Yet the respondent makes no showing that there is any ambiguity in the statute in need of resolution. On the contrary, the respondent preceded this argument by characterizing the statute as "clear." If the statute is "clear," then it is not ambiguous. And if it is not ambiguous, then there is no reason to resort to the rule of lenity.

The statute clearly defines that the damage must be to "property of another." See Appellant's Brief at 21. "Property" means "anything of value, whether tangible or intangible, real or personal." *Id.* And "property of another" means property in which the actor possesses

anything less than exclusive ownership. Id. Respondent fails to show any ambiguity in the statute requiring the application of the rule of lenity under the facts of this case. Because the State alleges that Mr. Newcomb has no ownership interest in the property he damaged, it is "property of another" within the meaning of RCW 9A.48.010(1)(c). Id.

L. The road in question is not synonymous with the easement.

Respondent often speaks as though the easement and the road were one and the same. See e.g., Respondent's Brief at 11. They are not. While the easement itself may well be something intangible, the improvements to the easement, the construction of which required time, labor, and raw materials, are tangible in nature.

M. Kredlo's rights were not limited to egress and ingress.

The State clearly pointed out in the court below that Mr. Kredlo had the right, not only to use the easement for egress and ingress, but also to make improvements to the easement. Appellant's Brief 6. See also CP 36-39. For this reason, the State's position is that Mr. Kredlo has a substantial property interest in the improvements to the roadway, even if that property interest is something less than outright ownership, and that Mr. Newcomb should have been aware of this substantial interest. Because this is a nonexclusive easement, no one has exclusive ownership as to the road itself.

N. Available civil remedies do not preclude criminal prosecution

Respondent seems to argue that this is entirely a civil matter.

Respondent's Brief 11-12. The fact that a civil remedy is available to an aggrieved party does not necessarily preclude the possibility of criminal prosecution. The range of actions in which a criminal act might trigger a civil remedy is wide and tremendously varied, including everything from simple trespasses to assaults to thefts, frauds, and wrongful deaths. The very fact that an injury has a remedy at civil law does not, in and of itself, prevent the state from prosecuting the offense as a crime, provided that it can prove a crime has been committed.

II. CONCLUSION

For the reasons stated above, this Court should reject the respondent's arguments and find that 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 4th day of March, 2010.

Respectfully submitted,

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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 Reply 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 4th day of March, 2010.

David Bustamante
DAVID BUSTAMANTE
DECLARANT