

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON NO. 40810-4-II

BY [Signature]

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID WOOTEN, JR.,

Appellant.

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

The Honorable James Lawler, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF THE CASE

1. Trial evidence

Trial Exhibit 1 was the purchase and sale agreement for a house at 303 Hadaller Road in Lewis County, Washington, entered into on May 17, 2005, between Dr. Wooten, on behalf of Wooten Primary Care, and Mr. Kohl, the owner of the house. The agreement specified a selling price of \$225,000, with \$10,000 to be paid during the first year as a down payment and the remainder to be paid in monthly installment at 8% interest over thirty years. It was understood that Dr. Wooten would be living in the house; and he, in fact, moved in with his family shortly after the agreement was signed. 2RP 43; 3RP 33.

Approximately four months later and without notice to Dr. Wooten, Mr. Kohl obtained a mortgage on the house for \$216,000.¹ 2RP 69-70.

Approximately two months later, on November 1, 2005, a real estate contract was drafted to replace

¹ Presumably Mr. Kohl received the \$216,000 and became obligated to pay back the mortgage. It was undisputed that none of this money came to Dr. Wooten.

the purchase and sale agreement. Exhibit 2. This contract was signed by Richard Miller, purportedly on behalf of Wooten Primary Care, on May 4, 2006, and Mr. Kohl on June 2, 2006. There was no evidence that Dr. Wooten was aware of this contract and no evidence establishing Mr. Miller's authority with Wooten Primary Care on that date; Dr. Wooten testified that Mr. Miller was "an ex business partner." 3RP 47. Mr. Miller did not testify at trial.

It was exhibit 2 which provided that the buyer agreed to pay taxes and maintain insurance and that the seller would convey a warranty deed when the property was "clear of all underlying debt encumbrances." The contract also provided that the seller "shall maintain in current status all obligations under each and every debt and/or security instrument of record against the property in his name and shall fully indemnify and hold Buyer harmless from all loss occasioned by his failure to do so." Exhibit 2.

It was undisputed that Dr. Wooten made the down payment and other payments to Mr. Kohl until

he learned that Mr. Kohl had taken out a mortgage and defaulted on it and that he would have to pay \$450,000 to keep the house he purchased for \$225,000-- the money he owed to Mr. Kohl plus repayment of the money Mr. Kohl obtained using the house for security. 3RP 40-41.

Dr. Wooten testified that he had begun remodeling the house in July 2007. 3RP 33. Once he started, however, he discovered black mold in the walls and had to remove a large amount of sheetrock from walls in the house. 3RP 37-38. In December 2007, Dr. Wooten found the default notice attached to the gate. 3RP 40.

The state presented no evidence that the remodeling did not begin in July 2007, or that there was not black mold in the walls of the house. The state's evidence was that the house was in good repair sometime in 2006, when Deputy Shannon of the Lewis County Sheriff's Office visited there. 2RP 98; 3RP 72.

Mr. Kohl testified that after he got a tax bill from the county, he went to his attorney in

September 2007, and "gave it [the house] back to the bank" because he had a mortgage on it. 2RP 50.

2. Closing arguments

The prosecutor argued to the jury, in closing, that (1) the house at 303 Hadaller Road was destroyed "after Dr. Wooten had it," sometime between January 1, 2006, and May 22, 2008; (2) there was property damage both because the value of the property was diminished and by "the ordinary meaning of physical damage"; (3) Dr. Wooten did not own the property because he or his company entered into a real estate contract "in which legal title to the property is retained by the seller as security for payment of the purchase price"; and (4) Dr. Wooten did not satisfy the terms of the contract. 3RP 72-75²

When defense counsel objected to the prosecutor's assertion that "Dr. Wooten, through Wooten Primary care, his company, he testified to that himself, entered into a real estate contract

² The verbatim report of proceedings is cited as in the Brief of Respondent: 1RP is May 14, 2009 Trial Setting; 2RP is Jury Trial Day 1; 2RP is Jury Trial Day 2 and Sentencing.

to purchase the property," the court responded: "His representative did, I'll overrule the objection." 3RP 74.

According to the prosecutor, the evidence of malice arose from the fact that Dr. Wooten learned in December 2007 that the house was in foreclosure and that he was

on the hook somehow for some astronomical amount of money, \$450,000. That's enough to make somebody pretty angry. So what do you do when you're angry, well, rip apart the house.

. . . . it's beyond a temper tantrum, it's a crime.

RP 87.

When defense counsel began closing argument, the state objected to the statement that after selling the house to Dr. Wooten, Mr. Kohl went to the bank and took out a loan on the house. 3RP 81. Counsel responded that it was "part of the evidence." 3RP 81. The court asked how it was relevant. 3RP 81.

The court cleared the courtroom and asked again how Mr. Kohl's conduct was relevant to "who owns this house or who did the damage." 3RP 82.

Defense counsel responded that this was part of the evidence that Dr. Wooten was forced out of the home and would still be there, "had it not been for the foreclosure." 3RP 83.

MR. RICHARDSON (the prosecutor) I don't see how the change in financing is relevant still. If the claim is Dr. Wooten didn't satisfy his end of the real estate contract, how Mr. Kohl had the house financed is not relevant still.

THE COURT: I'm having trouble seeing that myself. What you're trying to do is confuse the jury as to who is responsible here by talking about some issue that really has minimal relevance to this.

3RP 83. Defense counsel noted that the evidence came in at trial and "I should be able to argue it"

3RP 83. The court continued:

Just because there is evidence here, you should be allowed to misconstrue what the law says?

. . . . The idea is that, well, he's fulfilled his contract here, so therefore, he's what, he's destroyed the security regardless of whether it is secured by a mortgage. This would be the theory here would be he has destroyed the security that secures the contract or the mortgage, doesn't matter.

. . . . How it was financed is not what this case is about, so I'm going to sustain the objection.

3RP 83-85. The court concluded that defense counsel could not argue "that the mortgage somehow changed things, it didn't change things." 3RP 85.

When defense counsel inquired whether the court was preventing him from presenting argument on the conflicting statements Mr. Kohl made "about the mortgage, about the lack of notice, about his statements to Deputy Shannon," the court responded that even though the statements to Deputy Shannon came in without objection, they were "really not even properly before the jury as far as I am concerned So, no, I'm not going to allow you to do that either." 3RP 86.

The court concluded, "that's why I am not going to let you do it. It is irrelevant who owned this or who made the claim." 3RP 88.

Defense counsel then argued that there was no evidence that plumbing or wiring had been ripped out or that holes had been kicked in the sheetrock. 3RP 91. Counsel argued that Mr. Kohl accepted payment from Dr. Wooten, that it was never established that Dr. Wooten failed to have insurance on the house or that taxes had not been

paid in years prior to 2008. 3RP 92-93. Counsel argued that the teardown of the remodel had been hauled away. 3RP 94-95. Counsel argued that there was no evidence that Dr. Wooten strewed the garbage. 3RP 98.

B. ARGUMENT IN REPLY

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT DR. WOOTEN COMMITTED MALICIOUS MISCHIEF IN THE FIRST DEGREE.

Dr. Wooten's defense was that he purchased the house at 303 Hadaller Road through a Residential Real Estate Purchase and Sale Agreement which he personally signed on behalf of his clinic Wooten Primary Care, LLC. Exhibit 1. He paid the agreed-upon down payment, moved into the house with his family and made monthly payments. 3RP 31-33.

In July 2007, Dr. Wooten began remodeling the house to return it to its original configuration as a three-bedroom house. 3RP 34-46. Once he started remodeling, he discovered black mold in the walls of the house. 3RP 36-38. As a result, he removed an extensive amount of sheetrock from the affected walls over the next five months. 3RP 38. In December 2007 while taking a break from the

remodeling over Christmas, Dr. Wooten found a foreclosure notice posted on the property. 3RP 38-40. He learned at that time that, without his knowledge, Mr. Kohl had taken out a mortgage on the property after selling it and had defaulted on that mortgage. 3RP He learned that he would have had to pay almost twice the value of the house to keep it from foreclosure. He stopped making payments and stopped work on the remodeling project. 3RP 43.

Had the property not gone into foreclosure, he would have continued payments and completed the remodeling. For these reason, he did not damage the property of another and did not act with malice.

It was Mr. Wooten's further defense that when he left the house to move the family's belongings to Texas, the garbage from the house was enclosed in bags and stacked in the garage. His wife left after him. 3RP 45. He denied leaving the garbage strewn in the yard and house. 3RP 45-46.

Although it was the state's theory that Dr. Wooten damaged and trashed the house after learning

that it had been foreclosed on (3RP 72-73), the state introduced no evidence contesting Dr. Wooten's testimony about beginning to remodel the house months before learning of the foreclosure or his testimony about the black mold in the walls of the house. In any event, the mere fact of a possible motive for damaging property is in itself insufficient to establish proof beyond a reasonable doubt that the defendant actually damaged the property.

Further, there was no evidence that Dr. Wooten knew of the subsequent real estate contract which he did not sign, or the obligations it imposed on the buyer. Mr. Kohl's double hearsay testimony that Mr. Miller said he told Dr. Wooten these things certainly not establish that Mr. Miller did so. 2RP 61.³ Mr. Miller did not testify at trial

³ Q. And what did Mr. Wooten know about Exhibit 2?

A. I can't tell you because I don't know.

A. Not I knew he knew about it.

Q. Did you talk to him?

A. Through Bob I knew. Bob told me he knew about it.

and Mr. Kohl did not claim to have heard any discussions between Mr. Miller and Dr. Wooten.

Absent such testimony, the evidence was insufficient to establish beyond a reasonable doubt that Mr. Wooten knowingly and maliciously caused damage to the property of another, or did so in an amount exceeding one thousand five hundred dollars. RCW 9.94A.070.

Although "property of another" can include "property in which the actor possesses anything less than exclusive ownership," RCW 9A.48.010(c), this definition does not mean that beginning a remodel of a home one has purchased constitutes knowing and malicious damage to the property of another even though the house is in disarray during the remodelling.

While the state argues that it is up to the jury to determine the credibility of witnesses and they may have convicted because it found Dr. Wooten not credible, Brief of Respondent at 14, this

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- Q. You don't know that Mr. Wooten knew anything about this, do you?
A. I'm assuming he did.

overlooks the fact that there was no state witness who had any first-hand knowledge of anything happening in the house from May 2005 until May 2008. The state presented no more than Mr. Kohl's and the prosecutor's speculations about what might have happened.

The tort doctrine of *res ipsa loquitur* is instructive, as an analogy, in considering what is proven where there is no direct evidence of what occurred at a particular time and place. Under this doctrine, the trier of fact is permitted to infer negligence if "(1) the circumstances be such as to logically allow a presumption of negligence; and (2) that the circumstances suggest superior knowledge or opportunity for explanation on the part of the party charged. [However] . . . before these requirements can be said to exist, exclusive control in the control of the defendant will be essential as a matter of logic. Gardner v. Seymour, 27 Wn.2d 802, 811, 180 P.2d 564 (1947) (quoting "The Doctrine of Res Ipsa Loquitur," 13 Wash. Law Review 215, 220).

While inferences allowed by the rule or doctrine of *res ipsa loquitur* constitutes such proof [of negligence], it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked.

Id., at 812 (quoting Quass v. Milwaukee Gas Light Co., 168 Wis. 575, 170 N.W. 942 (1919)).

In other words, because one inference might be that Dr. Wooten had good reason to be angry, he therefore acted with anger and damaged the house, this does not constitute proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. The state failed to establish an inference of malicious damage because the state failed to show that no other possibility could explain what happened. The state failed to establish an exclusive motive of retribution rather than a motive to remodel the house. What the state established was some basis for speculation about Dr. Wooten's intent.

Further, as set out in appellant's opening brief, the state failed to establish that Dr.

Wooten knew that he did not own the house, given that there was no evidence showing that he knew of the terms of the real estate contract which provided that he would receive the deed only on completion of all of the payments. AOB at 20.

Because the state failed to provide sufficient evidence from which a rational jury could find all of the elements of malicious mischief proven beyond a reasonable doubt, Mr. Wooten's conviction should be reversed and vacated. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. DR. WOOTEN WAS DENIED DUE PROCESS WHERE THE STATE PRESENTED EVIDENCE OF TWO DISTINCT ACTS TO SUPPORT MALICIOUS MISCHIEF BUT THE COURT FAILED TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO UNANIMOUSLY CONCLUDE BEYOND A REASONABLE DOUBT THAT DR. WOOTEN COMMITTED AT LEAST ONE CRIMINAL ACT.

The state relied on two types of damage for its case: garbage strewn over the house and yard, and the actual removal of the walls and plumbing fixtures. 3RP 74, 78. The prosecutor further argued that there were two types of damage, diminishing the value of the property and the more commonly understood act of destruction. 3RP 73-74.

Specifically, the prosecutor noted that "garbage all over the house, that diminishes the value."

Given the evidence presented at trial, the jury may well have believed that the physical damage to the house was a result of remodelling undertaken with the sole aim of returning the house to its original three bedroom plan, but that Dr. Wooten was responsible for strewing garbage in anger over the foreclosure and the lack of notice that there was a mortgage on the house that he might be held responsible for. The jurors could also have found that the garbage was not strewn when Dr. Wooten left the house, but left in bags in the garage.

Given the failure of the state to establish that the garbage resulted in \$1,500 worth of damage, the failure to give a unanimity instruction was error.⁴ See Opening Brief of Appellant at 23 (citing State v. Petrich, 101 Wn.2d 566, 693 P.2d 173 (1984), modified in State v.

⁴ The testimony by William Teitzel was that the group who cleaned up the property filled a four or five-yard single rear axle truck with garbage. 2RP 133.

Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The error was not harmless because the nature of the verdict did not indicate that all jurors relied on the same incident for conviction, State v. Holland, 77 Wn, App, 420, 425, 891 P.2d 49, review denied, 127 Wn.2d 1008 (1995), and because a reasonable juror could have entertained a reasonable doubt about either act. Kitchen, 110 Wn.2d at 411.

3. DR. WOOTEN WAS DENIED HIS STATE AND FEDERAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND THE ASSISTANCE OF COUNSEL WHERE THE TRIAL COURT COMMENTED ON THE EVIDENCE AND IMPROPERLY LIMITED CLOSING ARGUMENTS.

a. Comment on the evidence

Given the defense theory of the case that Dr. Wooten had no knowledge of the real estate contract or its provisions, including the provision that a deed would be provided only after full payment, the court's comment that Robert Miller was acting as his agent in signing the contract was an unconstitutional comment on the evidence. The court essentially told that jurors that they could accept as proven that Dr. Wooten was bound by the real estate contract he did not sign and had no notice

of.⁵ From the court's comment the jury could infer -- particularly in light of the court's instruction that a real estate contract is an agreement in which the seller retained title of the property until all payments had been made by the buyer -- that any damage caused by Dr. Wooten was to the property of another.

(the prosecutor) The question is did Dr. Wooten own the house and the answer is no. Dr. Wooten, through Wooten Primary care, his company, he testified to that himself, entered into a real estate contract to purchase the property.

MR. BLAIR (defense counsel): I am going to object, your Honor, there's no evidence that he entered into that contact, he didn't sign it.

THE COURT: His representative did, I'll overrule the objections.

. . . .

(the prosecutor continuing). Fulfillment Deed, Number 6, Upon payment of all of the amounts due seller, seller shall convey to buyer via statutory warranty

⁵ The state writes in its brief that Dr. Wooten testified that he "was not disputing the terms of the real estate contract and was fulfilling its terms." Brief of Respondent at 20 (citing 3RP 50-52). Dr. Wooten's testimony that he was not contesting the terms in the contract, however, was not an admission that he knew about it or had authorized Robert Miller to sign it.

deed full title in fee simple absolute
clear of all underlying
debt/encumbrances, et cetera.

3RP 75. The prosecutor continued by referring to Instruction No. 9, which provided that "a real estate contract is a written agreement for the sale of real property in which legal title to the property is retained by the seller as security for the purchase price." 3RP 75. The prosecutor then argued, "If Dr. Wooten would have satisfied the contract, he would have got a deed. He didn't." 3RP 75.

A statement by the judge is a comment on the evidence "if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial." State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981). A comment is constitutional error when "the court's attitude toward the *merits* of the case or the court's evaluation relative to a *disputed fact* is inferable from the statement." State v. Hansen, 46 Wn. App. at 300 (emphasis in original). Because a comment on the

evidence is constitutional error, it may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); State v. Hansen, 46 Wn. App. 272, 300, 730 P.2d 706 (1986). Such comments on the evidence are presumed prejudicial. State v. Lane, 125 Wn.2d 825, 838-839, 889 P. 2d 929 (1995).

The comment was not only presumptively prejudicial, it was plainly so. It undermined Dr. Wooten's defense that he did not knowingly damage the property of another because, at the least, he believed he had purchased the property and had every right to live in it and remodel it.

The trial court commented on the evidence and this should require reversal of Dr. Wooten's conviction.

b. Limitation on closing argument

Mr. Kohl was a state's witness. He testified on direct examination that he "flipped" the house back to the bank because he had a mortgage on it. 2RP 50. Dr. Wooten testified without objection to his finding a default notice for a loan posted on his gate and his surprise "because I had not taken

out a loan on the property" or defaulted on his payments. 3RP 40. Dr. Wooten testified without objection that he then learned that he would have had to pay approximately \$450,000 to "salvage the property." 3RP 41-42.

In fact, the prosecutor argued that Dr. Wooten's motive arose from this default on the loan he never took out:

Well, the defendant admitted to you that there was a notice sent of foreclosure, I guess is how it was referred to. That was December of '07. At the same time he says, well, I thought I was buying that house. And then he also goes on the say the he thought he was going to be on the hook somehow for some astronomical amount of money, \$450,000. That's enough to make somebody pretty angry.

3RP 77. Thus, the trial court's statement that "How it was financed is not what this case is about," was not accurate; it was integral to the state's argument that Dr. Wooten acted with malice as well as to the defense theory of the case.

Mr. Kohl's mortgage and his default of it were part of the trial evidence and defense counsel had a right to use that evidence to support the defense

theory of the case, just as the state had the right to use it to support its theory.

As the Washington Supreme Court stated in the context of cross-examination in State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1968):

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at any point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.

The court's limitation on defense counsel's closing argument preventing him from arguing about the mortgage and about Mr. Kohl's inconsistent statements denied him his state and federal constitutional rights to counsel and to due process of law. Conde v. Henry, 198 F.3d 734, 738 (9th Cir. 1999); Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); State v. Frost, 160 Wn.2d 765, 773, 161 P.3d 361 (2007), cert. denied, 128 S. Ct. 1070 (2008).

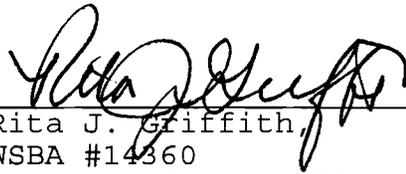
The error was constitutional and not harmless beyond a reasonable doubt. See AOR at 31-32.

C. CONCLUSION

For all the above reasons and the reasons set out in Dr. Wooten's opening brief, his conviction should be reversed and dismissed. At the least he should be granted a new trial.

DATED this 17th day of March, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 17th day of March, 2011, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

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 3/17/2011
Rita J. Griffith DATE at Seattle, WA

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DEPUTY