

No. 40810-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID A. WOOTEN JR.,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Is there sufficient evidence to sustain Wooten's conviction for malicious mischief in the first degree?
- B. Did the trial court error in failing to give a unanimity instruction?
- C. Did the trial court impermissibly comment on the evidence, denying Wooten a fair trial?
- D. Did the trial court impermissibly limit Wooten's trial counsel's closing argument and thereby deny Wooten a fair trial?

II. STATEMENT OF THE CASE

Dennis Kohl purchased a house and property located at 303 Hadaller Road on Mayfield Lake in Lewis County, Washington. 2RP 37-38¹. Mr. Kohl purchased the property in 1993 or 1994 and lived at the residence for approximately nine years beginning in 1994. 2RP 38. Mr. Kohl also lived in the house a second time for about six months around 2004. 2RP 38. Between 1999 and 2001, Mr. Kohl remodeled the house, converting it from three bedrooms and one bath into two bedrooms and two bathrooms. 2RP 39. Mr. Kohl took out one of the bedrooms and bathroom and made it a large bathroom with a laundry area and walk-in shower. 2RP 39. Mr. Kohl remodeled some of the kitchen. 2RP 39.

¹ There are three verbatim report of proceedings and the State will be referring to the reports as follows: 1RP – May 14, 2009 Trial Setting; 2RP – Jury Trial Day 1; 3RP Jury Trial Day 2 and Sentencing.

Mr. Kohl entered into a real estate contract with Wooten Primary Care for the house located at 303 Hadaller Road. 2RP 43. Wooten Primary Care is a family medical practice owned by Dr. David Wooten. 2RP 42. Mr. Kohl spoke to Wooten's business partner, Robert Miller, in regards to selling the house. 2RP 41. Originally the house was to be sold under a purchase and sale agreement. 2RP 42, Ex 1. In May 2005 Wooten and Janna Wooten² moved into the house. 2RP 45, 84. As part of the terms of the agreement, Wooten, through Wooten Primary Care, paid Mr. Kohl \$10,000 in May 2005. 2RP 43, 45. The agreement was modified into a real estate contract in 2006, which required monthly payments of \$1,577.46. 2RP 44; Ex 2. The real estate contract required the purchaser to pay the taxes and maintain the property. Ex 2. The contract had a specific provision regarding waste and willful damage to the property. Ex 2.

Mr. Kohl admitted to taking out a new mortgage on the house in 2005 for \$216,000. 2RP 69. Mr. Kohl explained that he had been in the process of getting the mortgage when he entered into the agreement with Wooten Primary Care. 2RP 70. Mr. Kohl had informed Mr. Miller, Wooten's business partner, prior to

² Janna Wooten will be referred to as Janna for clarification purposes so as not to confuse her with the defendant, Dr. David Wooten, no disrespect intended.

entering into the sales agreement about the mortgage. 2RP 70. All of Mr. Kohl's original dealings in regards to the sale of the house were with Mr. Miller. 2RP 70.

The house was in good condition when Mr. Kohl entered into the agreement with Wooten Primary Care. 2RP 47-48. The interior walls were all intact when the property was turned over to Wooten. 2RP 47. The two bedrooms had sheetrock and the closet was all white cedar or white cedar oak. 2RP 47. The bathroom, laundry area and shower were all tiled. 2RP 47. There was a claw foot bathtub in one of the bathrooms. 2RP 47. The living room had Berber carpeting, the bedrooms were carpeted and the kitchen had linoleum. 2RP 47. There were window coverings. 2RP 47. The living room had a ceiling fan and track lights. 2RP 47. The kitchen had a tongue and groove ceiling with inset lights. 2RP 47. The bathroom had a tongue and groove ceiling with recessed lights. 2RP 47. The bedrooms had lights. 2RP 47. The yard was manicured, weed free and clean, without any vehicles parked on it. 2RP 47, 82.

According to Gregory Kline, the next door neighbor, the upkeep on the property rapidly deteriorated after Wooten moved in to the house in May 2005. 2RP 83. Mr. Kline called the house an

“eyesore” and stated that stuff just started accumulating. 2RP 83. Mr. Kohl left to take a job in California in January of 2007. 2RP 45. Mr. Kohl made a trip up to Washington to speak to his lawyer in regards to the house. 2RP 50. According to Mr. Kohl the taxes on the property were not getting paid, the yard was overgrown and the grass was dead. 2RP 46, 49. Due to the \$8,000 in back taxes owed on the house Mr. Kohl’s attorney suggested Mr. Kohl turn the property back over to the bank. 2RP 60. Mr. Kohl returned to California and next visited the house in May of 2008. 2RP 51.

Mr. Kohl went to look at the house on May 24, 2008. 2RP 51, 97. The yard was completely overgrown with weeds. 2RP 51, Ex 21. The claw-foot bathtub that was formally in one of the bathrooms was sitting outside. 2RP 52, 85.

Lewis County Sheriff’s Deputy Susan Shannon arrived at 303 Hadaller and contacted Mr. Kohl. 2RP 97. Deputy Shannon had been to the residence before on January 10, 2006 and spoken to Janna. 2RP 98. In January 2006 the house appeared normal, with sheetrock and carpeting. 2RP 98. On May 24, 2008 Deputy Shannon observed outside of the house there were bags of garbage piled high, lots of medical garbage, dog fecal matter everywhere and it stunk. 2RP 99; Ex 3, 4, 5, 6, 21. There was a

large burn pile in the backyard. 2RP 106-107; Ex 20. The steps leading up to the front porch were in disrepair and there was a “nasty” couch on the front porch. 2RP 99; Ex 5. There was a note on the front door that stated:

←WARNING→ We still live here and have right to be here until the 22nd – As you know from your previous attempt to enter my home – I have 3 Great Danes and mine will attack – So stay the fuck off my property until the 22nd – You are trespassing and I will have my dogs on your ass the moment you try to come in again.

2RP 107, 111; Ex 22. The note appeared to have been written by Janna. 2RP 124-125.

Deputy Shannon and Mr. Kohl went inside the house. 2RP 51, 99. The house appeared destroyed. 2RP 98. The tiling and carpeting were removed and the floors were down to bare plywood. 2RP 51, 106; Ex 10, 15. The walls were down to the two by fours studs. 2RP 52, 102, 104-105; Ex 15, 17. The plumbing was gone and the bathroom fixtures were missing. 2RP 51-52, 104; Ex 15, 19, 20. The house stunk, there was garbage and dog fecal matter everywhere, lots of beer cans and rotten food in the kitchen. 2RP 52, 102, 105; Ex 13, 14. There were hypodermic needles and vials of blood lying around. 2RP 85,103; Ex 12. In one bedroom there was a mattress with feces on it and the other bedroom had

children's items scattered all over the floor. 2RP 102, 104-105; Ex 16,17.

William Teitzel, a code enforcement supervisor for Lewis County Public Health and Social Services Department went over to 303 Hadaller and helped with the clean-up of the property. 2RP 130, 132. Mr. Teitzel stated there were five or six people helping clean up the property. 2RP 132-133. In four hours they had filled a four or five cubic yard dump truck full of garbage. RP 133.

Mr. Kohl stated he purchased the house for approximately \$80,800 and valued the house at \$295,000 when he entered into the contract with Wooten Primary Care. 2RP 38, 40, 42. Mr. Kohl stated that after Wooten moved out the house had zero value. 2RP 52.

Travis Amundson, a general contractor and building inspector reviewed the photographs of the house. 3RP 3-5. Mr. Amundson was able to make a rough estimate regarding the cost to clean up and repair of the house. 3RP 6. According to Mr. Amundson it would cost \$500 for a hazardous materials team to come out and access the property. 3RP 7-8. It would cost approximately \$3,000 perhaps more to haul off the garbage and pay the dump fees. 3RP 9. The cost to fix the bathrooms was

estimated at a minimum to be \$8,500. 3RP 10. At a minimum it would cost \$15,000 to get the rest of the house up to code. 3RP 11. It was also noted by Mr. Amundson that some of the wood paneling had been torn out and discarded and other pieces were still hanging in the house. 3RP 20.

Wooten met Mr. Kohl in 2003 when Mr. Kohl was a patient of Wooten's. 3RP 27. Wooten admitted to entering into a purchase sale agreement with Mr. Kohl in 2005 and signing the agreement. 3RP 28-29; Ex 1. Wooten claimed that he never saw the real estate contract that was later signed. 3RP 29; Ex 2. The payment amount set forth in the real estate contract was \$1,577.43 per month and Wooten stated he made those monthly payments. 3RP 32; Ex 2. Wooten lived at 303 Hadaller from May 2005 until May 2008. 3RP 33. According to Wooten he started some remodeling at the house in July 2007. 3RP 33. Wooten stated he needed the third bedroom to accommodate Janna and his children. 3RP 33-36. Wooten decided to convert the second bathroom back into a bedroom. 3RP 33-36. Wooten stated when he removed the linoleum in the bathroom he discovered black mold. 3RP 36. Wooten said he took down walls to combat the black mold issue. 3RP 37. According to Wooten the debris from the sheetrock and

insulation were removed and he decided to take a break on the remodel in December 2007. 3RP 39-40.

Wooten stated in December 2007 he found a default notice for a loan attached to the gate at the residence. 3RP 40. According to Wooten he attempted to contact Mr. Kohl in regards to the loan default notice. 3RP 42. In May 2008 Wooten moved to Texas. 3RP 43-44. Wooten agreed that he had left approximately five yards of garbage on the property but stated it was in garbage bags and it was not strewn about. 3RP 45. Wooten said Janna was the last person to leave the residence. 3RP 45.

The purchase sale agreement entered into by Wooten and Mr. Kohl specifically states on page 1, Addendum/Amendment to Purchase and Sale Agreement:

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

Buyer and Seller shall enter into a [sic] option to Lease Purchase the Property drawn by sellers attorney. Terms shall be \$10,000 down, \$5,000 at 180 days, and \$5,000 at 365 days. . .

3RP 48-49; Ex 1. Wooten signed this agreement. 3RP 49; Ex 1.

The real estate contract that was entered into stated:

6. FULFILLMENT DEED: Upon payment of all amounts due Seller, Seller shall convey to Buyer via Statutory Warranty Deed full title in fee simple

absolute clear of all underlying debt encumbrances referred to in Paragraph 5.

Ex 2. Wooten admitted he did not have a fulfillment deed. 3RP 50.

The trial court did limit some of defense counsel's closing arguments due to irrelevance and misconstruing the law. 3RP 83-89.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST WOOTEN FOR MALICIOUS MISCHIEF IN THE FIRST DEGREE.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; *In re Winship*, 397 U.S. 358, 362-65, 25 L.Ed.2d 368, 90 S. Ct 1068 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all

reasonable inferences therefrom are drawn in favor of the State.

State v. Goodman, 150 Wn.2d 774, 781, 83 P.2d 410 (2004).

When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

In order to convict Wooten of malicious mischief in the first degree the State must prove beyond a reasonable doubt that he caused physical damage to the property of another in an amount exceeding \$1,500; he acted knowingly and maliciously; and the acts occurred in the State of Washington. RCW 9A.48.070; WPIC 85.01; WPIC 85.02; CP 8, 9. Malice is defined as "an evil intent,

wish, or design to vex, annoy or injure another person. WPIC 2.13; CP 11. The jury is allowed, but not required, to infer malice “from an act done in willful disregard of the rights of another.” WPIC 2.13; CP 11.

1. Wooten Did Not Own The House Located At 303 Hadaller And It Was Clearly The Property Of Another.

A conveyance of real property shall be done by deed. RCW 64.04.010. A person who obtains a statutory warranty deed is deemed to have an indefeasible estate in fee simple. RCW 64.04.030. “The essence of a real estate contract is that a purchaser of land promises to pay an agreed price for it over a period of time, and the vendor promises to convey title when he [the purchaser] has fully paid.” WILLIAM B. STOEBUCK & JOHN W. WEAVER, 18 WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 21. 2, at 442 (2d ed. 2004). A person has a property interest in property they are purchasing under a real estate contract. *Tomlinson v. Clarke*, 118 Wn.2d 498, 509, 825 P.2d 706 (1992). But, an interest in property does not make a person or entity the exclusive owner of the property.

Wooten claims that the State did not prove the residence located at 303 Hadaller was the property of another. Brief of Appellant 18. This is not true. The definition of property of another

can be found in RCW chapter containing malicious mischief.

"Property of another" means property in which the actor possesses anything less than exclusive ownership." RCW 9A.48.010(1)(c).

Wooten, and/or his agent, entered into an agreement with Mr. Kohl to purchase the residence located 303 Hadaller via a lease to own or real estate contract. Ex 1, 2. The contract had not been fulfilled. 2RP 46, 49, 60; 3RP 50. There was no deed transferred to Wooten, which would have occurred had the contract been fulfilled. 3RP 50. Ex 2. Wooten did not have exclusive ownership of the residence located at 303 Hadaller. At most, Wooten could argue he had a property interest in the house.

Wooten spends a considerable amount of time in his opening brief discussing that this case should have been a civil matter. While there may have been contractual issues that could have been litigated civilly, that is not the matter at hand in the present case. The knowing and malicious destruction of another's property is a criminal matter, regardless of any potential extrinsic civil matters between Wooten and Mr. Kohl. There is sufficient evidence, when the facts are looked at in the light most favorable to the State, that the house located at 303 Hadaller was the property of another.

2. Wooten Acted Knowingly And Maliciously.

The jury had ample evidence available to convict Wooten of malicious mischief in the first degree. Wooten repeatedly argues that but for the foreclosure on the home he would have finished his remodeling project and none of this would be before the court. Brief of Appellant 21. Wooten and his trial counsel continually referred to the destruction of the residence as a remodeling project, but just because Wooten claims he was simply remodeling the residence does not make it so.

Wooten states he was remodeling a home he believed he owned therefore the State did not prove the essential element of knowingly. Brief of Appellant 21. WPIC 10.02 defines knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 10. The original purchase sale agreement states that the buyer and seller shall enter into an option to lease purchase the property agreement. Ex 1. Wooten signed this agreement. 3RP 49; Ex 1. The additional contract had specific language regarding fulfillment of the contract and the transfer of a statutory warranty deed. Ex 2. Wooten did not possess the deed to the property located a 303 Hadaller. 3RP 50. There is sufficient evidence for the jury to find Wooten had knowledge he was not the owner of the property, or in the alternative a reasonable person in Wooten's position would know they did not own the property.

What Wooten fails to remember is, the jury is the sole determiner of credibility of the witness and on appeal the Court cannot substitute its judgment for that of the jury's. *State v. Myers*, 133 Wn.2d at 38. It is conceivable in this case that the jury decided Wooten's testimony was not credible and disregarded it due to the improbability of his explanation in regards to the alleged remodeling of the house.

Given the nature of the destruction at the residence, the state of the yard, the amount of dog feces everywhere, piles of garbage, a junk vehicle, the rotting food and medical waste, the specific criminal intent, in this case malice, may be inferred

because is a matter of logical probability. *State v. Delmarter*, 94 Wn.2d at 638; Ex 3-21. The damage to the house was catastrophic, it was gutted and simply a shell. Malice is evident. The jury does not leave its common sense at the door.

The standard here is whether there is sufficient evidence if any rational jury could possibly find all of the essential elements of the crime can be found beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d at 201. In the case at hand any rational jury would have found Wooten guilty of the crime of malicious mischief in the first degree. The evidence is overwhelming and Wooten's conviction should be affirmed.

B. THE KNOWING AND MALICIOUS DESTRUCTION OF THE HOUSE AND PROPERTY WAS PART OF A COMMON PLAN OR SCHEME THEREFORE NO UNANIMITY INSTRUCTION WAS NECESSARY.

Washington State requires a unanimous jury verdict in criminal cases. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). If the State elects to only file one count of criminal conduct when there is evidence of several acts protection of jury unanimity is required. *State v. Petrich*, 101 Wn.2d at 572. Failure to instruct on unanimity can be considered harmless error. *Id.* at 573; *State v. Kitchen*, 110 Wn.2d 403, 409-12, 756 P.2d 105

(1988)³. Harmless error in this context requires the State to show “no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *State v. Kitchen*, 110 Wn.2d at 411, *citations omitted*. The error must be harmless beyond a reasonable doubt to uphold the conviction. *Id.* at 412, *citing Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d (1967).

In the present case the State did not rely on two separate and distinct acts as Wooten suggests in his brief. Brief of Appellant 24. Wooten alleges the removal of items and the strewn garbage are two separate and distinct acts of malicious mischief the State used to convict Wooten. This is a misstatement of the evidence and the law. The information filed alleged that between January 2006 and May 2008 Wooten knowingly and maliciously caused damage to property of another in an amount exceeding \$1,500. CP 1. The removal of items from the residence and utter destruction therein in addition to the garbage situation constituted the completed crime of malicious mischief in the first degree.

Wooten states that jury instruction number seven only refers to the aggregate value of items removed and that the strewn

³ *State v. Kitchen* modified the harmless error test set forth in *Petrich*, clarifying that harmless error required that the error is harmless beyond a reasonable doubt instead of each incident must be proved beyond a reasonable doubt.

garbage is separate. Brief of Appellant 24. Wooten further argues that the deputy prosecutor “specifically argued the strewn garbage diminished the value of the house, not that it constituted physical damage in of itself.” Brief of Appellant 24. Wooten fails to understand that diminished value constitutes physical damage. WPIC 88.03, CP 13. Therefore, the strewn garbage is physical damage. Wooten also incorrectly asserts the State failed to present any evidence regarding the dollar amount of the diminished value of the “easily removed garbage.” Brief of Appellant 24. The garbage was not “easily removed.” It took several people several hours to remove the garbage. 2RP 133. Mr. Amundson testified it would cost approximately \$3,000 just to remove and dump all of the garbage that was lying around the property. 3RP 9. It is only logical the excessive garbage diminished the value of the residence.

The act of the strewn garbage is not separate and distinct from the destruction and removal of items from within the house. Any rational jury, looking at the photographs admitted into evidence and hearing the testimony presented at trial would not believe Wooten was simply remodeling the residence. Wooten would like the court to separate the garbage from the destruction because he

is couching the destruction as an unfinished remodeling project.

There was a common plan or scheme to destroy the house and the property in a knowing and malicious way because Wooten was unhappy with Mr. Kohl and the situation surrounding the house.

While the State is not conceding that the strewing of garbage and the destruction inside the residence are two separate acts, for the sake of argument, failure to give a unanimity instruction is harmless in this case. Given the evidence presented to the jury, no rational juror could have a reasonable doubt as to either of the "incidents" alleged. The property damage caused by the garbage exceeded \$1,500 in damage. Likewise the destruction inside the house well exceeded \$1,500 in damage as testified to by Mr. Kohl and Mr. Amundson. 2RP 52; 3RP 10-11.

C. WOOTEN WAS NOT DENIED A FAIR TRIAL WHEN THE TRIAL COURT REFERRED TO MR. MILLER AS WOOTEN'S REPRESENTATIVE.

1. The Trial Court Did Not Impermissibly Comment On The Evidence.

A judge is prohibited from instructing a jury in regards to a matter of fact. Const. art. IV § 16. A claim that the judge impermissibly commented on the evidence may be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). A statement is considered a comment on the

evidence when the judge's "attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). When determining if the trial judge's remark constitutes a comment on the evidence the "reviewing court's evaluate the facts and circumstances of the case." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). If a trial court's statement is deemed to be a comment on the evidence then it is presumed to be prejudicial. *State v. Lane*, 125 Wn.2d at 838. The State has the burden of showing the defendant was not prejudiced by the judge's comment unless the record affirmatively reflects that no prejudice resulted. *Id.* A judge's comment on evidence, unless deemed harmless, is reversible error. *Id.* at 393.

In *Lane* the trial court read a statement to the jury regarding the reason for a witness's early release from jail. There was testimony regarding why the witness was released from jail, but it was a disputed issue of fact. The court found that by making the statement to the jury regarding the reason from the witness's early release the trial court was expressly conveying an opinion as to the evidence and thereby charging the jury with a fact. *Lane*, 125 Wn.2d at 839.

The trial court judge did not comment on the evidence during Wooten's trial by stating briefly during the State's closing in response to an objection "[h]is representative did, I'll overrule the objection." 3RP 74. There was independent testimony that Robert Miller was a business partner of Wooten at Wooten Primary Care. 3RP 47-49. There was also testimony by Wooten on redirect that he was not disputing the terms of the real estate contract and he was fulfilling the terms, including making the payments as specified in the contract. 3RP 50-52; Ex 2.

The trial court's statement does not meet the definition of a comment on the evidence. According to *Lane*, the trial court comments must be inferred as an evaluation of a disputed fact or display the trial court judge's attitude regarding the merits of the case. *State v. Lane*, 125 Wn.2d at 838. In Wooten's case the trial court judge was not making a comment regarding a disputed fact. Wooten testified on his own behalf, stated Robert Miller had been a business partner and acknowledged knowing the terms of the real estate contract that was apparently signed by Mr. Miller. 3RP 47-52; Ex 2. At no point during Wooten's testimony or during closing argument did Wooten's trial counsel state or argue that Mr. Miller was not a business partner or representative of Wooten. The only

testimony elicited was that Wooten had not had a conversation with Mr. Miller regarding the real estate contract that had been executed. 3RP 31.

The comment did not display the trial court judge's attitude regarding the merits of the case. The trial judge was not telegraphing the judge's attitude regarding the merits of Wooten's case by briefly referring to Mr. Miller as Wooten's representative. Further, Wooten's knowledge of the terms of the contract was admitted when he testified on his own behalf. 3RP 50-52.

2. If The Trial Court's Comment Is Found To Be An Impermissible Comment On The Evidence, It Is Clear From The Record The Comment Was Not Prejudicial To The Outcome Of Wooten's Case And Therefore It Is Harmless Error.

Even assuming, arguendo, that there was an impermissible comment on the evidence by the trial court judge, it would be harmless because Wooten was not prejudiced by the comment. The comment was brief. Mr. Miller had been described by both Mr. Kohl and Wooten as Wooten's business partner. 2RP 41-42; 3RP 47.

Wooten claims in his brief that that the State relies on the real estate contract to prove that Wooten lacked the legal authority to remodel the house. Brief of Appellant 28. This claim ignores the

purchase sale agreement Wooten did sign stating Wooten Primary Care shall entered into an option to lease purchase property agreement, that Wooten did not receive the deed to the property and Wooten acknowledged knowing the terms of the real estate contract. 3RP 28-29, 47-52; Ex 1, 2. The trial court gave the standard jury instruction that commands jurors disregard any apparent comment on the evidence by the trial judge and a jury is presumed to follow the jury instructions. *State v. Hana*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994); WPIC 1.02; CP 5. The trial court's brief mention of a representative of Wooten's signing a contract, without more, does not prejudice Wooten in this matter and is harmless error.

D. THE TRIAL COURT'S LIMITATION OF WOOTEN'S TRIAL COUNSEL'S CLOSING ARGUMENT DID NOT DENY WOOTEN A FAIR TRIAL.

A trial court's decision to limit the scope of closing argument is reviewed for abuse of discretion. *State v. Frost*, 160 Wn.2d 765, 771, 161 P.3d 361 (2007), *cert. denied* 552 U.S. 128, 118 S. Ct. 1070, 169 L.Ed.2d 815 (2008). The reviewing court will find abuse of discretion only if no reasonable person would take the view adopted by the trial court. *Id.* An erroneous decision limiting closing argument is subject to harmless error analysis. *Id.* at 781-

82. To find harmless error the court must find “proof beyond a reasonable doubt that ‘any reasonable jury would have reached the same result in absence of the error.” *Id at 782, citing State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.3d.2d 321 (1986).

In the present case Wooten’s trial counsel was attempting to discuss in his closing argument the mortgage Mr. Kohl took out on the house after entering into the contract with Wooten. 3 RP 82-83. The trial court opined that trial counsel was attempting to misstate and misconstrue the law and the financing of the house was irrelevant. 3RP 84-85, 88-89. The limitation had to do solely with regards to Mr. Kohl’s financing of the house. A reasonable person would come to the same conclusion the trial court did in regards to the limitation of trial counsel’s closing argument, therefore the trial court has not abused its discretion.

If, *arguendo*, the court finds the trial court abused its discretion, any error is harmless. The overwhelming evidence, as discussed above at length, requires this court to find that any reasonable juror would have found Wooten guilty beyond a reasonable doubt in absence of the error. Therefore, the court

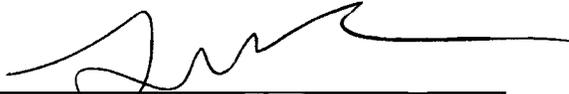
should affirm Wooten's conviction.

CONCLUSION

For the foregoing reasons, this court should affirm Wooten's conviction for malicious mischief in the first degree.

RESPECTFULLY submitted this 25th day of February, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 

SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

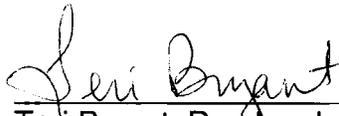
**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 40810-4-II
Respondent,)	
vs.)	
)	
DAVID A. WOOTEN JR.,)	DECLARATION OF
Appellant.)	MAILING
)	
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On Feb. 25, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Rita Joan Griffith
4616 25th Ave. NE, PMB 453
Seattle, WA 98105-4523

DATED this 25 day of 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office