

NO. 45253-7-II

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

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL PREDMORE,

Respondent,

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

The Honorable John A. McCarthy, Judge

BRIEF OF RESPONDENT

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A. INTRODUCTION

In the prosecution against Michael Fredrick Predmore for malicious mischief in the first degree, the State's evidence showed only that Predmore¹ had the opportunity and a possible motive to commit the crime, and that the house Predmore rented sustained more than \$5000 worth of damage. This evidence, even when viewed in the light most favorable to the State, was insufficient to prove the elements of first degree malicious mischief contained in the jury instructions. Specifically, the State failed to put forth sufficient evidence that Predmore acted with knowledge and malice, that Predmore actually caused the damage to the house, and that the damage occurred on or about the period between May 17, 2012 and May 24, 2012. In light of the State's dearth of evidence in this case, the trial court properly arrested judgment against Predmore pursuant to CrR 7.4(a)(3) and dismissed the State's case with prejudice. This court must affirm.

B. COUNTERSTATEMENT OF THE ISSUES

1. Where the State's evidence only shows that a defendant had an opportunity and a motive to commit a crime, is the State's evidence insufficient to support a conviction for malicious mischief in the first degree?

2. Where the State asserts that evidence was sufficient through inferences that amount to mere surmise and speculation, is the State's

¹ For clarity, this brief will refer to Michael Predmore simply as Predmore and will refer to codefendant Keelan Bernice Predmore by her first and last name.

evidence insufficient to support a conviction for malicious mischief in the first degree?

3. Where the State fails to present any evidence regarding whether a defendant acted knowingly and maliciously, is the State's evidence insufficient to support the mens rea element required to sustain a conviction for malicious mischief in the first degree?

4. Where the trial court instructs the jury that to convict a defendant of first degree malicious mischief, the property damage must have occurred within a specific date range, and the State's evidence does not indicate that the property damage occurred within this range, is the State's evidence insufficient to support the conviction?

C. COUNTERSTATEMENT OF THE CASE

Predmore and his wife Kaleen Predmore rented a Bonney Lake house from Seth Walter in February 2010. 1RP² 24-25; CP 215. Predmore and his wife stopped paying rent in April 2012, prompting Walter to initiate eviction proceedings the same month. 1RP 30; CP 216. Walter obtained a judgment of eviction on May 16, 2012. 1RP 30-31; CP 216.

Roger McElroy visited the house on February 9, 2012 to provide a quote for the replacement of five internal doors. 1RP 91-92; CP 215; Ex. 25.

² This brief will cite 1RP to refer to the June 3, 4, and 5, 2013 proceedings, 2RP to refer to the August 2, 2013 proceedings, and 3RP to refer to the August 16, 2013 proceedings.

During his visit in the home, McElroy observed damage to a cabinet, one cabinet door, and an end panel on the kitchen island. 1RP 92; CP 215.

Walter visited the house in March 2012 to make repairs to the refrigerator. 1RP 31, 69-70; CP 215. He did not observe any damage at the residence. 1RP 31-32; CP 215-16.

Deputy Sheldon Lessard and Deputy Dennis Miller, Jr. went to the home on May 17, 2012. 1RP 66, 76; CP 216. Deputy Lessard spoke with Predmore, who stated he was moving because he had been evicted. RP 67, 72; CP 216. Both Deputies Lessard and Miller observed damage to the house on May 17, 2012. RP 67-68, 78-79; CP 216. Neither could remember the extent or precise location of the damage, however. RP 68, 79; CP 216.

Walter went to the house on the evening of May 24, 2012 after being notified that Predmore and his wife had vacated the property. 1RP 32-33; CP 216. Walter observed extensive damage in the home, including holes in the walls and kitchen cabinetry, nail polish on the carpet, a dented refrigerator, damaged cabinet doors, and graffiti reading "suck my dick." 1RP 35-46; CP 216-17. Walter contacted police. 1RP 46.

Deputy Lessard responded on the morning of May 25, 2012. 1RP 46, 59. Deputy Lessard walked through the house with Walter and observed the damage. 1RP 46, 60. Deputy Lessard believed much of the damage was caused by a hatchet-type tool with a wedge head or a smaller splitting maul.

1RP 65. The extensive damage to the house required repairs totaling \$13,700. 1RP 52; CP 216.

Based on the damage to the house, the State charged Predmore with one count of malicious mischief in the first degree. In its information, the State charged that Predmore caused the damage between May 17 and 24, 2012. CP 114.

Prior to trial, the defense brought a motion to dismiss under Knapstad³, asserting that the State lacked sufficient evidence to prove that Predmore caused damage to the house or that the damage occurred between May 17 and 24, 2012. 1RP 4-14; CP 116-20. The court denied the motion. 1RP 15. After the State rested, Predmore renewed his motion to dismiss. 1RP 81-85. The court denied the motion. 1RP 86.

The State proposed a jury instruction on accomplice liability. 1RP 107-09; CP 141. The trial court refused to instruct the jury on accomplice liability noting,

There is absolutely no evidence that either defendant solicited, commanded, encouraged, or requested another person to commit a crime. There is absolutely no evidence that either person aided or agreed to aid another person in planning or committing a crime. There is no evidence of words, act, encouragement, support or presence.

1RP 109.

³ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

The jury returned a verdict finding Predmore guilty of malicious mischief in the first degree. 1RP 141-44; CP 191.

Following the verdict, Predmore moved to arrest judgment under CrR 7.4(a)(3). CP 193-201. Predmore argued that the evidence was insufficient to show that the damage to the house was caused on or about May 17 to May 24, 2012, that he caused the damage, that he caused the damage with the requisite malice and knowledge, and that he was personally responsible for causing more than \$5000 worth of the damage. CP 196-200. The trial court heard argument regarding the motion for arrest of judgment and granted it. 2RP 1-19; CP 224. The trial court determined that there was insufficient evidence that Predmore caused damage to the property exceeding \$5000, that he did so maliciously, and that he did so between the dates of May 17 and 24, 2012. CP 224.

Following the arrest of judgment, the court held another hearing to consider proposed written findings of fact and conclusions of law. 3RP 1-13. The trial court entered its findings of fact and conclusions of law on August 16, 2013. CP 214-19.

The State appeals. CP 222-23.

D. ARGUMENT

CrR 7.4(a) provides, "Judgment may be arrested on the motion of the defendant for the following causes: . . . (3) insufficiency of the proof of a

material element of the crime.” This court reviews the trial court’s CrR 7.4(a)(3) determination by engaging in the same inquiry as the trial court. State v. Longshore, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000); State v. Ceglowski, 103 Wn. App. 346, 349, 12 P.3d 160 (2000). Thus, like the trial court, on appeal this court employs the familiar sufficiency analysis.

This court reviews the sufficiency of the evidence to prove the elements of an offense by asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the State.⁴ State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Indeed, convictions “should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 2d 191 (1911).

⁴ The State mistakes the standard of review in sufficiency cases, stating, “the court is only empowered to determine whether there is ‘substantial evidence’ tending to establish circumstances on which a necessary element of a crime may be predicated.” Br. of Appellant at 10-11. Our supreme court has long rejected the substantial evidence standard in determining the sufficiency of the State’s evidence. State v. Green, 94 Wn.2d 215, 221-22, 616 P.2d 628 (1980). Contrary to the State’s misunderstanding of the standard of review, this court must “reject[] a substantial evidence standard in determining the sufficiency of the evidence because it does not require proof beyond a reasonable doubt.” State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Even when examining the evidence in the light most favorable to the State, there was insufficient evidence to prove every element of first degree malicious mischief. On appeal, the State resorts to the rankest of speculations to support its position. Therefore, this court must affirm.

1. THE ELEMENTS OF FIRST DEGREE MALICIOUS MISCHIEF PER THE LAW OF THIS CASE

“A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously: (a) Causes physical damage to the property of another in an amount exceeding five thousand dollars” RCW 9A.48.070(1).

The trial court instructed the jury that to convict Predmore of malicious mischief, the following elements of the crime must be proved beyond a reasonable doubt: “(1) That on or about the period between the 17th day of May and the 24th day of May, 2012, the defendant caused physical damage to the property of another in an amount exceeding \$5000; and (2) That the defendant acted knowingly and maliciously” CP 164.

Under the “law of the case” doctrine, the definition of a crime in the court’s jury instructions defines the State’s proof requirements. Moreover, “the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.” State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d

900 (1998) (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). Thus, the State bore the burden of proving (1) that Predmore caused \$5000 worth of physical damage to the property; (2) that he did so knowingly and maliciously; and (3) that the damage occurred on or about the period between May 17 and May 24, 2012. The State utterly failed to carry its burden.

2. THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE PREDMORE CAUSED THE DAMAGE TO THE PROPERTY

There was no direct evidence that Predmore committed physical damage to the property. 1RP 55-56, 66, 72, 80 (witnesses' testimony that they did not observe Predmore cause the damage or receive reports that Predmore caused the damage). The State all but concedes this point. Br. of Appellant at 13-21 (acknowledging "perceived deficiency" of direct evidence and arguing inferences to be drawn from circumstantial evidence). Thus, the question is whether the evidence presented permits reasonable inferences that Predmore physically damaged the property. It does not.

The State seizes on the fact that Predmore had the motive, means, and opportunity to commit the crime. Br. of Appellant at 15, 17-19. But having motive and opportunity to commit a crime is insufficient alone to support criminal liability. State v. Pennewell, 23 Wn. App. 777, 782, 598 P.2d 748 (1979). Were it otherwise, juries could convict a person of

malicious mischief on the sole basis of his or her access to the damaged property. Only reasonable, nonspeculative inferences may be drawn from circumstantial evidence. Vasquez, 178 Wn.2d at 16. It is simply not reasonable to draw an inference that a person caused physical damage to property based solely on his or her ability to access property or his or her possible motive to damage it.

The State asserts that the trial court impermissibly weighed “inferences of potential innocence” based on the trial court’s perception of an alibi situation. This assertion misconstrues the record. When the trial court made the statement regarding an “alibi situation” it was considering the “on or about” language in the jury instructions, not whether Predmore actually committed physical damage:

So switching from proving a crime between a particular week to a period of on or about is somewhat – it’s almost like an alibi situation, in that, there was evidence that there was other damage to these very same doors at least in February. We don’t know if those doors were replaced. We don’t know if they were repaired. We’re not exactly clear.

2RP 14-15. Contrary to the State’s assertion, the trial court was not “weighing inferences of potential innocence against inferences that support the verdicts.” Br. of Appellant at 12. This court should reject the State’s misreading of the record.

Nor did the trial “reiterate” the “verdict-undermining inference” when it recalled that Predmore’s children lived in the home. Br. of Appellant at 12. The trial court did mistakenly perceive that “[t]here was a suggestion at some point in the proceedings, maybe not in the trial, that maybe one of the teens caused the damage. But was there testimony about the age of the children?” 3RP 4-5. However, defense counsel and the State corrected the court’s perception, noting that there was no testimony about the age of the children or about the possibility that one of the children was responsible for the damage. 3RP 5. Therefore, contrary to the State’s suggestion, the trial court did not base its sufficiency ruling in any way on the presence of Predmore’s children in the house.

The State also argues that “clandestine destruction of rental property” stands among crimes like arson, child abuse, and conspiracy and must necessarily rely on circumstantial evidence. Br. of Appellant at 14. Predmore takes no issue with the basic assertion that circumstantial evidence may provide sufficient proof of malicious mischief, but each of the cases cited by the State requires circumstantial evidence beyond mere motive and opportunity.

In State v. Young, 87 Wn.2d 129, 131, 550 P.2d 1 (1976), the “circumstances raised compelling inferences” that Young set fires given his

dubious account of his actions and unconvincing explanation for his burns. This amounted to more than just opportunity and motive.

In State v. Despain, another arson case, the court found sufficient circumstantial evidence given that Despain was observed outside the house weeding when the fire occurred, that there was a strong order of kerosene at the time of the fire, that Despain had used the stove an hour or two before the fire occurred, and that Despain had overinsured his furniture and home. 152 Wash. 488, 489-90, 278 P. 173 (1929). Thus, the circumstantial evidence against Despain clearly went beyond mere opportunity and motive to commit the crime.

The other arson cases the State cites similarly show that mere opportunity and motive are insufficient to sustain criminal liability. In State v. Nichols, 143 Wash. 221, 226-27, 255 P. 89 (1927), circumstantial evidence included unchallenged damaging statements by Nichols or by others in his presence, and testimony inconsistent with Nichols's story. In State v. We, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007),⁵ evidence showed that We was at her apartment when the fire started and that she had recently purchased renter's insurance. In State v. Clark, 78 Wn. App. 471, 479 & n.9, 898 P.2d 854 (1995), circumstantial evidence included that Clark

⁵ The State erroneously cites this case as State v. White Eagle or Eagle. Br. of Appellant at 14-15. White Eagle appears to be We's first and middle names.

attempted to collect insurance proceeds, was deeply in debt, owed significant amounts in child support, and experienced a slowing in his business.

The child abuse and manslaughter cases on which the State relies similarly require more evidence than just motive and opportunity. In State v. Johnsen, 76 Wn.2d 755, 757-58, 458 P.2d 887 (1969), circumstantial evidence included medical testimony regarding the timing of the injuries sustained by a child and the child's fear and unwillingness to be near Johnsen. Thus, the State showed more than just Johnsen's opportunity to abuse the child in question.

In State v. Pennewell, 23 Wn. App. at 782, the court held, "mere opportunity to commit a criminal act, standing alone, provides no proof that defendant committed the criminal act, but if that opportunity is coupled with other circumstances, the proof may be sufficient" Because the State adduced evidence that Pennewell had total control of the manslaughter victim at all critical times and gave two conflicting explanations for accidental injury, the court was satisfied that sufficient evidence supported the jury finding of guilt. Id.

None of the cases on which the State relies supports the State's assertion that motive, means, and opportunity is sufficient alone to support criminal liability.

The State also argues that Predmore acted inconsistently with innocence because he did not report or explain the damage and because he was “agitated” on May 17, 2012 when sheriff’s deputies were in his home. Br. of Appellant at 19-20. No evidence regarding Predmore’s reporting or explaining the damage, or lack of reporting or explaining the damage appears in the record, however. The State should not be permitted on appeal to rely on factual evidence that it failed to develop at trial. Nor does Deputy Lessard’s testimony that Predmore was agitated show that Predmore acted inconsistently with innocence. Deputy Lessard also testified that Predmore did not attempt to hide anything, was not evasive, and freely indicated that he was being evicted. 1RP 72. The State’s argument that Predmore’s agitation supported an inference that he was concerned the damage would be attributed to him, amounts to pure speculation and is therefore unreasonable. Bailey, 219 U.S. at 232; Vasquez, 178 Wn.2d at 16.

Grasping at straws, the State also asserts that Predmore must be responsible for the damage because graffiti written on a wall in the house gave “reference to its author’s male genitalia.” Br. of Appellant at 18. The fact that Predmore has a penis cannot remotely support a reasonable inference that he wrote “suck my dick” on a wall or caused any other damage to the home. The State’s suggestion to the contrary teeters over the line of absurdity and must be rejected.

The State's evidence showed only that Predmore had an opportunity to commit malicious mischief. Nothing adduced in evidence gave rise to a reasonable inference that Predmore actually committed malicious mischief.⁶ Accordingly, the trial court properly arrested judgment against Predmore for insufficient evidence.

3. THERE WAS NOT SUFFICIENT EVIDENCE TO SHOW
PREDMORE POSSESSED THE REQUISITE
KNOWLEDGE AND MALICE

Nothing whatsoever admitted into evidence showed that Predmore acted knowingly and maliciously. Accordingly, there was insufficient evidence to demonstrate that Predmore acted with the requisite mens rea for the crime of malicious mischief.

The State does not point to any evidence of Predmore's state of mind, ostensibly because there is none. Instead, the State baldly asserts, "The malicious quality of defendants' crime was manifest in the purposeful nature of the extensive destruction." Br. of Appellant at 16. This assertion puts the cart before the horse: only by presuming that Predmore committed the crime can the State argue that the crime was committed with malice. Arguing that the crime itself was malicious is not evidence that Predmore acted knowingly and maliciously.

⁶ The State does not assign error to the trial court's refusal to instruct the jury on accomplice liability. Br. of Appellant at 1. Accordingly, Predmore does not separately address whether the State's evidence was sufficient to prove that Predmore caused the damage through complicity in the conduct of another.

Similarly, the State writes, “Malice was more overtly implied by the demeaning message written on the downstairs wall” Br. of Appellant at 16-17. Without putting forth sufficient evidence that Predmore wrote the message in question, the State cannot rely on the supposed malice implied in the “suck my dick” message to show that Predmore acted with knowledge and malice.

Because there was no evidence that Predmore acted with the requisite knowledge and malice—the essential mens rea element of the crime of first degree malicious mischief—the State’s evidence was insufficient to support Predmore’s conviction and the trial court correctly arrested judgment.

4. THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE THAT THE DAMAGE OCCURRED BETWEEN MAY 17 AND 24, 2012

The trial court instructed the jury that to convict Predmore, it had to find that the damage occurred “on or about the period between the 17th day of May and the 24th day of May, 2012.” CP 164. This instruction became the law of the case because neither party noted an exception at trial. Hickman, 135 Wn.2d at 102. Thus, the appropriate question on review is whether the State presented sufficient evidence that the damage to the house occurred within this time period.

The State failed to produce evidence showing that the damage to the house occurred between on or about May 17 and 24, 2012. The owner of the house, Seth Walter, observed the damage on May 24, 2012 when he entered the home and could only testify that the damage was not present when he last visited the home in March 2012. 1RP 31-33. Deputy Lessard's testimony was that he could not say whether or not all the damage he observed on May 25, 2012 was present on May 17, 2012. 1RP 68. Deputy Miller remembered seeing some damage on May 17, 2012 when he was in the home but could not recall the extent of the damage he observed. 1RP 78-79. Roger McElroy testified that he was in Predmore's home in February 2012. 1RP 91. McElroy provided a quote for replacing five damaged doors and also noted damage to a cabinet, a cabinet door, and the end panel on the kitchen island. 1RP 91-92.

No evidence showed that the damage to the house occurred on or about the period between May 17 and May 24, 2012. Accordingly, there was insufficient evidence that the damage occurred during the period on which the jury was instructed.

Perceiving the evidence's insufficiency, the State argues that the jury was "at liberty to believe McElroy visited the house several months later than he believed as his inability to identify [Predmore] after meeting him suggested a potential for error likely attributable to the thousands of houses

he visits in the course of his employment.” Br. of Appellant at 24. However, the quote that McElroy provided was dated February 9, 2012 and the State itself moved to admit the quote into evidence. 1RP 91, 96; Ex. 25. Thus, the evidence was clear that McElroy observed the damage in February 2012; no rational fact finder could conclude otherwise. This court should reject the State’s attempts to circumvent the clear evidence in this case.

The State, citing State v. Hayes, 81 Wn. App. 425, 432-33, 914 P.2d 788 (1996), also argues that the “on or about” language in the to-convict instruction “permit[ted] the State to prove the crime was committed anytime within the applicable statute of limitations where a defendant has not raised an alibi defense.” Br. of Appellant at 21. But Hayes involved “on or about” language in the State’s information, not in jury instructions. Hayes, 81 Wn. App. at 426, 432. Thus, the rule that “where time is not a material element of the charged crime, the language ‘on or about’ is sufficient to admit proof of the act at any time within the statute of limitations,” id. at 432, applies only to charging documents.

Given the trial court’s instructions in this case, an average juror would understand that the State bore the burden of proving beyond a reasonable doubt that the damage occurred between May 17 and 24, 2012 or immediately thereabouts. The State’s own proposed instruction required the jury to find that the damage occurred during this period. CP 137. It became

the law of the case when the court adopted the State's instruction. Hickman, 135 Wn.2d at 102. This court should reject the State's attempt on appeal to avoid the binding nature of the date range provided in the jury instructions.⁷

Moreover, as this court has previously noted, "Hayes involved evidence of a child rape that occurred shortly after the charging period," not before it. State v. Jensen, 125 Wn. App. 319, 326, 104 P.3d 717 (2005). The Hayes court specifically declined to address whether evidence of the crime that occurred *before* the date range in question could be used to support one of the charged counts. Hayes, 81 Wn. App. at 434-35. As the Jensen court noted, Hayes is easily distinguished on this ground, as the evidence in the instant case suggests that at least some of the damage to the house occurred prior to May 17, 2012. Jensen, 125 Wn. App. at 326. Thus, even in the unlikely event that Hayes applies to jury instructions, it should not control in this case.

Because there was insufficient evidence that the damage to the house occurred on or about the period between May 17 and May 24, 2012, the trial court appropriately arrested judgment against Predmore.

⁷ The State notes that "[a] defendant's failure to object to an instruction incorporating 'on or about' language . . . waives the right to challenge that language on appeal." Br. of Appellant at 22. The State appears confused, as this is the State's appeal and Predmore is accordingly not challenging the jury instructions or anything else. In any event, the State is also bound by the jury instructions in this case that clearly required proof beyond a reasonable doubt that the damage to the house occurred around the period from May 17 to May 24, 2012.

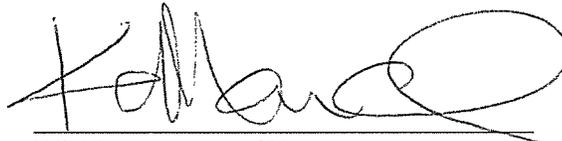
E. CONCLUSION

There was not sufficient evidence that Predmore caused the damage to the house, that Predmore acted with malice and knowledge, or that the damage to the house occurred between May 17 and 24, 2012. Accordingly, even viewing the evidence in the light most favorable to the State, no rational finder of fact could convict Predmore of first degree malicious mischief. Because the trial court's conclusion in this regard was correct, this court must affirm its ruling.

DATED this 5th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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

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)	
Appellant,)	
)	
v.)	COA NO. 45253-7-II
)	
MICHAEL PREDMORE,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL PREDMORE
9508 209TH E
BONNEY LAKE, WA 98391

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF MAY, 2014.

x *Patrick Mayovsky*

NAC

May 05, 2014 - 3:04 PM

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