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Court of Appeals

Division III

State of Washington

No. 29902-3-III

(Consolidated with No. 30087-1-III)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DOUGLAS R. PITTS,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing evidence of other acts contrary to ER 404(b).

2. The evidence was insufficient to support the conviction of second degree malicious mischief.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion in allowing evidence that Mr. Pitts had altered the rental agreement and rental receipts to show that the agreement was a lease with option to buy rather than strictly a lease agreement contrary to ER 404(b)?

2. Was Mr. Pitts' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of second degree malicious mischief?

C. STATEMENT OF THE CASE

Douglas Pitt and his daughter were charged with second degree malicious mischief for allegedly trashing the trailer they were renting after being evicted by the owner following an unlawful detainer action. CP1-2, RP 146-226. Prior to trial, Mr. Pitts moved to exclude under ER 404(b) evidence that he had altered the rental agreement and rental receipts to

show that the agreement was a lease with option to buy rather than strictly a lease agreement. Mr. Pitts acknowledged that the State was probably entitled to present evidence of an eviction proceeding in order to show motive, but argued the probative value of anything beyond that would be outweighed by the prejudicial effect. RP 13-20. The trial court disagreed finding all the evidence admissible under ER 404(b), including evidence that Mr. Pitts had altered the rental agreement and rental receipts. RP 27-29. Mr. Pitts renewed his objection when this evidence was elicited from the landlord during the trial. RP 150.

The landlord testified she met the sheriff at the trailer after the eviction deadline. She stated the trailer was filthy, stunk, and there was garbage everywhere. All the carpets had to be removed and the walls repainted. RP 153-215. She testified she spent around \$128 on paint, 56-70 hours labor on painting, and \$100 to rebuild some shelves and closets. RP 208-11. There was also some damage to a Pergo floor in the master bedroom. It was bubbled up and separated in places in the middle of the room apparently from water damage, but was still snug against the walls. RP 213-14. The landlord said she spent \$500 on materials for the Pergo floor when she originally installed it before renting the trailer. RP 225-26.

The court gave jury instructions for the lesser-included offense of third degree malicious mischief. CP 34-36. The jury convicted Mr. Pitts of second degree malicious mischief, as charged. CP 45. This appeal followed. CP 58-70.

D. ARGUMENT

1. The trial court abused its discretion in allowing evidence that Mr. Pitts had altered the rental agreement and rental receipts to show that the agreement was a lease with option to buy rather than strictly a lease agreement contrary to ER 404(b).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of prior convictions under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn.App. 482, 490, 234 P.3d

1174 (2010) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's prior acts will be reversed showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A trial court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. *State v. Myers*, 49 Wn.App. 243, 247, 742 P.2d 180 (1987) (citing 5 K. Tegland, Wash.Prac., Evidence, Comment 404, at 258 (2d ed. 1982)). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

Here, Mr. Pitts conceded that the State was probably entitled to present evidence of an eviction proceeding in order to show motive. However, as Mr. Pitts argued, the probative value of anything beyond that was greatly outweighed by the prejudicial effect. The only evidence the State needed to establish motive was evidence that there was an eviction and that it had been contested. The State did not need the evidence that Mr. Pitts had altered the rental agreement and rental receipts. This evidence was highly prejudicial to Mr. Pitts because it tended to show he was a "criminal type", and thus likely committed the crime presently charged. Moreover, since the State did not need this evidence to show motive, the scale should have been tipped in favor of the defendant and exclusion of the evidence. *Smith*, 106 Wn.2d at 776. For all these reasons, the trial court abused its discretion in failing to exclude this evidence.

2. Mr. Pitts' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree malicious mischief.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution,

Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9A.48.080 provides in pertinent part:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars . . .

For purposes of the malicious mischief statute, physical damage includes, "in addition to its ordinary meaning ... any diminution in the value of any property as the consequence of an act." RCW 9A.48.100(1). The "ordinary meaning" of damages under RCW 9A.48.100 includes the reasonable cost of repairs to restore injured property to its former condition. *State v. Newcomb*, 160 Wn.App. 184, 192, 246 P.3d 1286 (2011) (citing *State v. Gilbert*, 79 Wn.App. 383, 385, 902 P.2d 182 (1995)). "Evidence of proof of loss is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture." *State v. Mollichi*, 81 Wn.App. 474, 478, 914 P.2d 782 (1996) (citing *State v. Fellers*, 37 Wn.App. 613, 619, 683 P.2d 209 (1984)). In *Newcomb*, the State established the requisite evidence by submitting a \$7,000 repair estimate for the damaged property. *Newcomb*, 160 Wn.App. at 193.

By contrast, in the present case there was insufficient evidence to establish damage in excess of \$750. The landlord testified the trailer was filthy, stunk, and there was garbage everywhere, but there was no testimony of how much it cost to remedy this condition. The landlord testified she spent around \$128 on paint, 56-70 hours labor on painting,

and \$100 to rebuild some shelves and closets. However, since the State presented no evidence for the jury to place a value on the landlord's labor, the jury could only speculate on what would be a reasonable hourly rate to apply. Evidence of proof of loss is insufficient if it subjects the trier of fact to mere speculation or conjecture. *Mollichi*, 81 Wn.App. at 478.

The landlord said she spent \$500 on materials for the Pergo floor when she originally installed it before renting the trailer. However, she also testified the Pergo floor was only bubbled up and separated in places in the middle of the room, but was still snug and apparently undamaged against the walls. Since the State presented no evidence on what percentage of the Pergo floor would have to be replaced, or what the labor costs would be, the jury was again left to speculate on what the actual cost would be to fix the floor. Evidence of proof of loss is insufficient if it subjects the trier of fact to mere speculation or conjecture. *Id.*

Thus, the only ascertainable damages that did not subject the jury to mere speculation or conjecture were \$128 for the cost of the paint and \$100 to rebuild some shelves and a closet for a total of \$228. Even if the original cost of the Pergo floor-materials (\$500) is added, the total is still \$728—less than \$750. Since the State did not present sufficient evidence

to establish damages in excess of \$750, there was insufficient evidence to convict Mr. Pitts of second degree malicious mischief.

E. CONCLUSION

For the reasons stated, the conviction should be reversed, or, in the alternative, this Court should enter a judgment for only third degree malicious mischief.

Respectfully submitted November 30, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 15, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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