

No. 299023

(consolidated with 300871)

COURT OF APPEALS

FILED

DIVISION III

DECEMBER 15, 2011

OF THE STATE OF WASHINGTON

Court of Appeals

Division III

State of Washington

STATE OF WASHINGTON, Respondent

v.

CHRISTIE SHEA SANFORD, Appellant

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

THE HONORABLE REBECCA BAKER

OPENING BRIEF OF APPELLANT

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I. Assignments of Error

- A. The evidence was insufficient to support a conviction for malicious mischief second degree.
- B. The court's wrongful admission of evidence under ER 404(b) unfairly influenced the outcome of the proceedings

Issues Pertaining To Assignments of Error

- 1. An essential element of the crime of malicious mischief second degree is that the accused caused over \$750 in damage. Where competent evidence of the dollar amount establishes less than \$750, does the evidence only support a conviction for malicious mischief third degree?
- 2. Did the court err in admitting evidence under ER 404(b), and unfairly prejudice Ms. Sanford?

II. Statement of Facts

In May 2005, Tami Baump purchased a 1969 mobile home in the Yellow Pine Mobile Home Park. (RP 78, 80,234-35). In 2008 she painted the interior walls, replaced some appliances, put shelves in, and installed Pergo flooring. (RP 86,87,89,90).

On April 21, 2009, Ms. Baump leased the mobile home to Mr. Douglas Pitts and his daughter, Christie Shea Sanford. (RP 96, 99). They regularly paid the rent on the year-long lease. (RP 230).

In January, February, and March 2010, Ms. Baump informed Mr. Pitts and Ms. Sanford that she would not renew their lease in April. (RP 144). She filed an eviction summons on April 26, 2010. (RP 147). Mr. Pitts and Ms. Sanford contested the eviction. (RP 149). Ms. Baump prevailed in the action. (RP 152).

On August 27, 2010, Ms. Baump met with the sheriff at the mobile home to take possession. (RP 154). Ms. Baump testified the home smelled, there were piles of garbage, the carpets and counters were filthy, and the bathroom toilet had been stopped up. (RP 155-177). She also reported the Pergo flooring had bubbled and separated in some places. (RP 213). She removed the garbage and carpets, repainted the walls and rebuilt some shelves. (RP 187, 205,210). She paid \$128 for paint, \$100 for shelving, and approximated she spent up to 70 working cleaning and painting. (RP 208-211).

Ms. Baump stated when she initially installed the Pergo flooring in 2008, it cost \$500, which included the price of installation tools. (RP 225-226). She also testified she obtained estimates for

the necessary repairs to restore the property, however, none of the estimates were offered at the jury trial. (RP 205, 224).

In a pretrial motion, defense counsel moved to exclude, under ER 404(b), reference to any evidence that Mr. Pitts and Ms. Sanford allegedly altered the rental agreement and receipts to show they had a claim of ownership in the property. (RP 18-19). Ms. Sanford most specifically objected to introduction of an affidavit signed by her that was the subject of a district court matter on ownership. She argued it was highly prejudicial without any probative value to the charge of malicious mischief. (RP 27). The court held the eviction summons, statements made in the eviction complaint, the writ of restitution, and the affidavit were admissible under 404(b). (RP28-29). The court ruled the State was entitled to go into the matters in order to establish motive. (RP 28).

The court gave jury instructions for both second and third degree malicious mischief. (CP 34-36). After a jury trial, Ms. Sanford found guilty of malicious mischief second degree. (CP 106). She appeals. (CP 133).

III. Argument

A. The State's Evidence Was Insufficient To Sustain A Conviction Of Malicious Mischief Second Degree Where

The State Failed To Prove The Physical Damage
Exceeded Seven Hundred Fifty Dollars.

The State is required to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Washington Constitution Art. 1 § 3. On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). An essential element of a crime is one that must be proved to establish the illegality of the behavior. *State v. Johnson*, 119 Wn.2d 143, 144, 829 P.2d 1078 (1992).

To sustain a conviction of malicious mischief in the second degree beyond a reasonable doubt, the state was required to prove that Ms. Sanford knowingly and maliciously caused physical damage to the property of another in an amount *exceeding* seven hundred fifty dollars. RCW 9A.48.080(1)(a). (Emphasis added). The dollar value of the damage caused is an essential element that

must be proved beyond a reasonable doubt. *State v. Timothy K.*, 107 Wn. App. 784, 789, 27 P.3d 1263 (2001).

Damages to the property of another is defined as “physical damage” which includes the reasonable cost of repair to restore the property to its former condition, and any diminution in value of the property as a consequence of an act. RCW 9A.48.100(1). *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. Smith*, 33 Wn.App. 791, 797, 658 P.2d 1250 (1983).

Here, the trial record established the following facts: Ms. Baump spent \$128 for paint and \$100 to rebuild closet shelves. She completed the work herself, and the court specifically ruled the State “has an obligation to *not* require the jury to speculate on the value of labor.” (RP 376). The State did not present any estimates for labor or material cost for the alleged needed repair work. (RP 224).

Further, although Ms. Baump reported that a few years earlier she spent about \$500 on flooring, that cost also included the cost of necessary equipment to install the flooring. The evidence

presented at trial was that the flooring had bubbled and separated in places, but was undamaged in others. The State presented no repair estimate for the cost of any replacement flooring.

The facts presented to the jury could not rise to the level of proof beyond a reasonable doubt because the presented evidence did not exceed \$750 worth of damage. The existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726,728, 502 P.2d 1037 (1972) (citing *State v. Carter*, 5 Wn. App. 802, 490 P.2d 1346 (1971), *rev. denied*, 80 Wn.2d 1004 (1972)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

B. The Court Erred In Admitting Evidence Under ER 404(B) Which Unfairly Prejudiced The Outcome Of The Proceedings.

A trial court's rulings on motion in limine or the admissibility of evidence is reviewed for an abuse of discretion. *State v. Griswold*, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. ER 401. However, if the probative value of even relevant evidence is substantially outweighed by the danger of unfair prejudice, it may be excluded. ER 403. In determining relevancy, the trial court must decide if the purpose for which the evidence is admitted affects the outcome of the action, and secondly, if the evidence tends to make the fact more probable than not. *State v. Saltarelli*, 98 Wn.2d 358, 362-363, 655 P.2d 697 (1982).

Here, there had been a prior proceeding in which the court had issued a writ of restitution for Ms. Sanford and Mr. Pitts to vacate the premises. (RP 16). Defense counsel agreed the State had the right to introduce evidence that Ms. Sanford and Mr. Pitts had been evicted from the property to show motive. (RP 19). Counsel sought however, to preclude the State from introducing any facts underlying the eviction order. (RP 27). Counsel specifically sought to preclude Ms. Sanford's affidavit about ownership, arguing it was highly prejudicial and unnecessary to determine whether there was malicious mischief damage after the parties were evicted. (RP 27).

ER 404(b) prevents a trial court from admitting evidence of other crimes, wrongs or acts to prove the character of a person in order to show he acted in conformity therewith. ER 404(b); *State v. Foxhaven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). While evidence of prior crimes, or acts, or wrongs may be admitted for other purposes, such as to prove, plan or identity, the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose of the evidence; (3) decide whether the evidence is relevant to an element of the State's case; and (4) find that the probative value of the evidence outweighs its prejudice. *Id.* at 175; ER 404(b). This analysis must be conducted on the record. *Id.*

Here, the court observed that the allegedly altered rental receipts and agreement and affidavit were :

“...highly probative of the fact that Mr. Pitts and Ms. Sanford hotly contested their eviction from this mobile home. I agree that there is some danger of getting of on a tangent, which often—Evidence Rule 404(b) evidence can do. But I think the state is entitled to go into this in order to establish their theory of the case of this being the motive for the malicious mischief that they claim has been committed on the – on the property. ... Now, is it more prejudicial than probative? Well, there's some

prejudice in that it tends to really establish a motive, but it's not unfairly prejudicial." (RP 29).

Any evidence about alleged alterations needed to be logically relevant to a material issue before the jury, that is, whether evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). Here, the state did not need to show that Mr. Pitts or Ms. Sanford had allegedly altered any written documents. The very fact of eviction was sufficient to establish motive.

Ms. Sanford was prejudiced by the admission of the documents because it tended to show she and her father were "just the type" of people who would commit the crime of malicious mischief because they had allegedly forged documents. The introduction of that evidence was unnecessary, prejudicial, and the trial court abused its discretion in failing to exclude it.

IV. Conclusion

Based on the foregoing facts and authorities, this conviction should be reversed, or in the alternative, this Court should enter a judgment for only third degree malicious mischief.

Respectfully submitted December 15, 2011.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Christie Shea Sanford, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that I served a copy of appellant's opening brief on December 15, 2011, to the following:

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And per agreement between the parties, by email to:
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