

COURT OF APPEALS
LEWIS COUNTY
STATE OF WASHINGTON
BY: *ks*
DEPUTY

Court of Appeals No. 40810-4-II
Lewis County No. 08-1-00857-1

STATE OF WASHINGTON,

Respondent,

vs.

DAVID WOOTEN, JR.

Appellant.

BRIEF OF APPELLANT

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pm 12-20-10

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

On May 17th, 2005, David Wooten entered into a purchase and sale agreement to purchase a home at 303 Hadaller Rd. in Mossyrock from Dennis Kohl. Exhibit 1.¹ Mr. Kohl was a patient of Dr. Wooten. RP Vol. 1, p. 41. The agreement provided that Wooten Primary care, LLC would purchase the home for a price of \$225,000. Exhibit 1. The agreement further provided that the buyer would pay \$10,000 down, to be paid as follows: \$5000 at 180 days and \$5000 at 365 days. Exhibit 1. The remaining payments were set to be paid at 8% interest. Exhibit 1. Three people signed the agreement as “buyers”: David Wooten, Christine Monge and Robert Miller. Exhibit 1. Dr. Wooten initialed each page of the purchase and sale agreement. Exhibit 1.

About four months after entering into the agreement with Dr. Wooten, Mr. Kohl took out a mortgage on the home for \$216,000. RP Vol. 1, p. 69. Mr. Kohl did not tell Dr. Wooten that he took out a mortgage on the home. RP Vol. 1, p. 70.

On November 1st, 2005, Mr. Kohl purportedly entered into a real estate contract with Wooten Primary Care. Exhibit 2. Robert Miller signed the contract as “buyer,” and stated that he was signing it for Wooten Primary Care, LLC as the managing member of Wooten Primary Care. Exhibit 2. Dr. Wooten did not sign this contract, and the State

¹ The purchase and sale agreement refers to the address as 303 Hadaller Rd., but Dennis Kohl testified that it was 303 Hadler Rd. See RP Vol. 1, p. 37.

presented no evidence that he was aware this new contract.² Exhibit 2.

This contract, by its terms, superseded the contract Dr. Wooten signed on May 17th, 2005. Exhibit 2. Although this contract was purportedly entered into on November 1, 2005, it was not signed by Mr. Miller until May 4th, 2006, and was not signed by Mr. Kohl until June 2nd, 2006. Exhibit 2.

This contract provided, among other things, that Mr. Kohl was required to “maintain in current status all obligations under each and every debt and/or security instrument of record against the property in his name and fully indemnify and hold Buyer harmless from all loss occasioned by failure to do so.” Exhibit 2. The contract provided that that the buyer agreed to pay, on time, all taxes and assessments becoming due on the property after the date of the contract, and the buyer agreed to maintain insurance on the home Exhibit 2. Paragraph 9 of Exhibit 2 provided a civil remedy for failure to pay taxes, insurance premiums, or utility charges constituting liens on the property. Exhibit 2. The civil remedy provided that “Seller may pay such items and Buyer shall forthwith pay Seller the amount thereof plus a late charge of 5% of the amount thereof plus any costs and attorney’s fees incurred in connection with making such payment.” Exhibit 2. Paragraph 10 of Exhibit 2 required the buyer

² Robert Miller did not testify at the trial.

to maintain the property in such condition as complies with all applicable laws, and paragraph 12 provided that “Buyer shall keep the property in good repair and shall not commit or suffer waste or willful damage to or destruction of the property.” Exhibit 2. Paragraph 15 of the contract found in Exhibit 2 provides for civil remedies in the event that the buyer default on the agreement:

If the Buyer fails to observe or perform any term, covenant, or condition of this Contract other than the special obligation in paragraph 6, Seller may:

- (a) Suit for installments. Sue for any delinquent periodic payment; or
- (b) Specific Performance. Sue for specific performance of any of Buyer’s obligations pursuant to this Contract; or
- (c) Forfeit Buyer’s Interest. Forfeit this Contract pursuant to Ch. 61.30, RCW, as it is presently enacted and may hereafter be amended. The effect of such forfeiture includes: (i) all right, title, and interest in the property of the Buyer and all persons claiming through the Buyer shall be terminated; (ii) the Buyer’s rights under the Contract shall be canceled; (iii) all sums previously paid under the Contract shall belong to and be retained by the Seller or other person to whom paid entitled thereto; (iv) all improvements made to and unharvested crops on the property shall belong to the Seller; and (v) Buyer shall be required to surrender possession of the property, improvements, and unharvested crops to the Seller 10 days after the forfeiture.
- (d) Acceleration of Balance Due. Give Buyer written notice demanding payment of said delinquencies and payment of a late charge of 5% of the amount of such delinquent payments and payment of Seller’s reasonable attorney’s fees and costs incurred for services in preparing and sending such Notice and stating that if payment pursuant to said Notice is not received within 30 days after the date said Notice is either deposited in the mail addressed to the Buyer or personally delivered to the Buyer, the entire balance owing, including interest, will become immediately due

and payable. Seller may thereupon institute suit for payment of such balance, interest, late charge, and reasonable attorney's fees and costs.

(e) Judicial Foreclosure. Sue to foreclose this Contract as a mortgage, in which event Buyer may be liable for a deficiency.

Dr. Wooten testified that he was not aware of the contract purportedly entered into on November 1, 2005, found in Exhibit 2. RP Vol. 2, p. 29, 30. The first contract, to which Dr. Wooten was clearly a party and admitted knowledge of, did not contain any provisions regarding the condition in which the property should be maintained or the payment of taxes and insurance. Exhibit 1. When asked by the prosecutor who Bob Miller was, Dr. Wooten testified he was an ex-business partner in Wooten Primary Care. RP Vol. 2, p. 47. Although the prosecutor could have asked Dr. Wooten on what date Mr. Miller became a business partner in Wooten Primary Care and what date the partnership ended, he did not ask such obvious questions. RP Vol. 2, p. 47-52. As such, the record contains no evidence about when Mr. Miller was entitled to act on behalf of Wooten Primary Care and/or Dr. Wooten personally. RP Vol. 2, 47-52.

Dr. Wooten testified that he purchased the home from Mr. Kohl in May of 2005. RP Vol. 2, p. 27. Dr. Wooten testified that Exhibit 1 was his purchase and sale agreement with Mr. Kohl. RP Vol. 2, p. 28. Dr. Wooten moved in to the home and paid monthly mortgage payments of \$1577.43 to Mr. Kohl. RP Vol. 2, p. 32-33. Dr. Wooten and his family

lived in the home until May of 2008. RP Vol. 2, p. 33. Dr. Wooten and his wife, Janna, decided to remodel the home beginning in July of 2007. RP Vol. 2, p. 33. They decided to remodel because although the house was listed and represented as three bedroom, one bath, it had previously remodeled to be a two bedroom, two bath. RP Vol. 2, p. 34. Dr. and Mrs. Wooten wanted to return the home to its original configuration, and they decided to begin the remodel with the bathroom. RP Vol. 2, p. 34. Dr. and Mrs. Wooten have one young child in common and several children between them from previous marriage. RP Vol. 2, p. 34.

Dr. Wooten planned on doing the remodel himself. RP Vol. 2, p. 35. Dr. Wooten planned on getting permits for any work which specifically required permits. RP Vol. 2, p. 35-36. Dr. Wooten testified that when remodeling you have to remove what you are planning to replace. RP Vol. 2, p. 36. He began in the small bathroom, removing old and cracked linoleum from the floor. RP Vol. 2, p. 35. He disconnected the water to the toilet and removed it so that he could clear out the linoleum from underneath it. RP Vol. 2, p. 36. He anticipated finding mildew but instead found black mold. RP Vol. 2., p. 36. He knew that black mold is a penetrating organism that penetrates sheetrock, wallpaper and paint. RP Vol. 2, p. 37. At that point he investigated further and found that the black mold had penetrated at least halfway through the

sheetrock layer and was unsalvageable. RP Vol. 2, p. 37. As a result of the extent of the spread of black mold through the walls Dr. Wooten had to take an extensive amount of sheetrock out of the house. RP Vol. 2, p. 37-38. The teardown, including removal of all the debris and mold took about five months, up into December of 2007. RP Vol. 2, p. 38. Dr. Wooten disposed all of the sheetrock and insulation that he took off the walls. RP Vol. 2, p. 40. The Wootens decided to take a break for the Christmas holidays and start up again after the new year. RP Vol. 2, p. 40.

However, in December when the family arrived back at the house they found a default notice for a loan attached to the gate. RP Vol. 2, p. 40. This was surprising to Dr. Wooten because he had not taken out a loan on the property, nor had he defaulted on any of his monthly payments to Mr. Kohl. RP Vol. 2, p. 40. The default notice was placed on the property because Mr. Kohl had stopped paying on the mortgage he took out after entering into the purchase agreement with Dr. Wooten; the mortgage that Dr. Wooten knew nothing about. RP Vol. 1, p. 65, Vol. 2, p. 41. Dr. Wooten attempted to contact Mr. Kohl to talk about the default notice but wasn't able to reach him. RP Vol. 2, p. 42. Mr. Kohl never contacted Dr. Wooten with an allegation that he (Dr. Wooten) was in default of the purchase and sale agreement. RP Vol. 2, p. 43.

Mr. Kohl stopped making his mortgage payments in September of 2007, when he decided to give the house back to the bank. RP Vol. 1, p. 65. However, he continued to collect the monthly \$1577.43 mortgage payments from Dr. Wooten.³ In December of 2007, Mr. Kohl's bank evidently began foreclosure proceedings (as evidenced by the default notice placed on the gate at 303 Hadaller Rd.), but Mr. Kohl claimed he did not receive a foreclosure notice. RP Vol. 1, p. 75. Mr. Kohl never recorded the purchase and sale agreement with Lewis County. RP Vol. 1, p. 75. Mr. Kohl claimed it "never occurred to him" that by failing to record the document with the county, the mortgage company would have no way of discovering that Mr. Kohl sold the property to Dr. Wooten. RP Vol. 1, p. 73.

Gregory Kline has a vacation home neighboring the Wooten's home. RP Vol. 1, p. 78-79. A week or two before Memorial Day of 2008 he came down to his vacation home from his regular home in Everett and was told by some other neighbors that the Wootens had moved out of 303

³ When defense counsel Don Blair asked Mr. Kohl whether he continued to collect mortgage payments from Dr. Wooten the State objected and the court, for reasons that are not clear, sustained the objection. However, in the next question Mr. Blair asked Mr. Kohl whether the Wootens had defaulted on their contract and he replied that they had, citing their alleged failure to pay taxes, maintain insurance (Mr. Kohl was forced to admit that he had no basis on which to claim that the Wootens did not have insurance), and to maintain the house and the yard. He did not cite, as a basis for their alleged breach, their failure to make their mortgage payments. Thus, he admitted that he continued to collect mortgage payments from them after deciding to relinquish the house to the bank and defaulting on his own (secret) mortgage. RP Vol. 1, p. 64-66.

Hadaller Rd. RP Vol. 1, p. 84. Mr. Kline went over to inspect the Wooten's home and found that walls had been taken down and tile had been removed from the floor, and the clawfoot bathtub was on the front porch. RP Vol. I, p. 85. Mr. Kline also found a substantial amount of trash strewn all throughout the house. RP Vol. 1, p. 85-87. Mr. Kline claimed to see "kick holes" in sheetrock in the bathroom and the living room. RP Vol. 1, p. 92. The last time Mr. Kline saw Dr. Wooten at the house was in January of 2008. RP Vol. 1, p. 91.

William Teitzel is a personal friend of Dennis Kohl. RP Vol. 1, p. 131-32. He is also a code enforcement supervisor for the Lewis County Public Health and Social Services Division. RP Vol. 1, p. 130. Code Enforcement received a complaint in May of 2008 about 303 Hadaller Rd. RP Vol. 1, p. 132. Mr. Teitzel contacted Mr. Kohl's daughter about the complaint and she told him they had plans to clean up the property that coming Saturday. RP Vol. 1, p. 132. Mr. Teitzel offered to come and help clean up on his personal time. RP Vol. 1, p. 132. Mr. Teitzel saw among the garbage medical supplies and medical publications. RP Vol. 1, p. 134. The cleaning party filled up a four or five-yard single rear axle truck with garbage. RP Vol. 1, p. 133.

The State called an expert witness who testified that it would cost approximately \$15,000, minimum, to “bring this house back to finish.” RP Vol. 2, p. 11.

Deputy Shannon of the Lewis County Sheriff’s Office received a complaint of “malicious mischief” at 303 Hadaller Rd. on May 24th, 2008. RP Vol. 1, p. 97. The complainant was Mr. Kohl. Id. When she arrived she found the front door open and the yard was overgrown. RP Vol. 1, p. 99. There was garbage strewn everywhere. Id. Specifically, she saw garbage *bags* everywhere, some that were still intact with garbage in them and some that were exploded. RP Vol. 1, p. 118-19. Deputy Shannon disputed that there were kick holes in the walls. RP Vol. 1, p. 118. Deputy Shannon found a note taped to the front door of the house. RP Vol. 1, p. 108. Deputy Shannon determined that the note was written by Janna Wooten, based on a comparison with another note found in a vehicle on the property which was signed by Janna. RP Vol. 1, p. 113. The note on the door said: “Warning, we still live here have every right to be here until the 22nd. As you know from your previous attempt to enter my home, I have three great danes and mine will attack. So stay the fuck off my property until the 22nd. You are trespassing. I will have my dogs on your ass the moment you try to come in again.” RP Vol. 1, p. 111.

Dr. Wooten testified that even after he found the foreclosure notice on his gate, he believed he was the responsible party for the house. RP Vol. 2, 46. Indeed, he feared he was on the hook for \$450,000. RP Vol. 2, p. 41. Dr. Wooten testified that the last person to leave the home was his wife, Janna. RP Vol. 2, p. 45. When he left the home he packed his family's belongings into his Suburban and hauled a car hauler behind him with another car. RP Vol. 2, p. 44. He agreed that he left garbage behind, confined neatly into garbage bags. RP Vol. 2, p. 45. There were quite a few garbage bags, and they were placed in the garage. RP Vol. 2, p. 45. The garbage was not strewn about. RP Vol. 2, p. 45. When he left, at least one shower and toilet were working, and the electricity was on. RP Vol. 2, p. 46.

The State charged Dr. Wooten with malicious mischief in the first degree. CP 1. The State prosecuted Dr. Wooten as the principal, not an accomplice. Report of Proceedings, Court's Instructions to Jury at CP 3-17. The State also prosecuted Janna Wooten, and she was convicted in a separate trial. RP Vol. 1, p. 3-4. The State originally sought to have the jury instructed on accomplice liability but the trial court denied the request. RP Vol. 2, p. 57-60. The State acknowledged that its theory of the case involved two distinct acts: (1) The removal of the drywall, floor coverings and plumbing fixtures attributable, according to Dr. Wooten, to

the remodel; and (2) the strewing of the garbage. RP Vol. 2, p. 58. The State acknowledged “there is [sic] two parts there,” and acknowledged that Dr. Wooten had only admitted to doing the acts related to remodeling but denied strewing the garbage. RP Vol. 2, p. 58. The court held that the State had presented no evidence that Dr. Wooten had acted as an accomplice to Mrs. Wooten in the strewing of the garbage. RP Vol. 2, p. 58-60.

The State’s theory of the case was that Dr. Wooten had not begun remodeling the house, but rather he had removed the drywall, floor coverings, insulation and plumbing fixtures because he was angry. RP Vol. 2, p. 79. “This wasn’t a remodel that halted in its track in December of 2007 and sat like that until nearly the end of May in 2008, nearly half a year living in those conditions. I submit to you that’s not reasonable. This was anger, this was designed to annoy or vex, this was malicious.” RP Vol. 2, p. 79. The State further said that this demolition, which took Dr. Wooten several months to complete, was the product of a “temper tantrum.” RP Vol. 2, p. 80. The State argued that Dr. Wooten committed malicious mischief in two independent ways: First, that he strew garbage around the house and property, and second that he damaged the physical house itself by removing the drywall, plumbing fixtures and floor coverings. RP Vol. 2, p. 73. The State argued that the presence of

removable garbage constituted malicious mischief because it diminished the value of the property. RP Vol. 2, p. 73. The State did not present any evidence during the trial about how much it cost to haul the trash away, or present a specific dollar figure representing the diminution of the value of the property as a result of the strewn garbage. Report of Proceedings. The State argued that Dr. Wooten was guilty because he did not “own” the house. RP Vol. 2, p. 74. The prosecutor referenced the “real estate contract” that Dr. Wooten entered into and Mr. Blair objected, stating “there’s no evidence that he entered into that contract, he didn’t sign it.” The court overruled the objection, stating “His representative did, I’ll overrule the objection.” RP Vol. 2, p. 74.

The prosecutor argued that one would not be entitled to remodel a home unless one possesses the deed to the home. RP Vol. 1, p. 75-76, 102. Dr. Wooten didn’t own the home, argued the prosecutor, because he defaulted on the conditions outlined in the contract signed by Robert Miller and found at Exhibit 2, namely that he didn’t pay the taxes, didn’t care for the lawn, and didn’t pay insurance (despite the fact that Mr. Kohl conceded that there was no evidence Dr. Wooten did not pay insurance). RP Vol. 2, p. 102. In contradiction of his own position, the prosecutor, in defending the various transgression of Mr. Kohl, argued that Mr. Kohl had done nothing wrong because “Mr. Kohl sold the house, entered into a real

estate contract, that's what he did." He added "Mr. Kohl is not on trial."

RP Vol. 2, p. 103.

During closing argument, Mr. Blair brought up Mr. Kohl's devious conduct in taking out a mortgage after selling the home to Dr. Wooten, and the State objected. RP Vol. 2, p. 81. The court sustained the objection and Mr. Blair reminded the court that this was a fact that was presented to the jury. RP Vol. 2, p. 82. The court removed the jury and scolded Mr. Blair, asking what Mr. Kohl's conduct had to do with who owned the house? Mr. Blair replied that it was relevant because it was Mr. Kohl's act of defaulting on a mortgage that Dr. Wooten didn't even know about that forced Dr. Wooten to leave the house and abandon the remodel. RP Vol. 2, p. 82. Mr. Blair argued that the State's allegation of "damage" to the home was actually a remodel stopped midstream, and "nobody would have seen any damage whatsoever had he (Dr. Wooten) not been forced out of the house." RP Vol. 2, p. 83. Mr. Blair said "we wouldn't be here today had it not been for the foreclosure." RP Vol. 2, p. 83. The court agreed with the State that as a matter of law, Mr. Kohl's surreptitious loan taking was irrelevant because Dr. Wooten, in the words of the prosecutor, "didn't satisfy his end of the real estate contract..." RP Vol. 2, p. 83. The court said Mr. Blair was trying to "confuse the jury." RP Vol. 2, p. 83. Mr. Blair reminded the court that this evidence came in

before the jury and he should be able to argue it. RP Vol. 2, p. 84. The court said that just because something came into evidence doesn't mean that "you should be allowed to misconstrue what the law says," and parroted the State's position that a mortgagor would never be entitled to remodel his home until such time as he retrieves the deed from the mortgagee. RP Vol. 2, p. 84. Such an action "destroyed the security that secures the contract or the mortgage, doesn't matter." RP Vol. 2, p. 84. Mr. Blair reminded the court that whether the security was in fact "destroyed," or whether it was in the process of being improved by way of a remodel was the central fact in issue for the jury to decide. RP Vol. 2, p. 84. The court ruled that Mr. Blair would be prohibited from making any further reference to facts relating to the financing of the home. RP Vol. 2, p. 85.

Mr. Blair then asked if he would be allowed to talk to the jury about the statements Mr. Kohl made to Deputy Shannon which were inconsistent with his trial testimony and the court said "no," because in the court's opinion, Mr. Blair elicited that evidence improperly and the State should have objected but didn't. RP Vol. 2, p. 85-87. The court further opined that any inconsistency in Mr. Kohl's statements was "irrelevant." RP Vol. 2, p. 87. The court said "It is irrelevant who owned this [house] or who made the claim....It is not relevant, Mr. Blair, it has never been

relevant. In fact, you are now telling me this was your plan all along tells me I was exactly right. So I am sustaining the objection, you now know what the ruling is, don't do it." RP Vol. 2, p. 88. When Mr. Blair sought further clarification of the ruling, the court said "The fact that he (Mr. Kohl) is the owner, that he gave inconsistent statements about ownership. He didn't. He's still on the hook for it today. You don't just give it back and say, I disavow having to pay for this, that's just not the case." RP Vol. 2, p. 88. Mr. Blair expressed frustration that "I think I've made my case through the evidence that's come in, and during my closing argument Your Honor says, no, that shouldn't have come in so I'm not going to allow you to argue it." RP Vol. 2, p. 89. The court replied "No, that's not it at all. It shouldn't have come in. The issue is still it wasn't relevant to begin with. *It is not relevant who owns this.*" RP Vol. 2, p. 89 (emphasis added).

The jury convicted Dr. Wooten of malicious mischief in the first degree. CP 18. At sentencing the prosecutor argued that Dr. Wooten and his wife were nothing more than renters of the home. RP Vol. 2, p. 113. Mr. Wooten was given 60 days in jail on a standard range of 0-90 days in jail. CP 21, 24.

D. ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT DR. WOOTEN COMMITTED MALICIOUS MISCHIEF IN THE FIRST DEGREE WHERE IT FAILED TO PROVE THAT DR. WOOTEN KNOWINGLY CAUSED DAMAGE TO THE PROPERTY OF ANOTHER; THAT HE ACTED WITH MALICE; AND THAT HE CAUSED DAMAGE IN AN AMOUNT EXCEEDING \$1500.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). 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 that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980).

When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *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. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

RCW 9A.48.070 defines malicious mischief in the first degree. It

says:

(1) 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;

(b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication; or

(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

Here, the State failed to prove that Dr. Wooten knowingly caused physical damage to the property of another. Specifically, the State failed to prove that the home at 303 Hadaller Rd. was the property of another.

This case, it must be observed is a civil case that should never have seen the inside of a criminal court. Whether Dr. Wooten had the right to remodel this home was the central issue in whether he was criminally liable for starting and stopping this remodel. And the question of who owned this home is civil, not criminal. Do mortgagors have the right to remodel their homes without the permission of the mortgagee? Would a homeowner be guilty of malicious mischief for remodeling her kitchen without permission of the bank which holds the deed to her home?

According to the State, the answer to that question is “yes.” The sheer absurdity of such a suggestion notwithstanding, that question is a civil question. The question of whether Dr. Wooten was purchasing or renting this home is a civil question. The question of whether Robert Miller was Dr. Wooten’s agent and had the authority to bind Dr. Wooten to the terms of the real estate contract (Exhibit 2) is a civil question. Assuming Robert Miller and Dr. Wooten had an agency relationship when the real estate contract was executed, the question of whether Dr. Wooten was in breach of that contract is a civil question. The State alternated between characterizing Dr. Wooten as a buyer and a renter. If the prosecutor can’t figure it out, how could Dr. Wooten, a non-lawyer, be expected to do so?

The evidence demonstrated that Dr. Wooten believed he was buying this home. That the parties entered into a private mortgage relationship, with the seller “carrying paper,” does not change the essential nature of the mortgagor/mortgagee relationship. Whether the mortgagee was Dennis Kohl or Bank of America, Dr. Wooten was still the buyer. Granted, Bank of America would not typically take out a mortgage on a property on which it acted as mortgagee to someone else and keep it a secret, as Dennis Kohl did. Nor would Bank of America then default on that mortgage and nevertheless continue to collect mortgage payments

from the original mortgagor, pocketing the money and concealing that fact from the original mortgagor, as Dennis Kohl did.

Here, assuming without conceding the State proved that the home at 303 Hadaller Rd. *was* the property of another, it failed to prove that Dr. Wooten *knew* the home was the property of another. As noted above, not even the prosecutor could get his story straight on whether Dennis Kohl was a seller, lessor, or landlord. Dr. Wooten testified he believed that he had purchased the house when he entered into the purchase and sale agreement (Exhibit 1). The State presented no evidence to refute this understanding. The State attempted, during cross examination, to engage Dr. Wooten in an argument about the true legal effect of the purchase and sale agreement, which only further demonstrated that this case is civil, not criminal. Dr. Wooten also testified he knew nothing about the execution of the real estate contract (Exhibit 2) and the State, having failed to present Robert Miller to testify, did not refute this.

The evidence presented by the State not only fails to prove that Dr. Wooten knew this house was the property of another when he commenced the remodel of the house, the evidence leads to an opposite inference. Dennis Kohl took out the mortgage on the home without telling Dr. Wooten, and he entered into the real estate contract without recording it with the county. The reasonable inference to be drawn is that Dennis Kohl

acted with the intent to conceal the true nature of this transaction from Dr. Wooten. Moreover, Dennis Kohl continued to collect mortgage payments from Dr. Wooten even *after* he defaulted on the mortgage and gave the house back to the bank. Why would Dr. Wooten assume that the house is owned by Dennis Kohl when Dennis Kohl continued to pocket Dr. Wooten's monthly mortgage payments? The only point at which it can be said, based on the evidence, that Dr. Wooten knew the house was the property of another was after he found the foreclosure notice on his gate in December of 2007. After that point he abandoned the remodel (who in his right mind would have continued to remodel the home under these circumstances?), and because he abandoned the remodel, the house was deemed to be "damaged." Mr. Blair was right on point when he noted that had Dr. Wooten finished the remodel, nobody would have complained about this and the case would never have been filed. But it was Dennis Kohl's conduct which caused Dr. Wooten to abandon the remodel.

The State likewise failed to prove that Dr. Wooten acted maliciously for the same reasons it failed to prove he acted knowingly: Dr. Wooten was remodeling a home he believed he owned. When he discovered that the mortgagee on the home (Dennis Kohl) surreptitiously took out a mortgage on the home and then defaulted on that mortgage, he

abandoned the remodel. Because he abandoned the remodel, which was the fault of Dennis Kohl, he was alleged to have “damaged” the home.

The jury was instructed that “Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.” CP 11, Instruction No. 6.

Undertaking a remodel of his home was not malicious, nor was it malicious to abandon the remodel when he found a foreclosure notice he didn’t deserve taped to his gate. The State’s theory that Dr. Wooten undertook a major deconstruction of the interior of the home as part of a “temper tantrum” is absurd on his face. How many temper tantrums last several months (the amount of time it took to conduct the demolition)? Similarly absurd was the State’s contention that Dr. Wooten threw garbage all around the home and property out of anger. Why would he take the time to bag up the garbage (which was established by the evidence) and then rip open the bags and throw the garbage all around? The State’s theory wholly lacks sense.

The State’s failed to prove three essential elements of the crime: That the property at issue was the property of another, that Dr. Wooten knew it was the property of another, and that Dr. Wooten acted

maliciously. His conviction for malicious mischief first degree should be reversed and dismissed.

II. 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.

A jury must unanimously conclude that the defendant committed a charged criminal act. *State v. Petrich*, 101 Wn.2d 566, 569, 693 P.2d 173 (1984), modified, *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). When the State charges one count of criminal conduct but introduces evidence of multiple distinct acts, (1) the State must specify the particular act on which it relies for each conviction, or (2) the trial court must instruct the jury that it can convict only if it unanimously agrees on at least one criminal act. *Petrich*, 101 Wn.2d at 572. This requirement guards against the State's using multiple acts to prove one count, thus obscuring whether the jury unanimously based its conviction on the same act. *Petrich*, 101 Wn.2d at 572; *Kitchen*, 110 Wn.2d at 411. Nevertheless, a unanimity error may be harmless as long as the nature of the verdict indicates that all jurors relied on the same incident for conviction. See *State v. Holland*, 77 Wn.App. 420, 425, 891 P.2d 49, review denied, 127 Wn.2d 1008 (1995); *Kitchen*, 110 Wn.2d at 405-06.

Here, the State relied on two distinct acts to prove malicious mischief: (1) The removal of items from the home (drywall, insulation, floor coverings, a claw foot bathtub) and the unhooking of a toilet; and (2) the strewn garbage found throughout the property that was cleaned up and taken away in one truck load. Here, the nature of the verdict does not indicate which incident the jurors relied on for conviction. Although the jury was instructed that “If more than one item of property is physically damaged as a result of a common scheme or plan, then the sum of the value of all physical damages shall be the value considered in determining the amount of physical damage,” (See CP 12, Instruction No. 7), that instruction does not cure the problem. Instruction 7 is plainly referring to the aggregate value of the items removed as part of the remodel and not the strewn garbage. Indeed, the State specifically argued to the jury that the strewn garbage diminished the value of the house, not that it constituted physical damage in of itself. The State failed to prove that Dr. Wooten was the one who actually spread the garbage, and the State failed to present any evidence about the dollar amount of the alleged diminution of value the property suffered from the strewn, easily removable garbage. Although Dennis Kohl gave self serving testimony to the effect that the value of the house was “zero,” he was plainly referring to the removed items and not the garbage. See RP Vol. 1, p. 52.

With regard to the strewn garbage, Dr. Wooten testified that he was not the last one to leave the property, his wife was. The State presented no evidence to refute that. Further, there were exploded garbage bags all over which strongly suggests that trespassers or vandals spread the garbage around the house, probably while engaging in other illegal activity. Why would Dr. Wooten take the time to bag up garbage and then rip open the bags and throw it all over? Because the jury was not instructed on accomplice liability, the State was required to prove that Dr. Wooten was the *actual person* who physically spread the garbage all around; it was not enough for the jury to conclude that his wife likely did it. Moreover, even assuming the State proved that Dr. Wooten was the person who un-bagged the bagged garbage, the State failed to prove how much value, in dollars, was lost to this property as a result of the strewn garbage. The only dollar amount put in evidence by the State was the \$15,000 (minimum) it would take to get the house back up “to finish,” in the words of the State’s expert, resulting from the missing drywall, floor coverings, etc. Because the State chose not to elect a single act on which to rely, and relied on a theory of littering that it failed to prove, Dr. Wooten’s conviction must be reversed where the jury was not instructed that it had to be unanimous as to which act upon which it relied to conclude Dr. Wooten was guilty.

Here, Dr. Wooten's right to a unanimous verdict was violated. Should this Court disagree with Mr. Wooten that the evidence presented is insufficient to sustain his conviction, his case must be remanded for a new trial with proper jury instructions.

III. DR. WOOTEN WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE THE TRIAL COURT COMMENTED ON THE EVIDENCE AND LIMITING HIS CLOSING ARGUMENT BY PREVENTING HIS ATTORNEY FROM ARGUING FACTS IN EVIDENCE.

a. Comment on the evidence

Washington Constitution Art. IV, § 16 prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case.⁴ *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). “An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752 (1991). “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P. 2d 929 (1995).

⁴ Art. IV, §16 states: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane at 838.

“It is thus error for a judge to instruct the jury that ‘matters of fact have been established as a matter of law.’” *State v. Zimmerman*, 130 Wn.App. 170, 174, 121 P.3d 1216 (2005), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The defendant need not show prejudice resulting from the court’s comment. The Washington Supreme Court has stated:

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, §16. Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. In such a case, “[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.

Lane at 838- 39. (Internal citations omitted).

In this case, the court commented on the evidence when it told the jury that Robert Miller was acting as Dr. Wooten’s representative when Miller entered into the real estate contract found in Exhibit 2, thereby making Dr. Wooten legally bound by the terms of that contract. This is no

small matter in this case: The State relied on the notion that Dr. Wooten was in breach of the terms of the contract found in Exhibit 2 to argue that he lacked the legal authority to remodel the house. The State argued that even if Dr. Wooten was engaged in remodeling the house, he had no right to remodel because he did not own the house. The State proffered two arguments to support its contention that Dr. Wooten did not own the house: (1) That he was in breach of the real estate contract found in Exhibit 2, and (2) that no person, as a matter of law, is entitled to remodel his or her home until such time as he or she pays off the mortgage and obtains the deed to the home. The utter silliness of this latter contention is discussed in Part I, *supra*. But the former contention, that Dr. Wooten gave up legal authority to remodel the home that he might once have had because he violated the terms of the real estate contract found in Exhibit 2 was a central issue in this case.

Exhibit 2, it must be emphasized, does not bear Dr. Wooten's signature or initials anywhere. It was an agreement entered into between Robert Miller and Dennis Kohl. Dr. Wooten testified he had no knowledge of this contract. Thus, the State relied on an agency theory to argue to the jury that Dr. Wooten was bound by the terms of that contract. The State, however, failed to put forth any evidence to prove that Robert Miller had the authority to act on Dr. Wooten's behalf or bind him to the

terms of a contract either on November 1st, 2005, the day the contract was purportedly entered into, or May 4th, 2006, the day Robert Miller signed the contract. The State did not produce Robert Miller for trial and his whereabouts were never established. Dr. Wooten described Robert Miller as his ex-partner, and the State did not refute that characterization. It seems rather obvious that the State should have presented some evidence about the dates on which Robert Miller had authority to act on Dr. Wooten's behalf as his partner, but the prosecutor elected not to.

Given the total absence of evidence about whether Robert Miller had authority to act on Dr. Wooten's behalf when he entered into the second contract, it was particularly devastating to Dr. Wooten's right to a fair trial when the court instructed the jury that Robert Miller acted as Dr. Wooten's "representative" when he entered into the contract found in Exhibit 2. The court instructed the jury that a matter of fact had been established as a matter of law. Even worse, this particular matter of fact was not a proven fact at all. Dr. Wooten was denied a fair trial by the court's comment on the evidence and his conviction should be reversed and his case remanded for a new trial.

b. Limiting closing argument

The trial court ruled that Mr. Blair could not argue facts in evidence that were critical to Mr. Wooten's theory of the case. It was

evident that there is substantial ill-will between the judge and Mr. Blair, and that ill-will plainly infected this trial. The exchange between the judge and Mr. Blair during this portion of the trial demonstrates this. There was no reasonable basis for the court's limitation of Mr. Blair's closing argument. The facts Mr. Blair attempted to discuss were admitted during the trial without objection. The prosecutor could have objected but elected not to. It is not the prerogative of the court to do the prosecutor's job for him. The court's attitude and comments were totally improper.

A court violates an accused person's right to counsel by precluding the defendant from arguing his theory of defense. *Conde v. Henry*, 198 F.3d 734, 738 (9th Cir. 1999). While a court has discretion to limit closing argument for the purpose of ensuring a fair and orderly trial, the court may not require that the lawyers to adopt or argue only inferences the judge sees as logical. *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550 (1975). Closing argument has "particular importance" in the effective exercise of the right to counsel. *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007), *cert. denied*, 128 S.Ct. 1070 (2008). Improper limitations on closing argument deny the right to counsel as well as due process of law. *Id.*, U.S. Const. amends 6, 14; Wash. Const. art. 1 §§ 3, 22.

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, ...no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

In *Conde*, the court found the improper limitation on defense counsel's closing argument to be so serious as to affect "the very framework" of the trial. *Conde* at 741. It deprived the defendant of effective assistance of counsel and due process of law by preventing the jury from analyzing whether the State proved all elements of the crime. *Conde* at 741. In *Frost*, the Court applied a constitutional harmless error test, which *Conde* also considered, requiring reversal unless the State proves it is harmless beyond a reasonable doubt. *Frost* at 773; *Conde* 741-42. The constitutional harmless error test requires reversal where there is "a reasonable possibility" that the error "might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824 (1967).

Here, the State cannot prove that this error was harmless beyond a reasonable doubt where ownership of this home and Dennis Kohl's credibility were the central issues in this case. That the court opined that ownership was irrelevant is shocking. As Mr. Blair observed in his argument to the court, the secret mortgage taken out on the home by Mr.

Kohl, and his subsequent default on that mortgage, was the event that caused Dr. Wooten to stop the remodel of this house. Had he finished the remodel, rather than stopped midstream, there would have been no "damage" and this case would never have been charged. The State chose to take a civil case and make it criminal. That the civil aspects of this case are messy and reveal Mr. Kohl to be devious should not have precluded Dr. Wooten from arguing these facts to the jury. Dr. Wooten should be granted a new trial.

E. CONCLUSION

Dr. Wooten's conviction should be reversed and dismissed due to insufficient evidence. Alternatively, he should be granted a new trial.

RESPECTFULLY SUBMITTED this 20th day of December, 2010.


ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Wooten

CERTIFICATE OF MAILING

I certify that on 12/20/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Lori Smith, Lewis County Prosecutor's Office, 345 W. Main St., Fl. 2, Chehalis, WA 98532, (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402, and (3) David Wooten, Jr., 214 1/2 Jackson St., Centralia, WA 98531.

APPENDIX

9A.48.070. Malicious mischief in the first degree

(1) 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;

(b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication; or

(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

(2) Malicious mischief in the first degree is a class B felony.