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SUPREME COURT
STATE OF WASHINGTON

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NO. 87855-2

BY RONALD R. CARPENTER COURT OF APPEALS NO. 40810-4-II



CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID ALLEN WOOTEN, JR.,

Appellant.

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

The Honorable Nelsen E. Hunt, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

PETITIONER

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A. ISSUES ON REVIEW

1. Did the appellate court err when it equated a security “lien-type” interest in real property with possessory interests in real property that can be “physically damaged” as that term is defined in the malicious mischief statute?

2. Did the appellate court err when it found that a security-type lien interest – even where not diminished in value by the actions of the defendant – fulfilled the requirement of the malicious mischief statute that “the property of another” be "physical[ly] damage[d]"?

3. If the malicious mischief statute applies to a security-type lien interest, was the evidence presented by the prosecution at trial insufficient to sustain defendant's conviction absent proof that the defendant diminished the value of another party’s “lien-type” security interest in the property by more than \$1,500?

4. Was the defense improperly precluded from arguing that the financing of the real property was relevant to guilt on malicious mischief when defendant had a buyer's ownership interest in real property and the seller had "flipped" any security interest he may have held to an unknown banking entity for a loan he obtained without the buyer’s knowledge or approval?

B. STATEMENT OF THE CASE

1. Overview

David Wooten was charged with and convicted of malicious mischief in the first degree arising from what the prosecution argued was damage to real property he purchased from a seller named Dennis Kohl. CP 1, 55; Exhibits 1, 2. Dr. Wooten's defense at trial was that he was remodeling the home and abandoned it in an uncompleted state several years later only after learning that the seller Mr. Kohl had, unbeknownst to him, taken a second mortgage on the home and then defaulted on the obligation to repay the mortgage. RP Vol. 1, 59, 65, 67, 69-70; RP Vol. 2, 33, 37-38, 40-41, 65

The issue on appeal was whether the state was obligated to prove only that Dr. Wooten had diminished the value of the real property by \$1,500 or more, or whether the state had to prove that he diminished the value of another's actual personal property interest in the real estate by that amount. As set out below, a panel of the Court of Appeals reversed and dismissed the conviction of Dr. Wooten's wife, Janna Wooten, who was tried separately on the same charge. *State v. Janna Wooten*, 2012 WL 1856994. Two members of a second panel affirmed Dr. Wooten's conviction; the dissenting judge agreed with the panel which reversed

Janna Wooten's conviction. *State v. David Wooten*, 169 Wn. App. 1029, 2012 WL 3011730. All appellate judges agreed that Dr. Wooten had a real property possessory interest in the property and that some other entity might have, at most, a personal property security interest in it. *Janna Wooten*, at 3; *David Wooten*, at 4. The conflict which resulted in the inconsistent decisions was whether any damage of \$1,500 or more to the value of the real property was sufficient to prove malicious mischief or if the damage had to be damage to the actual security interest of another in the real property. *David Wooten*, at 4, n.10 The dissent in Dr. Wooten's case also questioned whether diminishing the value of a security interest in property could constitute "physical damage" to property within the meaning of the malicious mischief statute. Dissent at 9 n.13

2. Evidentiary facts

In May 2005, David Wooten, Jr., on behalf of his clinic Wooten Primary Care, LLC, entered into a "Real Estate Purchase and Sale Agreement" to buy a home from Dennis Kohl; an addendum to the Agreement provided that the Buyer and Seller would ultimately enter into an Option to Lease Purchase the House. Exhibit 1. In November, 2005, however, the parties entered into a "Real Estate Contract;" signed by Dr. Wooten's former partner, on behalf of Wooten Primary Care. Exhibit 2.

This contract provided that Wooten Primary Care purchased the property from Mr. Kohl for \$225,000.¹

¹ 2. SALE AND LEGAL DESCRIPTION. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the following described real estate in Lewis County, State of Washington.

~~[Legal description]~~

3. PRICE: \$225,000.00

4. METHOD OF PAYMENT:

A. Down Payment: \$10,000, previously paid to Seller under earnest money agreement, receipt of which is hereby acknowledged.

B. Additional Lump Sums Payments: \$5,000 on November 1, 2005 and \$5,000 on May 1, 2006, to be credited to principal.

C. Monthly payments: Buyer shall pay to Seller \$215,000, less (1) the amount of principal reduction due to monthly payments made to seller between June 1, 2005 and October 31, 2005, and (2) additional lump sum payments made under paragraph 4-B, plus interest at \$8 per annum, in monthly installments of at least \$1,577.43 on the first day of each month with the first such payment due on November 1, 2005, subject to paragraph 5. Buyer shall at all times have the option of paying more than the minimum amount due, and there shall be no prepayment penalty assessable by Seller. The entire balance of unpaid principal and interest shall be fully due and payable on November 1, 2014.

5. SELLER OBLIGATIONS RE: UNDERLYING DEBT AND DUE-ON-SALE ACCELERATION. Seller shall 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 his failure to do so.

Exhibit 2.

Dr. Wooten and his family moved into the home and paid monthly mortgage payments of \$1577.43 directly to Mr. Kohl, in addition to \$20,000 paid as earnest money and additional lump sum payments. RP Vol. 2, p. 32-33. They lived in the home until May of 2008. RP Vol. 2, p. 33.

~~In July of 2007, the Wootens had decided to remodel the home.~~
RP Vol. 2, p. 33. When Dr. Wooten began remodeling in one of the bathrooms, he found black mold in the walls and had to remove an extensive amount of the sheetrock throughout the house. RP Vol. 2, p. 37-38. The teardown, including removal of the debris and mold, took about five months, into December of 2007. RP Vol. 2, p. 38. The Wootens decided then to take a break from the work on the house for the Christmas holidays. RP Vol. 2, p. 40.

As it turned out, Mr. Kohl had not recorded either contract with Wooten Primary Care; and four months after the original “Real Estate Purchase and Sale Agreement” was signed, had taken out a second mortgage on the home for \$216,000 without informing Dr. Wooten.² RP Vol. 1, p. 69-70, 75. Then, in September 2007, Mr. Kohl decided that he did not want to continue repaying this second mortgage and (he testified)

² The amount of the loan taken by Mr. Kohl was reported as \$325,000 in the decision in Ms. Wooten’s case, at 2.

“flipped” the house back to the bank. RP Vol. 1, p. 50, 65. As a result, when the Wootens arrived back at the house after their Christmas break in December, they found a default notice for Mr. Kohl’s loan attached to the gate.³ RP Vol. 1, p. 65, Vol. 2, p. 40-41.

Although he had already relinquished the property, on May 24, 2008, Mr. Kohl filed a complaint with the Lewis County Sheriff’s office. RP Vol. 1, 97. The deputy who came to the house found the front door open and the yard overgrown with garbage strewn everywhere.⁴ RP Vol. 1, p. 99.

The State called an expert witness at trial who testified that it would cost a minimum of \$15,000 to “bring this house back to finish.” RP Vol. 2, p. 11. The expert estimated that cost of garbage removal to be approximately \$3,000.

³ The State’s theory of the case was that Dr. Wooten had not begun remodeling the house in July, but rather he had removed the drywall, floor coverings, insulation and plumbing fixtures, and strewn the garbage about, because he was angry after receiving the eviction notice. RP Vol. 2, p. 79.

⁴ Dr. Wooten testified that the last person to leave the home was his wife, Janna. RP Vol. 2, p. 45. When he left, 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 and placed in the garage, 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.

3. The diverging appellate opinions

On appeal, Janna Wooten's conviction for malicious mischief in the first degree was reversed and remanded to the trial court for dismissal with prejudice; the Court held that, in her case, "the State's evidence was insufficient to prove that [Janna] Wooten committed first degree malicious mischief because it failed to show that the unfinished remodel of the Wootens' home resulted in any damage --- knowing or otherwise -- to the existing property interest of another." *State v. Janna Wooten*, 2012 WL 1856994, *State v. David Wooten*, 169 Wn. App. 1029, 2012 WL 3011739, at 4, n. 10.⁵

The Court in Ms. Wooten's case held that the state's theory of the case was that the Wootens were tenants under a lease, when under real property law they had, as purchasers under the real estate contract, a property interest in the house while the seller retained only a personal property security interest in it. 2012 WL 1856994 at 3. Because "an undisclosed person" took possession of the property when the Wootens left in May 2008, the question for the Court was whether they had damaged that person's interest in an amount exceeding \$1,500. *Id.* at 6.

⁵ Counsel for Dr. Wooten is aware that unpublished opinions may not be cited as authority in support of a legal argument in Washington. GR 14.1. The decision in Ms. Wooten's case is discussed here because it was addressed in Dr. Wooten's case.

Noting that the value of the seller's security interest is not the same as the value of the secured property, the Court held that the State presented no evidence that Mr. Kohl was owed money from Primary Care after he took a second mortgage greater than the amount owed by Primary Care or of a reduction of the undisclosed lender's interest -- "there was no evidence that any lender lost money after it evicted the Wootens." *Id.*, at 6.

Similarly, the dissent in Dr. Wooten's case would also have reversed his conviction and remanded to the trial court for dismissal because "the record is so inadequate that it does not support any reasonable conclusion that Wooten's 'remodel' diminished the value to the bank's security interest." *David Wooten*, at 9.

The majority agreed that "Wooten was the only person with a possessory or proprietary interest in the property," but that "the malicious mischief statutes still apply because, as Wooten knew, other parties had an ownership [security] interest in the house," and that "any distinction between real and personal property for purposes of our malicious mischief jurisprudence is inapposite." *Id.* at 3 and n.8. The majority then concluded that the opinion in Ms. Wooten's case "actually addressed a related but distinct issue: whether the evidence was sufficient to prove to whom restitution in an amount greater than \$1,500 was owed," and that "[t]he dissent also adopts this reasoning." *Id.* at 4, n.10. For the majority,

the amount it would take to restore the property or clean up the garbage was equal to the amount of damage to the property of another. *Id.* at 3.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT DR. WOOTEN “PHYSICALLY DAMAGED” THE “PROPERTY OF ANOTHER.”

The state charged Dr. Wooten with malicious mischief in the first degree under RCW 9A.48.070, which provides, in relevant part, that:

(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;⁶

.....

RCW 9A.48.010 further defines “Property of another” as “property in which the actor possesses anything less than exclusive ownership.” The rationale for allowing a prosecution for malicious mischief for damage to property which is owned, at least in part, by the defendant is that “[u]nlike theft, malicious mischief encompasses the damaging, if not the destruction of property, and therefore, possession can never be redeemed.” *State v.*

⁶ RCW 9A.48.070 was amended in 2009, to raise the damage limit from \$1,500 to \$5,000. Laws of 2009, ch. 431, Section 4. As noted by the Court of appeals, 2012 WL 3011730 2, n. 6, the events in this case took place under the previous version of the statute.

Webb, 64 Wn. App. 480, 824 P.2d 1257 (1992). It is the physical damage which distinguishes malicious mischief from theft,

RCW 9A.48.100(1) provides:

For the purposes of RCW 9A.48.070 through 9A.48.090 inclusive:

(1) "Physical damage," in addition to its ordinary meaning, shall include the total or partial alteration, damage, obliteration, or ~~erasure of records, information, data, computer programs, or their~~ computer representations, which are recorded for use in computers or the impairment, interruption, or interference with the use of such records, information, data, or computer programs, or the impairment, interruption, or interference with the use of any computer or services provided by computers. "Physical damage" also includes any diminution in the value of any property as the consequence of an act[.]

Thus, the elements of malicious mischief require proof that 1) property of another was 2) physically damaged, and 3) the damage diminished the value of property more than \$1,500.

Here, while the prosecution established at trial that physical changes were made to the property, it failed to establish that any property interest of another party was actually damaged or diminished in any way as a result of Dr. Wooten's remodel. Absent such proof, the evidence was insufficient to establish Dr. Wooten's guilt of malicious mischief.

As is agreed by the majority and the dissent in this case, Dr. "Wooten was the only person with a possessory or proprietary interest," in

the property he purchased from Dennis Kohl. *David Wooten*, 2012 WL 301130, at 3, n. 8, (dissent) at 3 n.8; (dissent) at 9. While security or lien-type interests of an unknown banking entity were present, the state failed to show *what* entity or persons actually held that security or lien-type interest and it failed to show that the unknown banking entity's security interest was diminished in any way. RP vol. 1, 49-50, 67-68, 75; RP vol. 2, 40-41, 81. Therefore, as a matter of long-standing state and federal constitutional law, Dr. Wooten's conviction for malicious mischief cannot be affirmed.

The evidence is not sufficient for conviction unless a rational trier of fact taking the evidence in the light most favorable to the state could find, beyond a reasonable doubt, the facts needed to support every element of the crime, including here that Dr. Wooten caused physical damage to the property of another in an amount exceeding \$1,500. *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

As stated *infra*, RCW 9A.48.010 defines "Property of another" is "property in which the actor possesses anything less than exclusive ownership." Here, the state presented no evidence that anyone other than Dr. Wooten had an ownership interest that was physically damaged. As the purchaser under a real estate contract, Dr. Wooten had "(1) the right to

‘contest a suit to quiet title’(2) *the right to possess the land, including controlling the use of the land*; (3) the right to sue for trespass; (4) *the right to mortgage the interest in the property*; (5) the right to participate as a necessary part in condemnation proceedings; and (6) the right to claim a homestead in real property.” *David Wooten*, dissent at 8 (citing and quoting, *Tomlinson v. Clarke*, 118 Wn.2d 498, 507, 825 P.2d 706 (1992), and *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 782, 567 P.2d 631 (1977).

In contrast, the seller retained only a “lien-type security” interest. *Id.* (quoting *Tomlinson*, at 509, and *In re McDaniel*, 89 B.R. 861, 869 (Bankr.E.D.Wash. (1988) (emphasis added)). The seller’s security interest is a personal property interest, *In re Pers. Restraint of Freeborn*, 94 Wn.2d 3365, 340, 617 P.2s 424 (1980); *Comm. Of Protesting Citizens v. Val Vue Sewer Dist.*, 14 Wn. App. 838, 842, 545 P.2d 42 (1976), enforceable through rights and remedies available to secured creditors. *David Wooten*, dissent at 8; *Tomlinson*, at 509.

The majority of the appellate court, in Dr. Wooten’s case, erred when it equated these two concepts: 1) the possessory or proprietary interest in real property and 2) personal property "security interest" for purposes of the malicious mischief statute. The two interests are not the same and should not be treated as such for purposes of the malicious

mischief statute. Unlike Dr. Wooten's real property possessory interest, right to possession of the property could arise for a security-interest holder only after default of the underlying loan. No matter how the real property might be altered or damaged, the security-interest holder would not be damaged – physically or otherwise -- as long as the loan was paid.

The appellate court considered RCW 61.12.030, which provides criminal sanctions if an owner, mortgagor, lessee, or occupant of real property, removes or damages fixtures, buildings or permanent improvement without obtaining written permission from the holders of any outstanding mortgages or liens, as proof that “the legislature has recognized the criminality of destroying property in which someone else holds a security interest.” *Wooten*, at 5, n.11. The enactment of RCW 61.12.030, in fact, shows that the malicious mischief statute was *not* intended to protect a security interest in real property.

The enactment of RCW 61.12.030 establishes that the legislature sought to fill a gap in existing statutes. It establishes, more importantly, that the legislature could and did clearly provide an appropriate sanction for altering structures on or improvements to real property without the consent of persons with a security interest in the property. Moreover, under RCW 61.12.030, a person would be guilty of a misdemeanor for damaging property in any amount, in contrast to the malicious mischief

statute which provides for a felony conviction for damage of \$1500.

When a specific statute punishes the same conduct as a general statute, the specific prevails over the general. *State v. Smelter*, 86 Wn. App. 818, 939 P.2d 1235 (1997). Similarly, a more recent statute prevails over an earlier statute if they cannot be harmonized. *State v. Stark*, 66 Wn. App.

~~423, 438, 832 P.2d 105 (1992). The enactment of RCW 61.12.030~~

demonstrates that the legislature did not intend for the malicious mischief statute to be used to enforce the rights of security-lien holders of real property. Such rights are not equivalent to possessory rights to the real property – whether real property or personal property possessory rights -- and not the equivalent to possessory interests for purposes of the malicious mischief statute.

2. THE VALUE OF A SECURITY-TYPE LIEN INTEREST - DIMINISHED OR NOT - WAS NEVER CONTEMPLATED WITHIN THE DEFINITION OF “PHYSICAL DAMAGE” AS SET OUT IN THE MALICIOUS MISCHIEF STATUTE.

The malicious mischief statute, as charged in this case, punishes for physically damaging property; the statute is unambiguous on that point: “(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.” RCW

9A.48.070. This statute should not be extended to apply to diminishing the value of a security lien on real property.

As noted by the dissent in this case, while RCW 9A.48.100(1) defines “physical damage” to include “physical damage to electronic data and computers, including interruption of the use of such data,” and includes a broad catchall provision of “any diminution in the value of any property as the consequence of an act,” “[n]othing in the statute’s language, however, supports reading the ‘diminution in value’ phrase as applying to all contract rights, which would conceivably criminalize all breaches of contract.” Dissent at 9, n.13.

In fact the malicious mischief statute has long been interpreted to require an actual physical invasion of the property: “[f]or property to be damaged there must be a physical invasion of the property that either destroys it or injures in so that it does not meet the ordinary test of efficiency. For example, when a wiretapper attached a wire to a telephone call box, this did not rise to the level of damages.” 13A WAPRAC section 1704 (citing *State v. Nordskog*, 76 Wash. 472, 136 P. 694 (1913)). Section 1704, then contrasted this with the facts in *State v. Gardner*, 104 Wn. App. 541, 16 P.3d 699 (2001), in which broadcasting over a police radio was sufficient to establish that the defendant “tampered with” the radio proving second degree malicious mischief. *Id.* This was because the

radio transmission actually interrupted and interfered with the regular police radio transmission. *Id.*

Here, unlike in *State v. Newcomb*, 160 Wn. App. 184, 246 P.3d 1286m, review denied, 172 Wn.2d 1005 (2001) and *State v. VanValkenburgh*, 70 Wn. App. 812, 856 P.2d 407 (1993), cases cited by the state involving *possessory* personal property rights = an easement and a lease -- or *Gardner*, the personal property security interest in the property could not be physically damaged in the same way. While there are some ways that physically damaging real property which secures a loan is analogous to damaging or impairing an easement or lease, there are many important ways in which they are not analogous.

A money judgment after a judicial foreclosure can attach to other real property and, in the event of a deficiency judgment, can be satisfied from other property of the mortgage debtor. 18 WAPRAC at section 19.17. Thus, in this case, if Mr. Kohl was the judgment debtor with respect to any bank having a security interest in the property, he may well have had assets to satisfy the judgment, even if the property purchased by Dr. Wooten was insufficient to cover the debt he owed. Dr. Wooten may also have had other real property assets. Thus, it is not clear that damage to real property results in damage to a security interest in the property

even where the value of the real property becomes insufficient to cover the amount of the loan.

Real property and mortgages are complicated areas of the law and have many statutes and rules governing transactions, rights and remedies during foreclosures. The criminal malicious mischief statute is not an appropriate way to enforce those rights and remedies.

Here, as the dissent notes, Mr. Kohl's failure to register his sale of the property and subsequent securing of a further mortgage triggered the foreclosure and was not something that Dr. Wooten knew about or sanctioned. The criminal trial was not the proper forum for determining the rights and wrongs of Mr. Kohl's actions under real property law or their relationship to the charges against Dr. Wooten. Mr. Kohl no longer maintained the status of a seller when he "flipped" his house back to the bank; however, if Mr. Kohl maintained the status of a seller then a seller's remedy for breach of contract are those of a secured creditor and the appellate court erred when it expanded the malicious mischief statute to include prosecution of breaches of contract.

3. IF THE MALICIOUS MISCHIEF STATUTE APPLIES TO THE VALUE OF A SECURITY TYPE INTEREST, THE STATE FAILED TO PRESENT EVIDENCE THAT ANY PERSONAL PROPERTY SECURITY INTERESTS OF ANOTHER WERE DIMINISHED OR PHYSICALLY DAMAGED IN ANY WAY.

The language of the malicious mischief statute and the relevant statutory definition of “property of another” and “physical damage” do not support a reading that the security interests in the property were “physically damaged.” For the majority in Dr. Wooten’s case, however, it was enough that another party had a security interest and that there was damage to the property in an amount over \$1,500. The majority did not require that the damage had to be damage of over \$1,500 *to the security interest*; and, thus, did not require that any party or person actually suffer monetary or other damage as a result of any action by Dr. Wooten.

“The value of a lender’s or real estate seller’s security interest in real property is not coextensive with the value of the secured property.” *David Wooten*, dissent at 9, (“*Bennett v. Maloney*, 63 Wn. App. 180, 185-86, 817 P.2d 686 (1991) (reversing a trial court’s denial of a directed verdict where plaintiff failed to offer competent evidence of the reasonable value of the security interest actually received); *Andersen v. Nw. Bonded Escrows, Inc.* 4 Wn. App. 754, 760, 484 P.2d 488 (1971) (in negligence action for failure to record mortgage, proper measure of damages is the

value of the security interest lost less plaintiffs' recovery in bankruptcy, not the purchase price of the home); *Tilly v. John Doe*, 49 Wn. App. 727, 731-32, 746 P.2d 323 (1987) (value of security interest lost through attorney's negligence in failing to perfect is not the value of the property, but the amount plaintiff would have collected had a perfected security interest been obtained").

Thus, under *Bennett v. Maloney*, *Andersen v. Nw. Bonded Escrows, Inc.*, and *Tilly v. John Doe*, the relevant damage calculation – even if a security interest can be “physically damaged” within the meaning of the malicious mischief statute -- is the damage to the security interest of any party with a personal property interest in the property. Otherwise – if the security interest is not damaged – then there is no actual requirement of damage to the actual property interest owned by another party.

The majority's holding, that the accused can be guilty of malicious mischief even though the party with a security interest had suffered no loss or injury, is contrary to the authority it cites.

As noted above, the majority relies on the decisions in *State v. Newcomb*, 160 Wn. App. 184, 246 P.3d 1286, *review denied*, 172 Wn.2d 1005 (2001), *State v. VanValkenburgh*, 70 Wn. App. 812, 856 P.2d 407 (1993), and *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993), for the proposition that malicious mischief convictions may arise from damage to

personal property. *David Wooten*, at 3-4. What the majority overlooks is that these cases hold that the damage was, and had to be, to that personal property, where here there was no proof of damage to the personal property. In *Newcomb*, the damage was to the easement itself, the personal property interest held by the injured party. *Newcomb* destroyed the \$12,000 gravel road built by neighbor who relied on the easement to get to his property, and otherwise blocked access over the easement.

Similarly, in *VanValkenburg*, the damage to the building was damage to the tenant lessee of the property. And in *Shaffer*, the damage was to the tires owned by someone else. In all of these cases, the physical damage was to the personal property. In Dr. Wooten's case the missing proof was proof that someone's personal property security interest had suffered damage in any amount.

None of these cases, neither *Newcomb*, *VanValkenburgh*, nor *Shaffer*, held that the state need not prove damage of \$1,500 to the actual personal property interest at issue. Here, the unknown bank/entity in this case as holder of the security interest had a right to utilize the property for repayment of the debt owed. *Boeing Employees' Credit Union v. Burns*. 167 Wn. App. 265, 273-274, 272 P.2d 908 (2012). If the property retained more than enough value to repay the debt, the lender suffered no damage to its personal property interest in the house. The evidence was neither

sufficient to establish that the property itself could not fully secure the outstanding obligation nor did it identify what entity or person held the security interest. Further:

The State presented no evidence that the bank's security interest was diminished in value because of Wooten's "remodel" or the garbage left on the property.⁷ Indeed, the State called no witness from the bank and offered none of the bank's loan documents pertaining to Kohl's loan. Thus, the jury did not know what Wooten owed on the property at the time of foreclosure, what Kohl owed the bank at the same time, and what the bank realized in selling the property or pursuing Kohl on his promissory note.

The issue is further complicated by the problem of distinguishing the harm Kohl caused the bank by encumbering the property from the harm Wooten may have caused with the "remodel." . . . Yet, it was this increased debt and Kohl's failure to make the bank payments, although he continued to accept Wooten's payments, that triggered the foreclosure. If Kohl had not obtained the bank loan, the only encumbrance on the property when Wooten performed his "remodel" would have been the balance owing on the Wooten contract [which was less than the value of the property.] . . . And, if Kohl had not further encumbered the property, he would not have suffered a loss in taking the property back, and his right to foreclose would not be diminished in value. *The point is that the record is so inadequate that it does not support any reasonable conclusion that Wooten's "remodel" diminished the value to the banks's security interest.*

Dissent at 9 (emphasis added).

Thus, while malicious mischief can be charged against persons damaging personal property, there must be evidence that the real personal property at issue was damaged. There is no authority suggesting, for

⁷ "[B]y the time of the foreclosure, Kohl no longer had even a security interest in the property. He transferred his interest in the property to the bank in September 2007. . . . Report of Proceedings at 50." Dissent, at 9.

example, that the conviction would have been upheld in *Newcomb, supra*, if the defendant had damaged his own property in some way separate from the easement held by the injured party. Under the majority's theory, in *Newcomb*, if the defendant had clear-cut the property and diminished its value without in any way interfering with the easement, he could have been found guilty of malicious mischief merely because another party had an interest – the easement – in the property. Absent proof that any act of physical damage actually injured or diminished another's personal property rights, Dr. Wooten should not be found guilty of malicious mischief.

4. THE TRIAL COURT IMPROPERLY PRECLUDED DR. WOOTEN FROM ARGUING THAT FINANCING EVIDENCE WAS RELEVANT TO HIS GUILT OR INNOCENCE OF MALICIOUS MISCHIEF.

The trial court's theory in this case was that of the majority opinion on appeal – that if there was any damage to the real property and there were any rights in the property other than Dr. Wooten's, then Dr. Wooten was guilty of malicious mischief. For that reason, the trial court excluded checks showing payments by the Wootens to Mr. Kohl, which would have been relevant to the question of whether the security interest had been diminished by any act of Dr. Wooten. RP(4/14/10) 14-15. The prosecutor

argued that “absent showing me enough checks to say that the house was paid off, I just don’t see the relevance” *Id.* The trial court ruled, “What difference does it make whether he did or didn’t get money? How does this make a difference, it is property of another, it can be any other, a bank in California, could be Mr. Kohl, it could be an individual in northern British Columbia for all we care.” *Id.*

The trial court would not let defense counsel argue, in closing, that Mr. Kohl took out a loan on the house after selling it to Wooten Primary Care: “[I]t doesn’t matter whether [Wooten] destroyed [the home] or lessened the security in it, that’s what this case is about. How it was financed is not what this is about.” RP(4/15/10) at 85.

As set out above, this evidence was vital to the determination of whether there was any valid security interest in the property; and, if so, whether it had been impaired by any acts by Dr. Wooten.

In the absence of evidence of the finances surrounding the selling of the property and the nature and extent of any personal property interests in it, the evidence was insufficient to establish that the property of another had been damaged and that the crime had been committed beyond a reasonable doubt. Dismissal with prejudice should be the remedy. If, however, this Court should hold that the evidence was sufficient to establish that a security interest had actually been impaired, Dr. Wooten

should be permitted to contest the state's evidence at a new trial.

F. CONCLUSION

Petitioner respectfully submits that this Court should remand his case for dismissal with prejudice.

DATED this 5th day of February, 2013.

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/s/
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I certify that on the 5th of February, 2013, I caused a true and correct copy of Appellant's Petition for Review to be served on the following by e-mail

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By e-mail

_____/s/_____/ 2/5/2013
Rita Griffith DATE at Seattle, WA

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Attached please find Appellant's Supplemental Brief in this cause.

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