

63891-2

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NO. 63891-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

FALINE MARSETTE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis R. Hill

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 5

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO
SUPPORT MS. MARSETTE’S CONVICTION FOR MALICIOUS
MISCHIEF IN THE FIRST DEGREE. 5

 a. Sufficient evidence must be presented to support each
 element of the crime charged..... 5

 b. Insufficient evidence was presented to convict Ms.
 Marsette of malicious mischief in the first degree..... 6

 c. Reversal and dismissal is the appropriate remedy 8

E. CONCLUSION 9

TABLE OF AUTHORITIES

Washington Supreme Court

Seattle v. Gellein, 112 Wn.2d 58, 768 P.2d 470, 775 P.2d 448
(1989) 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 6

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 6

Washington Court of Appeals

State v. Spruell, 57 Wn.App. 383, 788 P.2d 21 (1990)..... 9

United States Supreme Court

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)6

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
(1979) 6

Statutes and Rules

RCW 9A.48.070(1)(a) 6

A. ASSIGNMENT OF ERROR.

The State presented insufficient evidence to convict Faline Marsette of malicious mischief in the first degree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Without evidence that Ms. Marsette caused physical damage to Mardee Marquard's vehicle, either as a principal or an accomplice, did the resulting conviction for malicious mischief in the first degree violate due process, requiring reversal?

C. STATEMENT OF THE CASE.

On July 25, 2008, Faline Marsette attended a party at a house on the Muckleshoot reservation, where she resides. Most of the 30-50 people there were relatives, friends, or acquaintances, as the reservation is a very small, close-knit community. 6/4/09PR 46-47. 6/8/09RP 16, 19. Most, including Ms. Marsette, were drinking alcohol. 6/4/09RP 97; 6/8/09RP 8-9.

Some time after 2 a.m., Ms. Marsette arrived with her cousin¹ who was visiting from Montana. 6/4/09RP 90; 6/8/09RP 7. Three witnesses – Mardee Maquard, Matthew Jones, and Harold Price – testified both women were about the same height; Mr. Jones testified both were wearing long-sleeved black sweaters and

¹ None of the witnesses knew the cousin's name.

looked similar; he could distinguish them mainly in that Ms. Marquette's shirt showed cleavage and her cousin's did not and Mr. Price testified they both had black hair, although Ms. Marsette's was shorter. 6/4/09RP 116, 120; 6/8/09RP 18.

Mardee Maquard, who was also at the party, testified that around 3 a.m., she noticed Ms. Marsette and made eye contact with her but did not speak to her. 6/4/09RP 25, 29. There was some tension between the two women because in January 2008, Ms. Marsette had a brief relationship with Ms. Maquard's boyfriend while he and Ms. Maquard were separated. 6/4/09RP 4-7, 16. Ms. Maquard testified she was "upset" with both of them when she found out about the relationship and was still upset about it in July 2008. 6/4/09RP 48-49. Because she did not want to be around Ms. Marsette, Ms. Maquard told her boyfriend they should leave. 6/4/09RP 26. The hosts insisted that Ms. Marsette should leave instead. 6/4/09RP 28, 124.

Harold Clinton Price III also attended the party and saw Ms. Marsette and her cousin arrive. 6/8/09RP 7. Later, he went out to the front yard and saw a woman standing on the hood of a vehicle parked across the street, hitting the windshield with a brick. 6/8/09RP 10-11. Mr. Price testified he walked closer and

recognized the woman as Ms. Marsette. 6/8/09RP 11. A car, driven by another woman, then drove up, Ms. Marsette got in the passenger side, and they drove away without backing up.

6/8/09RP 12. Mr. Price testified he then went back in the house and announced "Somebody's car out there is getting fucked up."

6/8/09RP 10.

Matthew Allen Jones testified that he arrived at the party around 2:30 a.m. and saw Ms. Marsette and her cousin arrive shortly thereafter. 6/4/09RP 88, 90. Having been sober for over a year, Mr. Jones was one of the only people at the party who was not drinking. 6/4/09RP 86. He noticed that Ms. Maquard was drunk and angry and heard her talking, with some profanity, about the fact that Ms. Marsette was present. 6/4/09RP 115. He also observed that Mr. Price was drunk enough that he would not have wanted to get in a car with him. 6/4/09RP 117.

Around 4 a.m., Mr. Jones heard Mr. Price say someone was jumping on a jeep outside and immediately went out to see for himself. 6/4/09RP 95. He saw Ms. Marsette's car parked facing towards a black Chrysler SUV. 6/4/09RP 94. Mr. Jones testified both Ms. Marsette and her cousin were jumping on the hood of the Chrysler. 6/4/09RP 95. As the cousin jumped off on the driver's

side, Ms. Marsette slipped and fell and caught herself by pushing her hands on the hood. 6/4/09RP 95. The cousin grabbed a rock and threw it on the vehicle; it hit the frame between the driver's side windows and bounced off. 6/4/09RP 95. Both women then jumped into Ms. Marsette's car, with Ms. Marsette driving, and drove away quickly in reverse. 6/4/09RP 96.

Ms. Maquard testified she heard Mr. Price say a black car was being "busted up" and went outside, where she saw the front headlights of another car backing quickly away from the house. 6/8/09RP 29-30. She then saw that her car, a 2005 black Chrysler Pacifica, was damaged, including a broken windshield, dented hood, and scratched window. 6/4/09RP 34, 46.

Auburn Police Department Officer Jeff Shepard responded and obtained statements from only Ms. Marquard and Mr. Jones. 6/3/09RP 112-14. Auburn Police Department Detective Greg McPherson testified he created a photo montage and presented it to Mr. Jones and Mr. Price, separately, in December 2008. 6/4/09RP 73; 6/8/09RP 26. Both identified Ms. Marsette's photo. 6/4/09RP 75, 78.

Joel Johnson, assistant manager at Thoroughbred Collision Repair testified that the estimated cost of repair to the Chrysler was \$3,317.63.

Mr. Price and Mr. Jones both testified they had spoken with Ms. Maquard about the incident since it happened and knew she was accusing Ms. Marsette of the crime. 6/4/09RP 121-22; 6/8/09RP 26-27.

Ms. Marsette was charged with Malicious Mischief in the First Degree. CP 9. Following a jury trial before the Honorable Hollis R. Hill, Ms. Marsette was convicted as charged. CP 58. Because this was her first offense, she received a low-end standard range sentence of 30 days, fully converted to community service hours. CP 59-66.

D. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MS. MARSETTE'S CONVICTION FOR MALICIOUS MISCHIEF IN THE FIRST DEGREE.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d

368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

b. Insufficient evidence was presented to convict Ms. Marsette of malicious mischief in the first degree. To convict Ms. Marsette of malicious mischief in the first degree, the State was required to prove beyond a reasonable doubt that Ms. Marsette as a principal or accomplice knowingly and maliciously caused physical damage exceeding \$1,500 to Ms. Maquard's vehicle. RCW 9A.48.070(1)(a). The State did not do so.

Of the two eyewitnesses to this offense, one, Matthew Jones was sober and the other, Harold Price, was quite drunk. 6/4/09RP 86, 117. Mr. Jones testified he saw both Ms. Marsette and her cousin on the hood of the vehicle and saw the cousin throw a rock or brick at the vehicle. 6/4/09RP 95-96, 120-21. Mr. Price, on the other hand, testified he saw Ms. Marsette on the vehicle, hitting the hood and windshield with a brick. 6/8/09RP 10-11.

However, Mr. Price testified his line of sight was partially blocked by other parked cars. 6/8/09RP 31. The physical similarity between the two women was noted by all three witnesses and would have been particularly confusing in this situation, where both women were wearing black and it was still dark out. 6/4/09RP 119. In addition, Mr. Jones' account of their departure, with Ms. Marsette driving in reverse, is consistent with Ms. Marquard's account of a car in reverse. 6/4/09RP 31, 96. Mr. Price, however, described the cousin, not Ms. Marsette, in the driver's seat, driving the car forward. 6/8/09RP 28. Furthermore, the women could not have left twice. According to the combined testimony, Mr. Price saw the women drive away, went inside and announced what he had seen; Mr. Jones immediately went outside and saw the women drive away again, and Ms. Marquard then went outside and also saw the

women drive away. Although Mr. Jones and Ms. Marquard could have seen the beginning and end of the same incident, respectively, Mr. Price clearly described something totally different. No reasonable trier of fact could find that the same women drove away twice within moments.

Given Mr. Price's intoxication and these inconsistencies, Mr. Jones' testimony is far more reliable. Mr. Jones testimony only places Ms. Marsette on top of the car. He did not see Ms. Marsette herself cause any damage to the vehicle. At most, she dented the hood with her hand when she fell, but this act was not knowing or malicious. The State therefore could not prove she committed malicious mischief as a principal.

Nor could the State prove she committed malicious mischief as an accomplice. No evidence supports the proposition that Ms. Marsette solicited, commanded, encouraged, requested, aided, or agreed to aid her cousin in committing the crime.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Ms. Marsette of malicious mischief in the first degree. See e.g. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990) (reversing a possession conviction where the

State produced evidence of fleeting, but not actual possession).

This Court should reverse Ms. Marsette's conviction and dismiss the charge against her.

E. CONCLUSION.

The State presented insufficient evidence to prove beyond a reasonable doubt that Ms. Marsette committed the crime of malicious mischief in the first degree. She therefore respectfully asks this Court to reverse both convictions.

DATED this 29th day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

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FALINE MARSETTE,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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AUBURN, WA 98012 | <input checked="" type="checkbox"/>
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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JANUARY, 2010.

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