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67102-2

NO. 67102-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KYLE RENNICK,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	1
C. <u>ARGUMENT</u> .....	3
THE LEGISLATURE DID NOT INTEND FOR A DEFENDANT TO BE ABLE TO ENGAGE IN MULTIPLE ACTS OF PROPERTY DESTRUCTION AND FACE BUT ONE CHARGE PER VICTIM.....	3
D. <u>CONCLUSION</u> .....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bell v. United States, 349 U.S. 81,  
75 S. Ct. 620, 99 L. Ed. 905 (1955)..... 4

Callanan v. United States, 364 U.S. 587,  
81 S. Ct. 321, 5 L. Ed. 2d 312 (1961)..... 13

Ebeling v. Morgan, 237 U.S. 625,  
35 S. Ct. 710, 59 L. Ed. 1151 (1915)..... 6

Ex parte Snow, 120 U.S. 274,  
7 S. Ct. 556, 30 L. Ed. 658 (1887)..... 5

Washington State:

State v. Adel, 136 Wn.2d 629,  
965 P.2d 1072 (1998)..... 4

State v. C.G., 114 Wn. App. 101,  
55 P.3d 1204 (2002), overruled on other grounds,  
150 Wn.2d 604, 80 P.3d 594 (2003)..... 13

State v. Contreras, 124 Wn.2d 741,  
880 P.2d 1000 (1994)..... 13

State v. Ervin, 169 Wn.2d 815,  
239 P.3d 354 (2010)..... 9

State v. Gocken, 127 Wn.2d 95,  
896 P.2d 1267 (1995)..... 4

State v. Handran, 113 Wn.2d 11,  
775 P.2d 453 (1989)..... 11

State v. Kinneman, 120 Wn. App. 327,  
84 P.3d 882 (2003), rev. denied,  
152 Wn.2d 1022 (2004)..... 7

<u>State v. Lewis</u> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	10
<u>State v. Leyda</u> , 157 Wn.2d 344, 138 P.3d 610 (2006).....	12
<u>State v. Marko</u> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	11
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	4
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	13

Constitutional Provisions

Federal:

U.S. Const. amend. V .....	4
----------------------------	---

Washington State:

Const. art. I, § 9.....	4
-------------------------	---

Statutes

Washington State:

Laws of 2008, ch. 207, §§ 3-4 .....	12
RCW 9.35.020.....	12
RCW 9.94A .....	12
RCW 9.94A.411 .....	10
RCW 9A.48.090 .....	5
RCW 9A.48.100 .....	6
RCW 9A.56.020 .....	8

**A. ISSUE PRESENTED**

Should this Court hold that the "unit of prosecution" for malicious mischief is each discrete act of property destruction, or should this court adopt Rennick's claim that the unit of prosecution is per victim, regardless of whether the property destruction occurs at a different time or place?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Juvenile respondent Kyle Rennick was charged with two counts of malicious mischief in the third degree. CP 1-2. The case proceeded by way of a bench trial. Rennick presented a voluntary intoxication defense. RP<sup>1</sup> 90-95. The trial court rejected Rennick's defense and found him guilty as charged. CP 5, 17-20. The court imposed a standard-range disposition. CP 14-16.

**2. SUBSTANTIVE FACTS.**

On November 14, 2010, Kent police officers were dispatched to a report of a disturbance at Kent Station shopping mall. RP 13,

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<sup>1</sup> The verbatim report of proceedings consists of one volume, which will be referred to as "RP."

45-46, 71. When they arrived, they found Kyle Rennick, who was so disruptive that officers eventually had to detain him. RP 14-18. After running Rennick's name through a police database, Officer Matthew Wheeler discovered that Rennick had an outstanding warrant out of Grant County. RP 19. Officer David Bava spoke with someone in the Grant County sheriff's office, who agreed to meet at Snoqualmie Pass in order to take custody of Rennick. RP 19, 48.

The officers took Rennick back to the Kent Police Department and placed him in a holding cell while they completed paperwork. RP 21, 49. When it was time to leave, Officer Wheeler retrieved Rennick from the holding cell and noticed that he had carved the letter "s" into the wall. RP 21. Rennick told Officer Bava that he had intended to carve his nickname, "Smurf," into the wall. RP 50.

It took approximately 30 to 45 minutes for Officers Wheeler and Bava to drive Rennick to Snoqualmie Pass. RP 23. Although he was originally handcuffed with his hands behind his back, during the drive, Rennick maneuvered his hands so that they were in front of him. RP 51. Rennick also made several remarks about wanting to escape. RP 52. At some point during the drive, both officers

heard a loud noise that they assumed was something on the road. RP 26, 52-53. However, after transferring Rennick to the Grant County officers, Officer Wheeler discovered that Rennick had broken the interior handle off the patrol car's back door.<sup>2</sup> RP 24-25.

**C. ARGUMENT**

**THE LEGISLATURE DID NOT INTEND FOR A DEFENDANT TO BE ABLE TO ENGAGE IN MULTIPLE ACTS OF PROPERTY DESTRUCTION AND FACE BUT ONE CHARGE PER VICTIM.**

Rennick contends that one of his two convictions for malicious mischief must be vacated because they constitute one "unit of prosecution." This claim should be rejected. What constitutes a unit of prosecution is a question of legislative intent. The legislature could not have intended to allow a defendant who damages multiple pieces of property, at discrete times and in different places, to face but a single charge regardless of the number of acts he commits. The unit of prosecution for malicious mischief is each discrete act of property damage.

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<sup>2</sup> There was no testimony about the cost of repairing the cell wall or the patrol car.

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to twice be put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution offers the same protection. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or unit of prosecution. Adel, at 634. Thus, the question here is what act or course of conduct has the legislature defined as the punishable act for malicious mischief.

In determining the unit of prosecution for a particular statute, the court must examine the language of the statute at issue. State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (each possession of an access device is one unit of prosecution, even where the

defendant possesses multiple access devices at one time). In pertinent part, a "person is guilty of malicious mischief in the third degree if he or she ... [k]nowingly and maliciously causes physical damage to the property of another...." RCW 9A.48.090(1)(a).

The principal focus in determining whether the legislature intended multiple acts to constitute but one crime is whether the legislature intended the punishable offense to be a continuing offense. See Ex parte Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887). This is in contrast to statutes aimed at offenses that can be committed *uno actu*, or in a single act. Snow, 120 U.S. at 286.

In Snow, the defendant was convicted of three counts of bigamy, each count identical in all respects except that each count covered a different time span that was part of a continuous period of time. Snow, at 276. The Court noted that bigamy is "inherently a continuous offense, having duration, and not an offense consisting of an isolated act." Snow, at 281. Because bigamy is a continuing offense, the Court held that the defendant committed but one offense. The Court specifically distinguished between statutes aimed at offenses continuous in character versus statutes violated *uno actu*. Snow, at 286.

In contrast, in Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915), the Court found that the defendant's seven counts of feloniously injuring a mail bag were not one continuous offense, noting that each offense was complete irrespective of any attack upon any other mail bag. Morgan, 237 U.S. at 629. The Court distinguished "continuous offenses where the crime is necessarily, and because of its nature, a single one, though committed over a period of time." Morgan, at 629-30.

Rennick relies on the phrase "the property of another," to support his argument that the unit of prosecution for malicious mischief is "per person who had his or her property damaged." App. Br. at 5-6. Rennick's argument conflicts with both the malicious mischief statutes and case law examining a similar statute. Malicious mischief is a choate crime, complete when a single act of destruction occurs. There is nothing in the statutory language or in the nature of the crime that suggests the crime is a continuing offense. Indeed, the legislature has granted the State the discretion to decide whether multiple acts of destruction should be charged individually, or aggregated in order to elevate the crime to a felony. Under RCW 9A.48.100(2),

If more than one item of property is physically damaged as a result of a common scheme or plan by a person and the physical damage to the property would, when considered separately, constitute mischief in the third degree because of value, then the value of the damages may be aggregated in one count. If the sum of the value of all the physical damages exceeds two hundred fifty dollars, the defendant may be charged with and convicted of malicious mischief in the second degree.

The statute does not address the aggregation of property belonging to separate victims. Had the legislature intended for the aggregation provision to be limited to property belonging to different victims, it would have said so. The legislature clearly intended that when a defendant damages multiple items of property belonging to the same victim, the prosecutor has the discretion to charge each incident as a distinct count, or to aggregate all incidents into one count.

Although no published case in Washington has examined the unit of prosecution for malicious mischief, this Court's opinion in State v. Kinneman is instructive. 120 Wn. App. 327, 84 P.3d 882 (2003), rev. denied, 152 Wn.2d 1022 (2004). Kinneman, a lawyer, made 67 withdrawals from his IOLTA account and diverted the proceeds to his own use. Id. at 331. He was convicted of 28

counts of theft in the first degree and 39 counts of theft in the second degree. Id. at 332.

On appeal, he argued that his multiple withdrawals from his IOLTA account constituted a single count of first-degree theft because the legislature did not intend “to punish a person multiple times based on a series of takings from the same victim.” Id. at 333, 335. Therefore, he argued, his conviction on multiple counts of theft violated the protection against double jeopardy. Id. at 335. This Court rejected his argument, holding that “the State had the discretionary authority to charge Kinneman with a separate count of theft for each discrete, unauthorized withdrawal he made from his IOLTA account.” Id. at 338.

The statute at issue in Kinneman provides that “theft” means “to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services....” RCW 9A.56.020(1)(a). Because the definition of theft includes the same phrase, “the property...of another,” the same analysis should apply to malicious mischief. Just as this Court rejected Kinneman’s “per victim” argument, this Court should hold that discrete incidents of property damage may be charged as separate counts.

Rennick's interpretation--that the unit of prosecution for malicious mischief is per victim--is unreasonable and would lead to absurd results. For instance, in a case of domestic abuse, a defendant could go on an angry rampage in the house that he shares with his girlfriend, destroying many of her prized possessions. Several hours or days later, he could slash the tires of her car and break the windshield, and then visit her office and destroy any personal property that she kept at work. Under Rennick's interpretation, the defendant could be charged with only one count of malicious mischief, even if each incident of property destruction resulted in thousands of dollars of damage and occurred at different times and places. Likewise, under Rennick's interpretation, a defendant could destroy books at multiple Seattle library branches over the course of days or weeks, but face only one count of malicious mischief because he targeted the same victim. This Court should not assume that the legislature intended for such an absurd result. See State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354 (2010) (courts presume that the legislature did not intend absurd results).

Rennick's scare tactic that a defendant could be convicted of "an inordinate number of charges" for each dish broken during a

domestic dispute, or that a defendant who cuts off all the flowers of his neighbor's rose garden could be charged with one count for each flower is not supportable. App. Br. at 9. Such dire consequences are not realistic.

First, the number of charges any defendant potentially faces is based on the number of criminal acts he engages in. If a defendant assaults or attempts to assault a victim on five separate days, he potentially faces five separate counts--not one count because it is the same victim. Thus, it is a defendant's actions that dictate the number of potential charges he may face.

Second, filing decisions are regulated by law and standards of prosecution. See RCW 9.94A.411; State v. Lewis, 115 Wn.2d 294, 307, 797 P.2d 1141 (1990) (The filing decision was "within the prosecutor's filing standards, standards promulgated to secure the integrity of the SRA's sentencing framework. The charging decision adequately reflects the defendant's actions and ensures that his punishment is commensurate with the punishment imposed on others committing similar offenses and ensures that the punishment for a criminal offense is proportionate to the seriousness of the offense").

Third, the dire consequences suggested by Rennick are ameliorated by the application of the doctrine of "continuing course of conduct." See State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989). When the State presents evidence of several acts that constitute a "continuing course of conduct," there is but one act for charging purposes. Handran, 113 Wn.2d at 17. To determine whether multiple acts constitute a continuing course of conduct, the court considers the time frame in which the acts were committed, where the conduct occurred, whether the same criminal motive was involved, and whether there was more than one victim. Handran, at 17-18. The facts must be evaluated in a common sense manner. Handran, at 17-18 (two distinct assaults occurring in one place, over a short period of time, and involving the same victim considered but one continuing act); also State v. Marko, 107 Wn. App. 215, 231-32, 27 P.3d 228 (2001) (multiple threats over a 90-minute period of time held to be a continuing course of conduct and one criminal act).

Rennick's prediction that multiple convictions might be obtained for each dish broken or each rose cut is simply not supportable. Such acts would constitute but one act or a continuing course of conduct. In contrast, where Rennick committed separate,

distinct acts at different times and in different locations, he properly faced multiple charges.

Next, Rennick relies on State v. Leyda, 157 Wn.2d 344, 138 P.3d 610 (2006), to support his argument that the unit of prosecution is per victim. Rennick's reliance on Leyda is misplaced. Contrary to Rennick's contention, Leyda did not hold that the unit of prosecution for identity theft was per victim. Id. at 346, n.9 (noting that a separate unit of prosecution may be charged where the defendant uses multiple means of a single victim's financial information). Rather, the Supreme Court held that RCW 9.35.020 provided alternative means for committing identity theft and "once the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct, such as using the victim's information to purchase goods after first unlawfully obtaining such information."<sup>3</sup> Id. at 345. In contrast, the relevant portion of the malicious mischief statute does not provide

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<sup>3</sup> The Legislature amended the identity theft statute after Leyda, expressly rejecting the Supreme Court's holding. Laws of 2008, ch. 207, §§ 3-4. The statute now clarifies that "[e]ach crime prosecuted under this section shall be punished separately under chapter 9.94A RCW." RCW 9.35.020(4).

alternative means for committing the crime--it simply proscribes destroying property. Once Rennick carved the letter "s" into the holding-cell wall, his first act of malicious mischief was complete.

Finally, Rennick's hopeful reliance upon the rule of lenity is also misplaced. The rule of lenity serves only as an aid for resolving an ambiguity; it is not used to beget one. Callanan v. United States, 364 U.S. 587, 596, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961). A statute is not ambiguous when the alternative reading is strained. State v. C.G., 114 Wn. App. 101, 55 P.3d 1204 (2002), overruled on other grounds, 150 Wn.2d 604, 80 P.3d 594 (2003); State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Courts interpret statutes to effectuate the legislative intent and to avoid unlikely, strange or absurd results. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Rennick's interpretation is not only strained, it would lead to absurd results, undercut the legislature's intent, and create a giant loophole in the statute. The legislature could not have intended such an interpretation, and if the legislature had intended such an interpretation, it knew how to use language so indicating.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm Rennick's convictions.

DATED this 28 day of February, 2012.

Respectfully submitted,

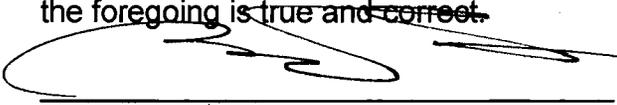
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KYLE RENNICK, Cause No. 67102-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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