

FILED
Sep 30, 2014
Court of Appeals
Division III
State of Washington

NO. 32232-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DAVID EMORY MANLOVE,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Defendant/Appellant
PO Box 1019
Republic, Washington 99166
(509) 775-0777

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ARGUMENT

The issue before the Court is one of first impression. Does “deliberate cruelty” as an aggravating factor, apply to a property crime?

RCW 9.94A.535(3)(a) defines deliberate cruelty as: “The defendant’s conduct during the commission of the current offense manifested deliberate cruelty **to** the victim.” (Emphasis supplied.)

The State contends that the word “victim” as set forth in the statute, controls the determination of whether or not the aggravating factor applies. Mr. Manlove asserts that the State misconstrues the language of the statute.

Mr. Manlove analyzes the statute as follows:

- The defendant’s conduct (what the person does);
- during the commission (at the time the offense occurs);
- of the current offense (residential burglary);
- manifested deliberate cruelty (the outcome of what the defendant did);
- to the victim (the person).

The record reflects that Mr. Manlove allegedly destroyed personal property belonging to another person. That person was not present when

the property was destroyed. The destruction occurred during a residential burglary. The destruction was malicious.

RCW 9A.52.025(1) defines residential burglary as:

A person is guilty of residential burglary if, **with intent to commit a crime against a person or property therein**, the person enters or remains unlawfully in a dwelling other than a vehicle.

(Emphasis supplied.)

It is evident from the definition of the offense that a crime may be committed either against a person (“victim”) or property inside the residence.

Mr. Manlove allegedly committed the crime against property; not against a person.

RCW 9.94A.535(3)(a) does not define the word “to.” “To” can be used either as a preposition or an adverb.

As a preposition the word “to” has the following meanings:

1. (used for expressing motion or direction toward a point, person, place, or thing approached and reached, as opposed to *from*)
-
6. (used for expressing aim, purpose, or intention)

WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

As an adverb “to” means: “**23.** Toward a point, person, place, or thing, implied or understood.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

Mr. Manlove asserts that “deliberate cruelty” must be directed “to”/toward the “victim.”

The State’s analysis of the other subsections of RCW 9.94A.535 is not helpful. The other subsections all use varying language insofar as each particular aggravating factor is concerned.

There are thirty-one (31) subsections to RCW 9.94A.535(3). Sixteen (16) of those subsections use the phrase “the current offense.”

Subparagraphs (b), (c), (f) and (j) are indicative of aggravating factors aimed directly to the person of a “victim,”

Also, interestingly enough, subparagraph (u) provides: “The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.”

In Mr. Manlove’s case no one was in the residence at the time of the offense.

The State fails to address either *State v. Pockert*, 53 Wn. App. 491, 768 P.2d 504 (1989) or *Post-Sentence Review of Childers*, 135 Wn. App. 37, 143 P.3d 831 (2006).

The two (2) cases, when read together, stand for the proposition that residential burglary is not a crime against persons and that malicious mischief, which requires malice, is synonymous with deliberate cruelty.

The State's argument is misplaced. Mr. Manlove otherwise relies upon the argument contained in his original brief.

DATED this 30th day of September, 2014.

Respectfully submitted,

s/Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Phone: (509) 775-0777/Fax: (509) 775-0776
nodblspk@rcabletv.com

NO. 32232-7-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) STEVENS COUNTY
 Plaintiff,) NO. 13 1 00126 2
 Respondent,)
) **CERTIFICATE**
 v.) **OF SERVICE**
)
 DAVID EMORY MANLOVE,)
)
 Defendant,)
 Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 30th day of September, 2014, I caused a true and correct copy of the and *APPELLANT'S REPLY BRIEF* to be served on:

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Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

CERTIFICATE OF SERVICE

STEVENS COUNTY PROSECUTOR'S OFFICE
Attention: Lech Radzinski
215 South Oak Street
Colville, Washington 99114

U. S. MAIL

DAVID EMORY MANLOVE #371952
Coyote Ridge Correction Center
PO Box 769
Connell, Washington 99326

U.S. MAIL

s/Dennis W. Morgan

Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
PO Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE