IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JANNA LEAANNE WOOTEN, Appellant.	No. 40787-6-II Unpublished OPINION

Van Deren, J. — The State charged Janna Wooten with first degree malicious mischief, alleging that Wooten was guilty as a principal or as an accomplice for damaging a house that her husband's medical practice purchased on a real estate contract from Dennis Kohl before the Wootens' marriage.[1] On appeal, Wooten argues that the evidence was insufficient to prove that she committed first degree malicious mischief because the State failed to show that she took part in damaging the home.[2] We agree that the State's evidence was insufficient to prove that Wooten

[1] The State charged and tried Janna and David Wooten separately for the felony offense of malicious damage to a house Wooten Primary Care LLC purchased under a real estate contract with Dennis Kohl. *See State v. Wooten*, No. 40810-4-II (Wash. Ct. App. heard Oct. 21, 2011). The State sent a deputy to Texas to bring Janna Wooten to Washington to face these charges. This appeal only addresses Janna Wooten's case specifically but necessarily relates the facts applicable to both cases.

[2] Janna Wooten also asserts that the prosecutor committed misconduct, a matter we do not reach because we reverse her conviction due to insufficiency of the evidence and remand for dismissal.

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 interests of another; and therefore, we reverse, vacate the conviction, and remand for the trial court to dismiss with prejudice.

FACTS

David Wooten and Robert Miller on behalf of Wooten Primary Care LLC (Primary) and Kohl executed real estate sale documents for the purchase of a house on Haldaller Road in Lewis County, Washington. Kohl and David Wooten signed a document titled "Residential Real Estate Purchase and Sale Agreement" in May 2005. Ex. 1. The Residential Real Estate Purchase and Sale Agreement indicated that the purchase price of the home was $225,000. An addendum to the purchase and sale agreement provided:

> Buyer and Seller shall enter into a[n] option to Lease Purchase the Property drawn by seller[']s attorney. Terms shall be $10,000 down, $5,000 at 180 days, and $5,000 at 365 days. Payments shall be made monthly on the remaining balance, calculated at 8% interest, at a 30 year amortization. All sums to be applied towards purchase price as drawn in this Purchase and Sale Agreement less interest. Interest and payment shall be determined by seller[']s attorney.
> Real Estate Commission to be paid at time of entering Lease Option.

Ex. 1.

A second document titled "Real Estate Contract" was dated November 1, 2005, and was signed by Miller on behalf of Primary in May 2006 and by Kohl in June 2006.[3] Ex. 2. The Real Estate Contract provided in part:

[3] The parties do not explain why the November 2005 Real Estate Contract was signed in May and June 2006. Robert Miller, David Wooten's former business partner, signed the real estate contract on behalf of the buyers. David Wooten never received a deed to the property, and Kohl never recorded either real estate sale document. Kohl admitted that he took out a mortgage on the property after he sold the property to Primary and, in September or October 2007, he stopped making payments and, in some undisclosed manner, turned the property over to the lender.

> 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:
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> [Legal description of Haldaller Road property]
>
> 3. PRICE: $225,000.00
>
> 4. METHOD OF PAYMENT:
>
> A. Down Payment: $10,000.00, previously paid to Seller under earnest money agreement, receipt of which is hereby acknowledged.
>
> B. Additional Lump Sum Payments: $5,000.00 on November 1, 2005 and $5,000.00 on May 1, 2006, to be credited to principal.
>
> C. Monthly Installments: Buyer shall pay to Seller $215,000.00, 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, 2015. . . .
>
> 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.[4]

Ex. 2 (underlines omitted).

Janna Wooten did not sign any the documents and was not married to David Wooten when the property was purchased. The Wootens, on behalf of Primary, made payments on the contract directly to Kohl. At trial, Kohl admitted that he took out a $325,500 loan on the Haldaller Road property from an unidentified lender shortly after selling the property to the Wootens without telling the Wootens he did so or that their equity was reduced by the money he took, i.e., $325,000. Kohl also admitted that he stopped making payments on his undisclosed loan in September or October 2007, despite continuing to receive payments from the Wootens

[4] The State argued to the jury, and Kohl insisted at trial, that the Real Estate Contract was really a lease with option to purchase, even when confronted with Exhibit 2.

until December 2007. The record does not reveal whether Kohl forfeited his interest to the lender or whether the lender foreclosed his interest for nonpayment of the debt and the record does not show the identity of the lender, whether it still exists or whether it still had an interest in the property by time of trial.

In May 2005, David Wooten moved into the house and lived there continuously until May 2008. Janna Wooten lived in the house during some of the time but finally moved out in compliance with an eviction notice from Kohl's lender in May 2008.

In May 2008, Kohl, who had defaulted on his mortgage payments in September or October 2007 and who no longer had an interest in the property, re-entered the property to find the house in the midst of the remodel David Wooten had begun, with most of the sheetrock removed from the walls, the flooring removed, only one bathroom functional, and a large amount of garbage spread inside and outside of the house.[5] Kohl instigated a police investigation, resulting in the State charging both of the Wootens with first degree malicious mischief based on the condition of the house and Kohl's representation that the Wootens were tenants on the property that he owned.

Janna Wooten claimed that there was no evidence that she was an accomplice to the remodeling project that was abandoned when the Wootens were notified that they had to vacate

[5] Travis Amundson, the State's damage expert, testified that it would cost between $10,000 and $15,000 to return the house to code. Amundson also testified that he estimated that it would cost between $3,000 and $6,000 to haul off the garbage, pay the dump fees, "and everything else that goes along with it." Report of Proceedings at 120. But William Teitzel, a code enforcement supervisor for the Lewis County Public Health and Social Services Department, testified that he and five or six other friends of Kohl did a cleanup day on a weekend to bag, load, and haul off the garbage. He also confirmed with Steve Garrett from the environmental health section that the solid waste had been removed.

the property due to Kohl's transferring the property to his lender due to his failure to keep the undisclosed, subsequent, mortgage current. A jury convicted both of the Wootens of first degree malicious mischief. Janna Wooten appeals.

ANALYSIS

I. Standard of Review

Whether the State's evidence was sufficient to prove that the condition of the house after the Wootens vacated it in May 2008 legally damaged another's interest in the property is an issue of law that we review de novo. *State v. Gardner*, 104 Wn. App. 541, 543, 16 P.3d 699 (2001). We test the sufficiency of the evidence by asking whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). We defer to the finder of fact on issues of credibility and persuasiveness of the evidence. *State v. Cantu*, 156 Wn.2d 819, 830-31, 132 P.3d 725 (2006).

II. Sufficiency of the Evidence of Damage to Property of Another

The State's theory in prosecuting Janna Wooten was that because Primary never received a fulfillment deed following its execution of a real estate contract, Kohl or an unidentified lender[6] retained an ownership interest in the real property that the Wootens damaged when they did not complete a remodeling project before they were evicted due to Kohl's failure to pay the

[6] Kohl could not identify which lender he had borrowed $325,500 from after he sold the property to Primary, nor could he say which month he borrowed the money or recall the bank's name when his interest was foreclosed after he stopped making payments in September or October 2007, even though the Wootens continued making their payments to him through December 2007 in accord with the Real Estate Contract. Exhibit 1 contains a facsimile copy of a document from someone, possibly a mortgage broker, showing the date (April 2005), the value placed on the property for Kohl's loan ($465,000), and the loan amount to Kohl ($325,500).

undisclosed underlying mortgage that he took out after he sold the property to Primary. And contrary to the evidence of the sale documents at trial, the State also maintained that the Wootens did not own the damaged property, but rather were tenants under a lease. But the State's theory and arguments were based on a misunderstanding of real property law and security interests in real property.[7] Moreover, in scouring the record we found no evidence that Janna Wooten, as a

[7] A real estate contract is a type of financing device. *Turner v. Gunderson*, 60 Wn. App. 696, 702, 807 P.2d 370 (1991). The historical distinction between a real estate contract and other financing mechanisms for real property "is no longer meaningful" in Washington law. *Tomlinson v. Clarke*, 118 Wn.2d 498, 504, 825 P.2d 706 (1992) (discussing the rights of the purchaser to protection under the bona fide purchaser doctrine). The historical distinction was based on the contractual nature of the real estate contract, which allowed the seller to avoid the formal foreclosure process. *Tomlinson*, 118 Wn.2d at 504. After the legislature imposed the formal forfeiture procedures in real estate contracts as well, the distinction became meaningless. *Tomlinson*, 118 Wn.2d at 504.

The "chief incidents of ownership of property" are the right to possess, use and enjoy, and sell the property. *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1974). A purchaser under a real estate contract gains several rights that fall within these chief incidents, such as: (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 his interest in the property; (5) the right to participate as a necessary party in condemnation proceedings; and (6) the right to claim a homestead in real property. *Tomlinson*, 118 Wn.2d at 507 (quoting *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 782, 567 P.2d 631 (1977)). On the other hand, the seller retains none of these rights, but only a "'lien-type security'" interest. *Tomlinson*, 118 Wn.2d at 509 (quoting *In re McDaniel*, 89 B.R. 861, 869 (Bankr. E.D. Wash. 1988)). "'Washington law considers the purchaser's interest under the real estate contract as a property interest and the seller's interest under that contract as a lien-type security device.'" *Tomlinson*, 118 Wn.2d at 509 (quoting *McDaniel*, 88 B.R. at 869). Thus, a seller's remedies for breach of the contract are those of a secured creditor. *Tomlinson*, 118 Wn.2d at 509 (citing *McDaniel*, 89 B.R. at 869).

Accordingly, as a seller under a real estate contract, Kohl retained a *personal* property right under the contract while Primary, the purchaser, gained an interest in *real* property. *See In re Freeborn*, 94 Wn.2d 336, 340, 617 P.2d 424 (1980) (discussing the rights of the seller's assignee); *see also Comm. of Protesting Citizens v. Val Vue Sewer Dist.*, 14 Wn. App. 838, 842, 545 P.2d 42 (1976) ("[T]he vendee possesses the beneficial interest and real ownership in the land, and the vendor retains only a security under the contract which is looked upon as personal property rather than as an interest in the land."). Thus, Primary bought the real property and all equity in it, subject only to the debt to Kohl. But then Kohl took $325,500 from the equity, encumbering Primary's interest in the property with Kohl's debt and without Primary's or the Wootens' knowledge.

principal or an accomplice, knowingly and maliciously damaged any interest of another in the property.

A. Physical Damage to Property of Another

To convict Wooten of first degree malicious mischief, the State had to prove beyond a reasonable doubt that she knowingly and maliciously caused physical damage to the property of another in an amount exceeding $1,500. Former RCW 9A.48.070(1)(a) (1983). RCW 9A.48.010(1)(c) defines "[p]roperty of another" as "property in which the actor possesses anything less than exclusive ownership." Thus, if one damages property "in which another person has a possessory or *proprietary* interest," he is liable for malicious mischief. *State v. Newcomb*, 160 Wn. App. 184, 190, 246 P.3d 1286 (emphasis added) (citing 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 1704, at 357 (2d ed. 1998)), *review denied*, 172

As a seller in the real estate contract, Kohl only retained the right to collect the payments due under the real estate contract that were secured by a "'lien-type security'" interest. *Tomlinson*, 118 Wn.2d at 509 (quoting *McDaniel*, 89 B.R. at 869). The real estate contract provided civil remedies that recognized Kohl's interest in the payment stream on the contract. In order to reacquire the real property if Primary failed to pay, the contract required that he forfeit Primary's interest in the contract or, if it breached terms of the contract, he could also sue Primary for any damages caused to the property that impaired his security interest. Furthermore, he could also sue for a deficiency judgment for the difference in what was owed and what the property was worth after he recovered and sold it at a loss, steps he never took. Nor did he sue for full payment by Primary, another civil contract remedy, if it breached the real estate contract. Instead of leaving the parties to the real estate contract to resolve these issues in the civil arena, the State charged the Wootens personally with maliciously inflicting damage to property of another, a felony. This action was apparently based on a sincere misunderstanding of the difference between a seller's security interest, the buyer's interest in real property, and the difference between a lease and a real estate contract, as well as Kohl's misrepresentation that the Wootens were tenants in a house he owned and that the house was totally destroyed. But here, the evidence does not support that Kohl's security interest had any value since he had extracted all the money owed by Primary, plus $100,000, through his post-sale, undisclosed borrowing against Primary's property. Kohl still had the right to try to enforce the contract to make the Wootens pay, but that right seems to not have any value under these facts.

Wn.2d 1005 (2011). That the defendant also has an interest in the property is irrelevant, as long as that property "'belong[s] at least in part to someone other than the accused.'" *Newcomb*, 160 Wn. App. at 190 (quoting 13A Fine & Ende, § 1704, at 357). "[I]n addition to its ordinary meaning . . . '[p]hysical damage' also includes any diminution in the value of any property as the consequence of an act." RCW 9A.48.100(1).

B. No Evidence of Diminution of Value in the Property of Another

Because an undisclosed person took possession of the entire property in May 2008, the relevant question in this appeal is whether the State presented sufficient evidence that Wooten had by then knowingly and maliciously caused damage to that person's interest in an amount exceeding $1,500.

It is well established that 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. *See e.g.*, *Bennett v. Maloney*, 63 Wn. App. 180, 185-86, 817 P.2d 868 (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. 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). Accordingly, to convict Wooten for first degree malicious mischief, the State had to show the diminution in value of property interests of another.

Here, the State did not present any evidence of a diminution in value of another person's interest in the property as a consequence of the Wootens' unfinished remodeling project and garbage left on the property.[8] What the State's evidence did show was that Primary paid Kohl over $20,000 cash and that, under the real estate contract, it owned the equity in the property, subject only to what was owed Kohl. But Kohl borrowed $325,000 from an undisclosed lender and secured that loan against the property he had sold to Primary. But Kohl, as the seller, only held a "'lien-type security'" interest in the property. *Tomlinson v. Clarke*, 118 Wn.2d 498, 509, 825 P.2d 706 (1992) (quoting *In re McDaniel*, 89 B.R. 861, 869 (Bankr. E.D. Wash. 1988)). He did not retain the right to mortgage his interest in the property. *Tomlinson*, 118 Wn.2d at 507 (citing *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 782, 567 P.2d 631 (1977)).

Thus, Kohl took enough money from Primary's equity in the property to pay himself the entire debt Primary owed him, plus more than $100,000 that he was not owed by Primary. Then Kohl failed to pay his lender and the entire property went to the undisclosed lender, who had valued the property at $465,000.[9] Someone, apparently on behalf of Kohl's unidentified lender, evicted the Wootens, who then lost all the money Primary had paid Kohl, as well as the equity they owned in the property.

The State presented no evidence of loss of value from anyone (other than Primary and the

[8] Kohl, who no longer owned the property, testified that the property was worth $295,000 in May 2005, when he sold the property to the Wootens for $225,000. He also testified at trial, over defense counsel's objection, that the house was a total loss, and that the real property was worth $160,000. Although owners of real property may testify to their personal opinion of value, a person who is not an expert witness or an owner is incompetent to offer an opinion of value. *State v. McPhee*, 156 Wn. App. 44, 65, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010).

[9] Kohl did not explain whether he was foreclosed on for nonpayment by the lender or whether he gave the lender a deed in lieu of foreclosure in October 2007.

Wootens) who had an interest in the property in May 2008 or later. And the State did not present any evidence that Kohl claimed he continued to be owed money from Primary on the real estate contract by January 2008, after he took $325,000 cash from a lender and secured the loan against Primary's property,[10] nor did the State present any evidence of a reduction of the undisclosed lender's interest.[11] Furthermore, there was no evidence that any lender lost money after it evicted the Wootens.[12]

Absent evidence of diminution in the value of any security interest in the Haldaller Road property, the record is insufficient to support a conviction for malicious mischief based on diminished value of the security interest as a consequence of the Wootens' unfinished remodeling project. This lack of evidence cannot support a felony conviction against Janna Wooten for knowing and malicious damage to property of another, essential elements of malicious mischief. Because the evidence utterly fails on these necessary elements of the crime of malicious mischief, Janna Wooten's conviction must be vacated.

[10] The sale price was $225,000 less $15,000 that Primary paid before closing, less the $5,000 lump sum payment Primary paid on May 1, 2006, and less the monthly payments between June 2005 and December 2007, thereby reducing the outstanding balance from $210,000 on November 1, 2005.

[11] Kohl borrowed $325,500 against Primary's property in April or May 2005. The lender's stated value of the property in April 2005 was $465,000. Kohl made payments on that loan by passing through the Wootens' payments from June 2005 until September 2007, thereby reducing his debt. The State presented no evidence of who ultimately took possession of the real property or whether the possessor's interests were diminished.

We reverse and vacate Janna Wooten's conviction and remand for the trial court to dismiss with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Worswick, J.