IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID ALLEN WOOTEN, JR., Appellant.	No. 40810-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On April 15, 2010, a jury found David A. Wooten, Jr. guilty of first degree malicious mischief. Former RCW 9A.48.070 (1983). On appeal, Wooten argues that the State failed to present sufficient evidence that he knowingly damaged "property of another" or that he acted with malice. Wooten also contends that the trial court erred in failing to give a *Petrich*[1] instruction because the State presented two distinct acts of possible malicious mischief and that the trial court impermissibly commented on the evidence.

We affirm.

FACTS

On May 17, 2005, Wooten signed a "Real Estate Purchase and Sale Agreement" (REPSA)

[1] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

to purchase Dennis Kohl's property on Mayfield Lake in Lewis County. The REPSA named Kohl as the seller and Wooten Primary Care, LLC (Primary) as the buyer with Wooten signing on Primary's behalf.[2] An addendum to the REPSA indicated that the buyer and seller "shall enter into a [sic] option to Lease Purchase the Property drawn by sellers [sic] attorney." Ex. 1. In May 2005, Wooten and his wife moved into the house and lived there continuously until May 2008. In May and June 2006, the parties signed a real estate contract dated November 1, 2005.[3] Kohl never recorded either of the agreements.

Wooten made payments on the contract directly to Kohl and, in line with their agreement, Wooten expected to receive the deed to the property after completing his final payment on the home. But Kohl admitted at trial that, unbeknownst to Wooten, he later took out a second mortgage on the property. In September 2007, Kohl (in his words) "flipped" the house back to the bank. Report of Proceedings (RP) (Apr. 14, 2010) at 50. Wooten acknowledged at trial that he did not dispute the provisions of this contract.

At trial, Wooten maintained that, in the course of remodeling the home, he discovered black mold infecting some of the walls and floors and that he needed to remove large amounts of sheetrock and flooring as a preventative measure. Wooten also testified that in December 2007, he and his wife decided to take a break from the remodel to go on vacation during the holidays. Upon returning from vacation, Wooten found a foreclosure notice posted at the home, which he did not understand because he was current on all of his payments.

[2] The State does not contend that Primary has an ownership interest in the property separate from Wooten's interest.

[3] Bob Miller, Wooten's former business partner, signed the real estate contract on behalf of the buyer, Primary.

By contacting the collection agency and a real estate attorney, Wooten discovered that he would be liable for double the amount he had agreed to pay Kohl for the house[4] in order to keep it from foreclosure. Wooten and his wife did not continue the remodel project and moved to Texas early in May 2008. Wooten asserted that when he left the house, he had bagged and neatly stacked all the garbage and refuse from the property in the garage. When later asked at trial whether a "five-yard container full of refuse" was a "good estimation" of how much trash was left on the property, Wooten agreed. RP (Apr. 15, 2010) at 45.

Later in May 2008, Kohl entered the property to find most of the sheetrock removed from the walls, the flooring removed, only one functional bathroom, and a large amount of garbage spread inside and outside of the house. Kohl called the sheriff's department to make a complaint, and Lewis County Sheriff's Deputy Susan Shannon responded to the scene. At trial, Shannon testified that the house "had been destroyed" and that

> [s]tarting in the driveway as you walked up to the house, there is this garbage everywhere, bags of garbage, junk, abandoned vehicles, really tall grass. Walking up to the house there is a garage and a car park. You can see more piles of garbage, there were garbage cans full of garbage, more bags, junk, couch, nasty couch out on the front porch in the front. . . .
>
> . . . .
>
> . . . Then I proceeded into the house and the filth was unsurmountable [sic], it was everywhere. . . .
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> . . . .
>
> . . . Beer cans, beer bottles, no carpet, dog poop everywhere, medical garbage, gauze, blood vials, blood in vials, needles, rotten food. There was no space on the kitchen counter, cake cups everywhere, stinky, rotten food, children's toys. . . .
>
> . . . .
>
> . . . Old yucky mattress in the back on the box springs, I think it had a sleeping bag on it. Children's clothes, children's shoes, more dog poop, fumes of

[4] Wooten agreed to pay $225,000 for the house and, in light of the foreclosure notice, Wooten believed he would have to pay $450,000 to keep the property—approximately the aggregate amount of Kohl's two mortgages on the home.

> urine in there, had to go out a couple of times to get your breath because it was so nasty.

RP (Apr. 14, 2010) at 98-102. On December 23, the State separately charged Wooten and his wife with first degree malicious mischief. The Wootens were also tried separately.

At trial, the State's construction expert, Travis Amundson, testified that it would take at least $15,000 to bring the house back "to code," and even more to put it back to "finish[ed]" condition. RP (Apr. 15, 2010) at 11. As a preliminary matter, Amundson estimated that, in light of hazardous medical waste on the property, an initial hazardous material assessment of $500 would be required and that garbage removal alone would cost roughly $3,000. No evidence contradicted these cost assessments.

The jury returned its verdict on April 15, 2010, finding Wooten guilty of first degree malicious mischief. Former RCW 9A.48.070.[5] The trial court sentenced Wooten to 60 days in jail. Wooten timely appeals.

ANALYSIS

Sufficiency of the Evidence

Wooten argues that the State failed to prove that he knowingly caused damage to "property of another" or that he acted maliciously because he believed he owned the home.[6]

[5] In a separate trial, a jury also found Wooten's wife guilty of malicious mischief.

[6] Wooten also indicates in his opening brief that the State failed to prove property damage in an amount exceeding $1,500. However, Wooten also reproduces RCW 9A.48.070 as amended by the Laws of 2009. ch. 431 § 4, which raised the damage requirement for first degree malicious mischief to $5,000. As the events in question clearly occurred prior to the amendment of RCW 9A.48.070, former RCW 9A.48.070's $1,500 damage requirement is applicable to this case. Moreover, Wooten fails to sufficiently argue how the $1,500 (or even $5,000) damage requirement was not proven and, accordingly, we do not address this issue. RAP 10.3(a)(6).

Because sufficient evidence established that Wooten knew that he did not own the property in fee simple and that either Kohl or the bank attempting foreclosure on the property had an ownership interest in the property, we affirm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Notaro*, 161 Wn. App. 654, 670-71, 255 P.3d 774 (2011). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). We do not need to be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the jury's verdict finding such guilt. *State v. Jones*, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999).

To convict Wooten of first degree malicious mischief, the State needed to prove that Wooten (1) knowingly and maliciously (2) caused damage (3) to the property of another and (4) the damage exceeded $1,500. Former RCW 9A.48.070. Wooten having failed to brief us

sufficiently on the damage amount element, we focus our analysis on whether Wooten knowingly and maliciously damaged "property of another."[7]

A. Knowledge

The malicious mischief statutes require that the damaged property be "property in which the actor possesses *anything less than exclusive* ownership."[8] RCW 9A.48.010(1)(c) (emphasis added). RCW 9A.48.100(1) defines "physical damage" in the context of malicious mischief broadly, including "erasure of records, information, data, computer programs, or their computer representations" and, in addition, "any diminution in the value of *any* property as the consequence of an act." (Emphasis added.)

In accord with this broad definition of "physical damage," Washington courts have held that the malicious mischief statutes protect a wide range of legally cognizable property interests. In *State v. Newcomb*, 160 Wn. App. 184, 246 P.3d 1286, *review denied*, 172 Wn.2d 1005 (2011), for instance, this court addressed whether the State could properly charge malicious mischief

[7] We do note, however, that Wooten failed to challenge Amundson's estimates about the cost for garbage clean up and removal ($3,000) or for returning the home to a livable condition ($15,000). Thus, the property damage at issue in this case clearly meets the $1,500 minimum required by former RCW 9A.48.070.

[8] The dissent quotes, with emphasis, *State v. Newcomb*, 160 Wn. App. 184, 190, 246 P.3d 1286, *review denied*, 172 Wn.2d 1005 (2011), for the proposition that "if one damages property 'in which another person has a possessory or *proprietary* interest,' he is liable for malicious mischief." Dissent at 17. The dissent then correctly concludes that nobody but Wooten had a real property interest in the damaged property. Although we agree with these propositions—and the dissent's insightful analysis tracing the historical convergence of the treatment of real estate contracts and mortgages in our jurisprudence—our malicious mischief statutes do not distinguish between such real and personal property interests. Moreover, innumerable cases in Washington have upheld malicious mischief convictions arising out of damage to personal property. *See, e.g.*, *State v. Schaffer*, 120 Wn.2d 616, 617, 845 P.2d 281 (1993) (upholding a third degree malicious mischief conviction related to damaging car tires). Accordingly, any distinction between real and personal property for purposes of our malicious mischief jurisprudence is inapposite.

against a defendant who damaged an easement. In resolving that case, we determined that even if someone else had a "use rather than an ownership interest" in the property, such an interest (the easement) "deprived Newcomb of an *exclusive* ownership interest in the roadway." *Newcomb*, 160 Wn. App. at 192 (emphasis added). Accordingly, we affirmed Newcomb's malicious mischief conviction.[9] *Newcomb*, 160 Wn. App. at 193.

In *State v. VanValkenburgh*, 70 Wn. App. 812, 856 P.2d 407 (1993), Division Three of this court addressed a defendant's challenge to his second degree malicious mischief conviction on the grounds that the charging document failed to name the owner of the property he damaged but, instead, named the lessee of the rented property. The *VanValkenburgh* court held that "[w]hile the property must belong, at least in part, to someone other than the accused, the failure to name the fee owner in the information does not make the information constitutionally defective." 70 Wn. App. at 815. Much like *Newcomb*, *VanValkenburgh* stands for the proposition that the malicious mischief statutes protect more than just fee simple ownership.

Neither *Newcomb* nor *VanValkenburgh* stand for the proposition that the malicious mischief statutes should be *limited* to protecting a specific real property interest or a simple fee ownership interest. In fact, both cases recognize the statutes' legislative intent to criminalize behavior that affects property in which someone else has an interest other than an exclusive real property interest in fee ownership. *Newcomb* recognized the illegality of damaging an easement and *VanValkenburgh* recognized the illegality of damaging property possessed, though not owned, by a lessee. Neither case stands for the proposition that the malicious mischief statutes

[9] Our opinion in *Newcomb* also relates that, prior to the enactment of the statutory definition of "property of another" in RCW 9A.48.010(1)(c), "property of another" protected a broader range of property interests than just fee simple ownership interests. 160 Wn. App. at 190.

require proof that someone has damaged *a real property interest of another*.

Here, although Wooten was the only person with a possessory or proprietary interest in the property, the malicious mischief statutes still apply because, as Wooten knew, other parties had an ownership interest in the home.[10] Having signed the REPSA, Wooten knew—at the very least—that Kohl retained a security interest in the home and, at trial, Wooten acknowledged that he thought, under the terms of the REPSA, he would receive a deed to the home only upon completion of all payments to Kohl.[11] Moreover, in December 2007, Wooten also became aware of the foreclosing bank's security interest in the property. As such, the State presented sufficient

[10] We are aware that another panel of this court has held to the contrary. That panel did not address whether Wooten's wife, Janna Wooten, had maliciously damaged the property of another (property the Wootens did not own in fee simple absolute) against the peace and dignity of the State of Washington. Instead, although characterizing the issue as involving the sufficiency of the evidence of the commission of a public offense, it 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. The dissent also adopts this reasoning. While we agree in thinking that this case would have been tried more appropriately in civil court, once criminal charges are brought and a jury has found a defendant guilty, it is beyond our discretion to overrule a prosecutor's charging decisions when sufficient evidence supports a conviction.

[11] We note that the legislature has recognized the criminality of destroying property in which someone else holds a security interest. RCW 61.12.030, effective since 2004, provides,

> (1) When any real estate in this state is subject to, or is security for, any mortgage, mortgages, lien or liens, other than general liens arising under personal judgments, it shall be unlawful for any person who is the owner, mortgagor, lessee, or occupant of such real estate to destroy or remove or to cause to be destroyed or removed from the real estate any fixtures, buildings, or permanent improvements including a manufactured home whose title has been eliminated under chapter 65.20 RCW, not including crops growing thereon, without having first obtained from the owners or holders of each and all of such mortgages or other liens his, her, or their written consent for such removal or destruction.
>
> (2) Any person willfully violating this section is guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

evidence to prove that Wooten had knowledge that he did not have an exclusive ownership interest in the home, which, therefore, was also the "property of another" at the time he damaged it. Former RCW 9A.48.070.

B. Malice

The trial court defined "malice" for the jury as "an evil intent, wish, or design to vex, annoy or injure another person" and further instructed that "[m]alice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another." Clerk's Papers at 11. As Deputy Shannon's testimony clearly indicates, within weeks of the Wootens moving to Texas, their former home was in an awful state of disgust and disarray. Because any rational trier of fact would have concluded that malice contributed to the overwhelming property damage that occurred, and because we defer to the jury on issues related to the persuasiveness of the evidence, we hold that sufficient evidence clearly supports the jury's finding of malice. *Camarillo*, 115 Wn.2d at 71.

Accordingly, Wooten's claim that insufficient evidence supports his conviction fails. We note in making this determination that Wooten's conviction is unrelated to any supposed "home remodel" and the possible damage that resulted from such a project; any rational trier of fact could conclude based on the photographic evidence alone presented at trial that the thousands of dollars in damage from the remaining trash—including hazardous medical waste and feces—supports the jury's guilty verdict finding Wooten acted with malice.

Petrich Instruction

Wooten also argues that the State relied on two distinct acts to prove malicious mischief: (1) The removal of items from the home (drywall, insulation, floor coverings, a claw foot

bathtub) and the unhooking of a toilet; and (2) the strewn garbage found throughout the property. And, in result, either the State needed to specify the particular act it wished the jury to consider for purposes of conviction, or the trial court needed to instruct the jury that it had to unanimously agree on at least one criminal act. Because the State did not rely on two separate and distinct acts to prove malicious mischief, this argument fails.

In order to convict a criminal defendant, the jury must unanimously agree that the defendant committed the charged crime. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In a multiple acts case, either the prosecutor must elect which act of misconduct constitutes the basis for the charged crime, or the trial court "must instruct the jury to agree on a specific criminal act." *Coleman*, 159 Wn.2d at 511. A trial court's failure to provide a unanimity instruction in this situation violates the defendant's federal and state constitutional rights. *Camarillo*, 115 Wn.2d at 64 (referencing U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. 10)). The error enables jurors, presented with several different acts of proscribed conduct, to rely on different acts to conclude guilt without agreeing on which act constitutes the criminal conduct beyond a reasonable doubt. *State v. Furseth*, 156 Wn. App. 516, 520, 233 P.3d 902, *review denied*, 170 Wn.2d 1007 (2010).

Courts distinguish between multiple acts and continuing offenses. *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). A unanimity instruction—often referred to as a *Petrich* instruction—is required only in a multiple acts case. *Furseth*, 156 Wn. App. at 520. A case is a multiple acts case when "'several acts are alleged and any one of them could constitute the crime charged.'" *Furseth*, 156 Wn. App. at 520 (quoting *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Facts indicating "conduct at different times and places, or different victims . . .

tends to show" a multiple acts case. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996). On the other hand, facts analyzed with common sense must indicate "an ongoing enterprise with a single objective" to qualify as a continuing offense. *Love*, 80 Wn. App. at 361.

Under a "common sense" interpretation, malicious mischief is a continuing offense because the sum of the damage is what determines the degree of the crime charged. *State v. Timothy K.*, 107 Wn. App. 784, 789-90, 27 P.3d 1263 (2001). Since damage takes several different forms and the malicious mischief charge broadly condemns "physical damage" to property, the sum of all the damage constitutes the value element and the degree of the crime. RCW 9A.48.010(1)(b); former RCW 9A.48.070(1)(a). Furthermore, in *Newcomb*, we explained that the "ordinary meaning" of damages "includes the reasonable cost of repairs to restore injured property to its former condition." 160 Wn. App. at 192 (citing *State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995)).

Here, the cost to repair the property to its former condition included cleaning up the garbage, including hazardous medical wastes, and rebuilding the interior of the house. RP (Apr. 15, 2010) at 9, 11 (expert witness estimated the cost of cleaning the garbage at $3,000, and an additional $15,000 to rebuild the interior). Again, the total sum of the cleaning and repair costs constitutes the value element of malicious mischief. Accordingly, the trial court had no need to give a *Petrich* instruction and the State was not required to specify which acts of property damage at the house the jury should consider.

Comment on the Evidence

Wooten next argues that the trial court impermissibly commented on the evidence when it

stated, in response to objection, that Miller was acting as a representative of Wooten in signing the real estate contract. Wooten further contends that the comment prejudiced his trial because the dispute over whether he knew the contract terms were essential to his defense, which focused on property ownership. Because the terms of both the RESPA Wooten signed and the real estate contract Miller signed prove that Wooten knew that someone else maintained an ownership interest in the property, any possible judicial comment on the evidence did not prejudice Wooten's defense.

Article 4, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)). Circumstances to consider in determining whether the trial judge commented on the evidence include: (1) whether the comment resolves a contested fact, (2) whether the statement addressed a witness's credibility, or (3) whether the remarks were isolated or cumulative. *State v. Sivins*, 138 Wn. App. 52, 59, 155 P.3d 982 (2007).

Courts apply a rigorous standard of review to alleged violations of article 4, section 16. *Sivins*, 138 Wn. App. at 59. Thus, once it is established that the trial judge commented on the evidence, the reviewing court "presumes [the comments] were prejudicial." *Sivins*, 138 Wn. App. at 58-59. "[T]he burden is on the State to show that the defendant was not prejudiced, unless the

record affirmatively shows that no prejudice could have resulted." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). To assess prejudice, the test is "whether there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61 (quoting *Lang*, 125 Wn.2d at 839).

Here, even assuming that the trial court's ruling that Miller acted as Wooten's agent in signing the real estate contract constituted an impermissible comment on the evidence, there is still overwhelming and untainted evidence supporting Wooten's malicious mischief conviction. In result, Wooten has suffered no prejudice and error, if any, was harmless.

Had Wooten successfully barred the real estate contract from the evidence, the jury would have considered only the REPSA, which Wooten himself had signed. The addendum to that agreement, which Wooten initialed, states,

> Buyer and Seller shall enter into *a [sic] option to Lease Purchase the Property* drawn by sellers [sic] 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 sellers [sic] attorney.

Ex. 1 (emphasis added).

Under this REPSA provision's explicit terms, Wooten was a lessee who had purchased the option to buy the property. The REPSA did not vest Wooten with exclusive ownership in the property; to the contrary, this provision actually made Wooten a tenant and further belies the notion that he believed himself to be the only person with either a real property or security interest in the home.

And, as we fully articulated above, under the real estate contract Miller signed on

Primary's behalf, Wooten still knew that either Kohl or the bank attempting foreclosure had a

security interest in the property.[12] Accordingly, whether the trial court impermissibly commented on the evidence when it stated that Miller was acting as Wooten's representative in signing the real estate contract is inapposite. Wooten has suffered no prejudice and this contention is without merit.

Limiting Closing Argument

Wooten argues that the trial court impermissibly limited his closing argument by ruling that he could not argue facts in evidence about Kohl's taking out a second mortgage on the home after selling it to Wooten. Because the trial court's ruling was correct and did not prejudice Wooten, this argument also lacks merit.

We review a trial court's action limiting the scope of closing argument for abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). We will find that a trial court abused its discretion "only if no reasonable person would take the view adopted by the trial court." *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). If we find an abuse of discretion, an erroneous limitation of the scope of closing argument is subject to harmless error analysis. *See State v. Frost*, 160 Wn.2d 765, 781-82, 161 P.3d 361 (2007), *cert. denied*, 552 U.S. 1145 (2008). To find harmless error, we must be "convinced beyond a reasonable doubt

[12] At trial, the following interaction occurred between Wooten and his defense counsel:

> [Counsel] Did you believe you were buying the house at 303 Hadler?
> [Wooten] Yes.
> Q Throughout these agreements they talk about buyer and seller, is that right?
> A Yes, that's correct.
> Q And then at the fruition of these agreements, purchase and sale agreement, real estate contract, whatever, you do your part, they do their part. Their part is giving you the deed after you do your part, is that right?
> A Right.
> Q That's what you were expecting?
> A Right.

RP (Apr. 15, 2010) at 51-52.

that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

During closing arguments, Wooten stated that "after [Kohl] had sold the property to Dr. Wooten, what did Mr. Kohl do. He went to some bank, and we don't know the name of the bank, but he went to some bank and he took out a loan." RP (Apr. 15, 2010) at 81. The State objected to this line of closing argument as being irrelevant. Outside the jury's presence, the trial court told Wooten that "[w]hat you're trying to do is confuse the jury as to who is responsible here by talking about some issue that really has minimal relevance to this." RP (Apr. 15, 2010) at 83. The trial court continued by stating, "[W]e're straying far afield, it 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 case is about, so I'm going to sustain the objection." RP (Apr. 15, 2010) at 85.

Wooten appears to contend that he was somehow prejudiced in not being able to articulate why Kohl's obtaining a second mortgage on the home caused Wooten to abandon his remodeling project. But as we previously discussed, overwhelming evidence supports a finding that Wooten did not merely abandon a remodeling project and, instead, with malicious intent caused significant damage to the home, in which he did not have exclusive interest. Accordingly, the trial court did not abuse its discretion in limiting closing argument related to Kohl's second mortgage.

Because sufficient evidence supports Wooten's malicious mischief conviction, and because Wooten's other assignments of error lack merit, we affirm.

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.

QUINN-BRINTNALL, J.

I concur:

HUNT, J.

Armstrong, J. (dissenting) — Because the State failed to prove Wooten damaged the property of another, I dissent.

Malicious mischief requires that the damaged property be "property of another." RCW 9A.48.070(1)(a). The statute defines "property of another" as "property in which the actor possesses anything less than exclusive ownership." RCW 9A.48.010(1)(c). 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, *review denied*, 172 Wn.2d 1005 (2011) (emphasis added) (citing 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 1704, at 357 (2d ed. 1998)).

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 rights 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 person who purchases real property under a real estate contract acquires: (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)). In contrast, the seller retains 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)).

Accordingly, a seller under a real estate contract retains a *personal* property right under the contract while the purchaser gains an interest in the *real* property. *In re Pers. Restraint of 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."). And the 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).

The State's theory both at trial and before us was that because Wooten never paid off the real estate contract and received a deed, he was not the sole owner of the property. But as we have discussed above, after the parties executed the real estate contract, Kohl retained only a personal property security interest under the contract; he did not have any ownership interest in the real property. *See Freeborn*, 94 Wn.2d at 340. He retained the right to collect payments secured by a "'lien-type security [interest].'" *Tomlinson*, 118 Wn.2d at 509 (quoting *McDaniel*, 89 B.R. at 869). And the bank from which Kohl borrowed money against the property similarly

held only a security interest. Accordingly, the State failed to prove that any legal entity other than Wooten had an ownership interest in the property; thus, the State failed to prove the element of "property of another."

The majority reasons, however, that the malicious mischief statute applies to both real and personal property; that "Wooten knew . . . either Kohl or the bank attempting foreclosure on the property had an ownership interest in the property"; and that Wooten knew "other parties had an ownership interest in the home." Majority at 5, 8. I agree that the malicious mischief statute applies to both real and personal property. But, by the time of the foreclosure notice, Kohl no longer had even a security interest in the property. He transferred his interest in the property to the bank in September 2007 ("I went to my attorney, he suggested flipping it back to the bank. . . . That's what I did."). Report of Proceedings at 50. Thus, the only remaining security interest in the property was the bank's right to sell it pursuant, most likely, to a deed of trust from Kohl. And, the only question left is whether, assuming the bank's security interest can be "physically damaged" as the malicious mischief statute contemplates, the State proved that Wooten's remodel and spreading of garbage around the property caused any damage to or reduced the value of the bank's security interest.[13]

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

[13] The counter-intuitive notion that Wooten could have "physically damaged" the bank's security interest is based on the legislature's language in RCW 9A.48.100 that includes alterations and other kinds of damage to computer records within the definition of "physical damage." Nothing 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.

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).

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. 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 a 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.

This 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 from the "remodel." We can be reasonably confident Kohl did not disclose to the bank that he had sold the property and already encumbered it with a security interest under the sale with Wooten, approximately $200,000 at the time of the foreclosure notice. And we know that Kohl did not disclose to Wooten that he substantially increased the debt on the property at about the same time he sold it to Wooten.[14] Yet it was this increased debt and Kohl's failure to make the bank

[14] The record is unclear as to the total amount that Kohl encumbered the property by taking the mortgage. Kohl agreed on cross-examination that he took out a second mortgage from the bank for approximately $216,000, but he could not remember the date that he took out that mortgage, nor could he remember whether the $216,000 figure was the actual amount of the mortgage.

payment, 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 $200,000. And Kohl testified the property was actually worth $295,000 when he sold it to Wooten. Moreover, even if the property was worth less than $295,000, Wooten paid $20,000 in principal in the first contract year, and he made monthly payments for three years after signing the real estate contract. Thus, but for Kohl increasing the debt on the property, Wooten had ample equity to cover the costs of repairing the property—estimated at $18,500,[15] including clean-up fees. 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 bank's security interest.

I would reverse and remand for the trial court to dismiss with prejudice.

Armstrong, J.

Also, a document in the record reflects that Kohl, as the borrower, borrowed $325,000 shortly before selling the property to Wooten.

[15] The estimate comes from the following: a minimum of $500 to have a hazmat team check the property, a minimum of $3,000 to remove the garbage from the property, and a minimum of $15,000 to repair the other damage to the house.