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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45597**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2017-166**
	)	
HALTON L. FLOWERS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Halton L. Flowers appeals from a judgment entered upon a jury verdict finding him guilty of felony malicious injury to property. He contends that the district court erred in denying a motion for judgment of acquittal because the state failed to present evidence sufficient to support the jury's finding that the value of the property damage he caused exceeded $1,000, the value of the property damage required to charge the offense as a felony. He asks this Court to remand for entry of a judgment of acquittal.

Mr. Flowers also contends that the district court abused its sentencing discretion when it imposed sentences for that and a related burglary conviction.

Statement Of The Facts And Course Of The Proceedings

Lillian ("Cassie") Snooks and Appellant-Defendant Halton L. Flowers met in late November of 2016 and began dating shortly thereafter. (Tr., p.39, L.17 – p.40, L.20.[1]) The two made plans to spend time together on New Year's Eve and were texting regarding those plans that evening while Ms. Snooks visited family at her grandmother's house. (Tr., p.42, L.24 – p.44, L.6.) During the course of this exchange, Ms. Snooks reconsidered those plans when Mr. Flowers became aggressive and angry in both text messages and at least one phone call because Ms. Snooks was not at her house. (Tr., p.44, L.7 – p.45, L.6.) Mr. Flowers was "super upset," was "yelling," and was making Ms. Snooks "really nervous." (Tr., p.44, Ls.13-29.) Ms. Snooks did not feel comfortable being around Mr. Flowers. (Tr., p.45, Ls.21-25.)

[1] Citations to "Tr." are to the transcript of the two-day jury trial in this matter, held August 15-16, 2017, contained in the file titled "45597 Flowers appeal."

After leaving her grandmother's house at around 11:00 or 11:30 P.M., Ms. Snooks visited another friend's house where she stayed until around 4:00 A.M. on January 1, 2017. (Tr., p.44, L.23 – p.45, L.20.) Mr. Flowers continued to text, claiming that he was outside Ms. Snooks' house and threatening that he would "f'ing come up in your house" if Ms. Snooks did not respond. (Tr., p.46, Ls.1-14.) While Ms. Snooks had her phone at this time, it was set to "silent" and she was not paying attention to it. (Id.)

At around 1:00 A.M., Mr. Flowers knocked at the front door of the home of Ms. Snooks' mother, Cindy Vaughn-Spencer. (Tr., p.181, L.12 – p.185, L.21.) Mr. Flowers, who had never met Ms. Vaughn-Spencer, introduced himself as Ms. Snooks' friend. (Tr., p.185, L.23 – p.186, L.5.) He left when Ms. Vaughn-Spencer said she did not know where Ms. Snooks was. (Tr., p.187, Ls.4-12.) Now concerned about Ms. Snooks, Ms. Vaughn-Spencer drove to Ms. Snooks' house. (Tr., p.187, L.22 – p.188, L.8.) When Ms. Vaughn-Spencer arrived at around 1:20 or 1:30 A.M., the lights were on in the house, but Ms. Snooks did not answer the door. (Tr., p.188, L.16 – p.189, L.17.) Ms. Vaughn-Spencer considered it unusual and unlike Ms. Snooks to leave her lights on when not home. (Id.) Ms. Snooks lived alone and did not recall leaving the lights on. (Tr., p.41, L.19 – p.42, L.23.)

Ms. Vaughn-Spencer returned to Ms. Snooks' house several hours later, at around 3:00 A.M., and found the lights off. (Tr., p.189, L.18 – p.190, L.22.) While still in her car, Mr. Flowers then approached and stated that Ms. Snooks was not home, but he was "trying to fix her doggy door, that had fallen out on him." (Tr., p.190, L.17 – p.191, L.13.) Mr. Flowers then asked Ms. Vaughn-Spencer if she would come into the house with him to "make sure that nothing was missing or messed with," and though she thought this was strange, she agreed. (Id.) The two entered through the door to the garage, which was open and in which a dog door had been broken

out. (Tr., p.191, L.16 – p.192, L.22.) Mr. Flowers stated that he would fix the dog door. (Id.) With the dog door removed, the door could be unlocked from outside. (Tr., p.172, Ls.5-17.) After entering the house with Mr. Flowers and standing briefly in the kitchen, Ms. Vaughn-Spencer left when her son called and asked her to come home. (Tr., p.194, L.5 – p.195, L.21.)

At around 4:00 A.M., Ms. Snooks visited another friend's house and, shortly after, received a call from Mr. Flowers. (Tr., p.46, L.23 – p.47, L.10.) Mr. Flowers demanded to know where Ms. Snooks was and what she was doing. (Id.) When Ms. Snooks told Mr. Flowers where she was, he drove to her friend's house and "started yelling outside." (Tr., p.47, Ls.3-18.) Ms. Snooks went out to speak with him, where Mr. Flowers admitted that he had been in Ms. Snooks' house. (Tr., p.47, L.19 – p.48, L.7.) Mr. Flowers did not have permission to enter Ms. Snooks' home. (Tr., p.93, Ls.11-16.) He then pulled out two dildos that he had taken from Ms. Snooks' house and threatened that "he was going to take them and either put them through the windows or tie them to the windows at [her] work and write on the windows how big of a slut [she] was and what – whose they were." (Tr., p.48, Ls.8-18.) He threatened to use the dildos to "to try and ruin [her] job at work." (Tr., p.48, Ls.16-18; p.50, Ls.1-3.) Mr. Flowers also threatened Ms. Snooks' family, threatening to "mess[] up where they worked" and "to mess up [her] relationship with [her] family." (Tr., p.50, Ls.1-7.) Mr. Flowers then slapped Ms. Snooks and told her to get her "cock-sucking face away from him." (Tr., p.49, Ls.16-20.)

Because Mr. Flowers stated that it would "be all over" if Ms. Snooks returned to her house with him, she agreed to ride back to her house in Mr. Flowers' truck. (Tr., p.50, Ls.15-19.) On the way, Mr. Flowers admitted to also taking beer from Ms. Snooks' home and leaving it "behind a dumpster for a homeless man to enjoy on New Year's Eve." (Tr., p.50, Ls.20-25.)

Once at the house, Ms. Snooks noticed clothes on her floor that had been bleached. (Tr., p.51, Ls.15-21.) Asked what happened, Mr. Flowers responded that he had been washing clothes and he spilled some bleach. (Id.) None of Mr. Flowers' laundry was at her house (Tr., p.55, L.19 – p.56, L.3), and Ms. Snooks did not recall seeing any laundry in Mr. Flowers' truck that evening (Tr., p.93, Ls.15-24). Ms. Snooks also noticed that her dog door had been damaged and an attached note stated: "I'm sorry, I forgot you got a new dog door." (Tr., p.59, Ls.15-25; Defendant's Exhibit A.) Mr. Flowers admitted to breaking the dog door. (Tr., p.135, Ls.8-10.)

Ms. Snooks noticed additional, extensive damage to her property over the next several days. (Tr., p.60, L.23 – p.61, L.24.) The damage consisted of fifteen items of clothing that had been either bleached or repeatedly cut or slashed; electronics in the form of a laptop and tablet that were no longer functioning; a stain on a hardwood floor onto which lotion had been poured; an unopened bottle of lotion that was opened and poured onto the floor; a "slash" in the hardwood floor; a kitchen table, the top of which had been slashed; a candle warmer that was broken in half; a mug that was broken; and a candle that appeared as though it had been thrown. (See generally Appellant's brief, Appendix A.[2])

Mr. Flowers was charged by information with (1) stalking in the first degree; (2) malicious injury to property, charged as a felony; and (3) burglary. (R., pp.66-68.) He exercised his right to self-representation (R., pp.159-60), but with standby counsel—Brad Willis—appointed by the Court (R., pp.165-66). After pleading not guilty, the stalking charge was bifurcated from the remaining two charges on Mr. Flowers' motion. (R., pp.159-61.) Mr. Flowers later entered a

[2] Citations to "Appellant's brief" are to the Revised Appellant's Brief. Appellant's brief, Appendix A provides a useful table listing the items damaged by Mr. Flowers, with citations to testimony regarding the nature of the damage, the purchase prices of the items, and the dates of purchase for the items. Rather than reproducing citations for each of the twenty-four items damaged by Mr. Flowers, the state will occasionally refer to this table.

conditional guilty plea to second degree stalking, a misdemeanor, which the district court accepted. (R., pp.359-61.[3])

Mr. Flowers' trial was held on August 15 and 16, 2017, with testimony provided by Ms. Snooks, Ms. Vaughn-Spencer, and, very briefly, from a police officer. (R., pp.301-06.) Just prior to submitting the case to the jury, Mr. Flowers made a "motion to dismiss." (Tr., p.216, L.8 – p.221, L.1.) As relevant here, Mr. Flowers argued that the state failed to present sufficient evidence that the value of the damage he caused to Ms. Snooks' property exceeded $1,000. (Tr., p.219, L.17 – p.220, L.22.) In particular, Mr. Flowers argued that the state failed to "provide one accurate, due diligence appraisal" of the damaged items both pre- and post-damage, and instead offered only evidence regarding the value of the damaged items when purchased. (Id.) The district court denied the motion. (Tr., p.222, Ls.15-18.)

Mr. Flowers also objected to the inclusion of a jury instruction addressed to misdemeanor malicious injury to property. (Tr., p.229, L.2 – p.232, L.4.) Based on Mr. Flowers' objection, the district court removed that instruction. (Tr., p.232, Ls.16-23.)

The jury returned a guilty verdict on both the burglary and malicious injury to property charges. (Tr., p.269, L.14 – p.270, L.12.)

The district court imposed concurrent sentences of (1) a unified term of five years with four years fixed for malicious injury to property, (2) a unified term of ten years with four years fixed for burglary, and (3) ten months for stalking in the second degree, consecutive to a prior felony sentence. (R., pp.366-70.) Mr. Flowers filed a timely Notice of Appeal. (R., pp.371-74.)

[3] Neither Mr. Flowers' guilty plea on the stalking charge, the sentence imposed by the district court for that conviction, nor any determination on which Mr. Flowers reserved the right to appeal regarding the stalking charge are at issue here. (Appellant's brief, p.8, n.3.)

ISSUES

Mr. Flowers states the issues on appeal as:

I. Did the State fail to present sufficient evidence to support Mr. Flowers' conviction for felony malicious injury to property, because it did not establish the value of the damage to the damaged items and the fair market value of the destroyed items exceeded $1,000?

II. Did the district court abuse its discretion when it imposed a unified sentence of five years, with one year fixed, upon Mr. Flowers following his conviction for malicious injury to property, and a concurrent unified sentence of ten years, with four years fixed, upon him following his conviction for burglary?

(Appellant's brief, p.9.)

The state rephrases the issues as:

1. Has Mr. Flowers failed to establish that no reasonable jury could have concluded from the evidence presented below that the value of the damage caused by Mr. Flowers exceeded $1,000?

2. Has Mr. Flowers failed to establish that the district court abused its discretion when it sentenced him following his convictions for felony malicious injury to property and burglary?

ARGUMENT

I.
Mr. Flowers Failed To Show That No Reasonable Jury Could Have Concluded From The Evidence Presented Below That The Value Of The Damage He Caused Exceeded $1,000

A. Introduction

Idaho Code section 18-7001 provides that a person who "maliciously injures or destroys any real or personal property not his own" is guilty of a felony if the damage exceeds $1,000 in value and a misdemeanor otherwise. Mr. Flowers was charged with a felony, requiring the state to establish beyond a reasonable doubt that the value of the damage he caused exceeded $1,000. (R., pp.150-52.) Mr. Flowers argues that the district court erred in denying his motion for judgment of acquittal on that charge because the state failed to present sufficient evidence regarding the value of the damage he caused. (Appellant's brief, pp.10-16.)

Drawing all inferences and construing all evidence in favor of the state, Mr. Flowers must show that no reasonable jury could have concluded from the evidence presented below that the value of the damage he caused exceeded $1,000, as this jury did. The evidence presented below included the dates on which the items damaged by Mr. Flowers were purchased; the price of the items when purchased; the condition of the items before they were damaged; and the condition of the items after they were damaged, including, for many but not all of the items, photographs documenting the damage. Mr. Flowers did not put in any contrary evidence as to the value of the damage he caused. Coupled with the ordinary knowledge and experience that jurors bring with them, and appropriately drawing all inferences in favor of upholding the conviction, that evidence is sufficient to sustain the jury's factual finding that the value of the damage caused by Mr. Flowers exceeded $1,000.

B. Standard Of Review

The trial court may enter a judgment of acquittal pursuant to Idaho Criminal Rule 29 only if the court finds the evidence "'insufficient to sustain a conviction of such offense or offenses.'" State v. Clark, 161 Idaho 372, 374, 386 P.3d 895, 897 (2016) (quoting I.C.R. 29(a)). "'In reviewing the denial of a motion for judgment of acquittal, the appellate court must independently consider the evidence in the record and determine whether a reasonable mind could conclude that the defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt.'" Id. (quoting State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). The relevant inquiry "is not whether this Court would find the defendant to be guilty beyond a reasonable doubt, but whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (internal quotation marks omitted) (emphasis in original) (quoting State v. Adamcik, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012)). "On appeal, where a defendant stands convicted, the evidence is viewed in the light most favorable to the prosecution and the reviewing court is precluded from substituting its judgment for that of the jury as to the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn from the evidence." State v. Allen, 129 Idaho 556, 558, 929 P.2d 118, 120 (1996).

C. Substantial Evidence Supports The Jury's Factual Finding That The Value Of The Damage Caused By Mr. Flowers Exceeded $1,000

Idaho Code section 18-7001 defines the offense of malicious injury to property as occurring when any person (1) maliciously, (2) injures or destroys, (3) property not his own. 'Malicious', in the context of this statute, means "an intent to damage the property without a lawful excuse for doing so." State v. Skunkcap, 157 Idaho 221, 229-30, 335 P.3d 561, 569-70 (2014). The statute

then provides that the offense of malicious injury to property is a felony if the value of the damage exceeds $1,000 and a misdemeanor otherwise. I.C. § 18-7001. Because the state charged Mr. Flowers with a felony, it had the burden to establish beyond a reasonable doubt that the value of the damage he caused exceeded $1,000. To meet that burden, the state did not need to establish the actual value of the damage, but only that the actual value of the damage, whatever precisely that value, exceeded $1,000. The evidence presented by the state was more than adequate to satisfy that burden.

The parties largely agree as to the nature of the evidence concerning the value of the damage caused by Mr. Flowers that was introduced below. (See Appellant's brief, Appendix A.) The evidence presented by the state consisted of the testimony of the victim and owner of the property, Ms. Snooks, as well as photographs of some (though, not all) of the damaged clothing. (State's Exhibits 1-9.) In all, Ms. Snooks identified twenty-four damaged or destroyed items. (See Appellant's brief, Appendix A.)

Many of those items are pieces of clothing that Ms. Snooks testified were either bleached or repeatedly cut or slashed. (Id.) For each, she identified the purchase price for those items. (Id.) For all but three—a t-shirt, a pair of dress pants, and a swimsuit cover-up—she also provided the date on which those items were purchased. (Id.) Accepting the lowest amount in the rare cases in which Ms. Snooks provided a range for the purchase price, the sum of the purchase prices of those items of clothing is $1,500. (Id.)

For seven other, non-clothing items, Ms. Snooks testified regarding the date on which the items were purchased, the price for which they were purchased, and the damage caused by Mr. Flowers: (1) a candle warmer she received as a gift that Christmas, just a week before Mr. Flowers broke into her home, that was purchased for $30 had been broken in half and was unusable; (2) a

mug she received as a gift that Christmas, just a week before Mr. Flowers broke into her home, was purchased for $16 and had a large ‘V’-shaped chip in it; (3) a decorative owl candle she received as a gift that Christmas, just a week before Mr. Flowers broke into her home, was purchased for $16 or $16.99 and looked as though it had been thrown against a wall, with its features “smushed”; (4) a wooden table she purchased used in 2014 for $40 had a large slash across its top; (5) an unopened bottle of lotion that Ms. Snooks sells for $18 dollars per bottle had been squeezed onto her hardwood floor; (6) a Samsung tablet given to her as a Christmas gift a year before and that was purchased for $500 was non-functioning; and, (7) an HP computer, purchased in late 2012 or early 2013 for $900, was also non-functioning.[4] (Id.) The sum of the purchase prices of those items is $1,520. (Id.)

Next, Ms. Snooks testified that her house itself had been damaged. The lotion poured onto Ms. Snooks’ hardwood floor left a large stain. (Id.) Ms. Snooks testified that “there’s nothing I can do to get it out besides sanding it out and re-staining,” and that the entire wood floor upstairs, not merely the area with the stain, would have to be refinished. (Tr., p.91, Ls.1-24.) Ms. Snooks testified that there was also a “slash” in the hardwood floor of the same room. (Tr., p.91, L.25 – p.92, L.2.) Last, the dog door that Mr. Flowers acknowledged breaking was also damaged. While Ms. Snooks testified that the door was recently installed, she could not provide additional information regarding the value of the door. (Tr., p.60, Ls.5-22.)

Ms. Snooks testified that the items in question were not damaged the last time she saw them prior to January 1, 2017. (Tr., p.56, Ls.11-13; p.59, Ls.15-19; p.62, Ls.10-24; p.64, L.24 – p.66, L.2; p.67, Ls.9-20; p.68, Ls.1-10; p.71, L.25 – p.72, L.9; p.73, L.24 – p.74, L.7; p.76, Ls.3-

[4] As Mr. Flowers notes, Ms. Snooks identified the date on which the HP computer was purchased by reference to the release date for the Windows 8 operating system, which was released on October 26, 2012. (Appellant’s brief, p.19, n.5.)

9; p.78, Ls.1-10; p.79, L.20 – p.80, L.1; p.81, Ls.3-5; p.81, L.18 – p.82, L.1; p.84, Ls.8-11; p.85, L.25 – p.86, L.12; p.88, L.10 – p.89, L.7; p.90, Ls.18-22; p.168, L.22 – p.169, L.6.) None of the items for which Ms. Snooks identified a purchase date—the vast majority of the items damaged—had been purchased more than four years before they were damaged by Mr. Flowers, and many were purchased or given to Ms. Snooks within the previous year or two. (See Appellant's brief, Appendix A.)

Again, accepting the lowest amount in the rare cases in which Ms. Snooks provided a range, the sum of the purchase prices for the items for which Ms. Snooks provided a date of purchase is $2,950. (Id.) That amount does not include an additional $70 for damaged items for which Ms. Snooks identified a purchase price but no purchase date, nor does it incorporate any amount for the damage to her hardwood floor or dog door.

The evidence presented by the state was more than sufficient to sustain the factual finding that the value of the damage caused by Mr. Flowers exceeded $1,000. That is particularly so where the evidence is construed in favor of the prosecution, reasonable inferences are drawn in favor of upholding the jury's verdict, and substantial evidence is sufficient to do so. See State v. Kuzmichev, 132 Idaho 536, 545, 976 P.2d 462, 471 (1999).

"[I]t is settled in Idaho that, in civil actions, the owner of property is competent to testify as to its market value without qualifying the owner as an expert witness. Idaho courts . . . should apply the same rule in criminal proceedings, as other jurisdictions have." State v. Vandenacre, 131 Idaho 507, 509-10, 960 P.2d 190, 192-93 (Ct. App. 1998) (citations omitted). "Moreover, when considering trial evidence, jurors are permitted to take into account matters of common knowledge and experience." State v. Neyhart, 160 Idaho 746, 752, 378 P.3d 1045, 1051 (Ct. App. 2016). See also State v. Payne, 146 Idaho 548, 566, 199 P.3d 123, 141 (2008) (noting that we

"expect jurors to bring with them to jury service their background, knowledge and experience" and "we encourage jurors to use their life experiences when evaluating testimony" (internal quotation marks omitted)). "A jury is entitled to draw any reasonable inferences from the evidence presented." State v. Parkinson, 128 Idaho 29, 38, 909 P.2d 647, 656 (Ct. App. 1996).

Recognizing that jurors do not leave their common sense and experience at home, courts in a number of jurisdictions have held that a jury can properly conclude that the value of damage to common, consumer items—or, the market value of such items—exceeds a specified amount based on testimony regarding the date on which the items were purchased, the purchase prices, and the condition of the items. See Hayes v. State, 228 S.E.2d 585 (Ga. Ct. App. 1976) ("We conclude that the evidence as to value was sufficient for the jury to conclude that the damage exceeded $100. Even though the witness was never asked to state his opinion as to the value before and after the incident, he did state its purchase price, length of ownership and condition before, and that it was broken to pieces afterward. A jury is in no event absolutely bound by opinion evidence, and as to everyday objects, such as automobiles, they may draw from their own experience in forming estimates of market value." (internal quotation marks omitted)); State v. Cobrera, 300 P.3d 729, 732 (N.M. 2013) (holding that testimony and evidence regarding the extent to which framed pictures were damaged and testimony that they were purchased for $1,400 was sufficient to sustain verdict that value of the damage exceeded $1,000); State v. Best, 186 Wash. App. 1046 (2015) (unpublished) (holding that where ordinary consumer items such as golf clubs, two televisions, two laptops, a vacuum cleaner, and lawn ornaments were stolen, the evidence was sufficient to sustain the jury's finding that the market value of those items exceeded $750 where there was testimony regarding purchase prices and that the golf clubs were ten years old while the remaining items were between two and five years old); State v. Clipper, 429 N.W.2d 698, 700

(Minn. Ct. App. 1988) ("Davey testified that the original purchase prices of the property totaled $1,790. Thus, the jury could properly infer that the current replacement value of the stolen property exceeds $1,000."); J & K Moving & Storage Co. v. Wyatt, 200 A.2d 384, 385 (D.C. 1964) (in civil case, holding that damage award was supported by the evidence where market value of allegedly lost consumer items, including clothing, was established through testimony regarding date of purchase and purchase price); Martin v. McIntosh, 346 N.E.2d 450, 453 (Ill. App. 1976) ("It has long been the law in this jurisdiction that where the property in question is of a usual and ordinary nature, such as household goods, their value is a matter of common knowledge and anyone, including a housewife, may testify as to its value.").

Particularly in a case like this, where the damage is extensive, varied, and to a large number of ordinary consumer items, the contrary view—that the state must introduce testimony specifically addressed to providing an appraised value for each such damaged item both pre- and post-damage—imposes an unnecessary and excessively burdensome requirement on the state not reflected in Idaho Code section 18-7001. Instead, the jury should be able to rely on its common sense and experience to determine—in light of evidence regarding the nature of the damage he caused, the purchase prices of the items damaged, the dates on which those items were purchased, and their condition—that the cumulative value of the damage caused by Mr. Flowers easily exceeded $1,000, even if the value of the damage to no individual item did so.

Mr. Flowers supports the contrary view with exclusive reference to a divided Court of Appeals opinion in State v. Hughes, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997). Hughes involved a prosecution of a felony malicious injury to property charge where the damage at issue was to an automatic garage door and in which the only evidence presented as to the value of the

damage was the cost of a replacement door. Id. at 703-04, 946 P.2d at 1343-44. Faced with those facts, the Court of Appeals stated:

> We hold, therefore, that replacement cost evidence may be used as an indicator of value only when the State has demonstrated that the fair market value of the destroyed item is not reasonably ascertainable or that the item had no market value, and when replacement cost evidence is relied upon, the State must show that the replacement (whether actually purchased by the victim or not) is a reasonably close proximation of the design and quality of the destroyed item.

Id. at 703, 946 P.2d at 1343. Because the state did neither, the Court of Appeals held that the evidence was insufficient to support the felony conviction. Id. at 703-04, 946 P.2d at 1343-44.

Because this is not a case in which the state introduced evidence regarding replacement costs to establish that the value of the damage exceeded $1,000, the holding of Hughes is not directly relevant. Mr. Flowers relies instead on other language from Hughes. In particular, the Court of Appeals stated that, for purposes of Idaho Code section 18-7001, "when the offender has harmed but not destroyed the property," the value of the damage is equivalent to "[e]ither the diminution of the object's fair market value or the reasonable cost of repair." Id. "If the State applies the diminution of value measure, then it must establish the fair market value of the property immediately before and after the damage." Id. By contrast, "[w]hen property has been entirely destroyed, neither the cost of repair measure nor the diminution in value measure are applicable." Id. "The proper measure of damages in such event is the fair market value of the property at the time and place of its destruction." Id. If a destroyed item has no fair market value or the fair market value is not "ascertainable," "upon a showing that fair market value cannot be established, the State may show the economic value of the loss caused by the defendant through such factors as original purchase price, replacement cost, the property's general use and purpose, and salvage value." Id. Mr. Flowers contends that the state failed to establish the diminution of market value of the property that was damaged and not destroyed, and for the property destroyed, failed to

establish either the market value of the property at the time it was destroyed or that the market value was unascertainable. (Appellant's brief, pp.14-15.)

But while Hughes provides that the value of damage for purposes of Idaho Code section 18-7001 is associated with market value, it says little about how to establish market value in the ordinary case. Hughes does not hold that where damage is to common consumer items like clothes and consumer electronics with which jurors will be familiar, the jury is unable to make reasonable inferences regarding market value—both pre- and post-damage or destruction—from evidence regarding the nature of the damage, the condition of the items, the purchase price of the items, and the dates of purchase. Likewise, Hughes provides that, "upon a showing that fair market value cannot be established, the state may show the economic value of the loss caused by the defendant through such factors as original purchase price, replacement cost, the property's general use and purpose, and salvage value." Hughes, 130 Idaho at 703, 946 P.2d at 1343. But, again, the court says nothing about the evidence required to show that fair market value cannot be established.

The only case cited in Hughes for the proposition that the value of stolen property or the value of damage can sometimes be determined by reference to purchase price is People v. Dunoyair, 660 P.2d 890 (Colo. 1983). Hughes, 130 Idaho at 703, 946 P.2d at 1343. In Dunoyair, the Colorado Supreme Court determined that the fair market value of a painting *was* adequately shown to be over $100 at the time that it was damaged where there was testimony that it had been purchased three years earlier for $400, it was in good condition on the date on which it was damaged, and a replacement painting would cost $800 to $1,000. Dunoyair, 660 P.2d at 894. The court in Dunoyair affirmed the reliance on *both* purchase price and replacement price to establish the market value of the painting at the time of the damage, and without the district court first making any finding that the market value could not otherwise be established. That case provides

no support for the proposition that purchase price is relevant and probative as to the value of damage only where there is a showing that market value cannot be established—in fact, it supports the proposition that market value can be established by reference to purchase price.

Dunoyair, in turn, cites only Burns v. People, 365 P.2d 698 (Colo. 1961), for the proposition that the value of stolen property or the value of damage can sometimes by determined by reference to purchase price. Dunoyair, 660 P.2d at 895. In Burns, the Colorado Supreme Court was considering a conviction for receiving stolen property charged as a felony because of the value of the property, various tools. Burns, 365 P.2d at 698-99. The defendant-appellant argued, inter alia, that there was insufficient evidence presented as to the value of the stolen tools at the time they were stolen where the evidence at trial concerned the purchase price for the tools. Id. at 700-01. The court noted that "[a]n owner is always competent to testify as to value" and "[o]bviously one not in the business of selling such items but putting them to use does not have them appraised from time to time in anticipation of their loss or that he may some day be called upon to testify as to their value on a particular date." Id. at 701. Therefore, "in the absence of evidence of market value of a particular item, the purchase price, junk price, replacement cost, the use of the article and common knowledge all may be considered." Id. That is, the court suggested that evidence as to purchase price couple with the "common knowledge" that jurors bring with them can establish the value of stolen items where there is simply an absence of testimony directed specifically to market value because, for instance, people who own and use ordinary items like clothes, consumer electronics, and tools do not have them appraised regularly. It is unreasonable to expect prosecutions to depend upon the introduction of appraisals for each such ordinary consumer item—particularly where the damaged items are diverse and there is a large quantity of them. Instead, jurors can make reasonable inferences regarding the market value of such items, and the

value of damage to them, based on ordinary experience and testimony regarding purchase prices, purchase dates, and the condition of the items.

Here, the evidence regarding the value of the damage caused by Mr. Flowers is not based on purchase price alone, but also on testimony regarding purchase dates and the condition of the items. But the purchase price is particularly probative in light of the nature of the items damaged. Mr. Flowers damaged clothing, electronics, and miscellaneous consumer items purchased within the previous four years for approximately $3,000. With respect to at least the $1,500 in clothing, the jury could reasonably have concluded that the items were destroyed, making their market value at the time of their destruction the relevant fact. Employing common sense, their familiarity with such products, and based on the evidence presented below regarding purchase dates, purchase prices, the condition of the items, and the nature of the damage caused, the jury could reasonably have concluded that the value of the damage caused by Mr. Flowers exceeded $1,000. That conclusion is only buttressed by the damage caused to Ms. Snooks' hardwood floor and dog door. The jury's verdict should therefore be affirmed.

D. If The District Court Erred In Denying Mr. Flowers' Motion Under Idaho Criminal Rule 29, The Appropriate Relief Is To Vacate The Felony Conviction And Remand For Entry Of A Conviction For Misdemeanor Malicious Injury To Property And Resentencing

Mr. Flowers failed to carry his burden on appeal to show that no reasonable jury could conclude from the evidence below that the value of the damage he caused exceeded $1,000. But, if this Court disagrees, the appropriate relief is not, as Mr. Flowers requests, to simply remand with direction to order a judgment of acquittal. (Appellant's brief, pp.15-16). The jury's verdict establishes that Mr. Flowers maliciously injured or destroyed Ms. Snooks' property, even if the evidence was insufficient to establish that the value of the damage exceeded $1,000. If the value of the damage did not exceed $1,000, Mr. Flowers was guilty of a misdemeanor. If this Court

concludes that the evidence was insufficient in that way, it should exercise its authority to "direct the proper judgment or order to be entered" and remand with instructions to enter a conviction for misdemeanor malicious injury to property. I.C. § 1-205. The propriety of that remedy is supported both by Idaho law and case law from other jurisdictions.

In Hughes, 130 Idaho at 704, 946 P.2d at 1344, the case on which Mr. Flowers centrally relies, the Court of Appeals determined that the state failed to introduce sufficient evidence to support the jury's guilty verdict on a charge of felony malicious injury to property because there was insufficient evidence to support the jury's finding that the value of the damage exceeded $1,000. "The insufficiency of the evidence on the damage value does not mean, however, that the charge against [appellant] must be dismissed," id., as Mr. Flowers asks the Court to do here. Instead, the Court of Appeals ordered that "the charge of which [appellant] has been found guilty must be reduced to a misdemeanor." Id. Because the value of the damage was relevant only to whether the malicious injury to property was charged as a misdemeanor or a felony, and because the only alleged insufficiency of the evidence concerned the value of the damage, the jury's guilty verdict on a felony misdemeanor injury to property charge effectively constituted a verdict as to a misdemeanor charge upon which the court had the authority to order the entry of conviction. Id.

The Idaho Supreme Court has endorsed the same remedy in a number of cases. In State v. Sprouse, 63 Idaho 166, 118 P.2d 378 (1941), the Court considered an appeal from a conviction for first degree murder and determined that there was insufficient evidence to support the jury's finding that the unlawful killing was committed with malice aforethought. Id. at __, 118 P.2d at 379. The Court noted that the only distinction between first degree murder and voluntary manslaughter was the requirement to establish malice aforethought for the former but not the latter.

Id. Relying on its statutory authority to reverse, affirm, or modify the judgment or order appealed from, the Court reduced the conviction from first degree murder to voluntary manslaughter. Id.

Likewise, in State v. Haggard, 89 Idaho 217, 404 P.2d 580 (1965), the Idaho Supreme Court considered an appeal from a conviction for first degree burglary. Appellant argued, inter alia, that there was insufficient evidence to support the jury's finding that the burglary was committed at night, a finding required to support the charge for first degree rather than second degree burglary. Id. at 228, 404 P.2d at 586-87. The Court agreed that the evidence for that finding was insufficient, id., but did not order the entry of a judgment of acquittal on that count, instead remanding to the district court "with instructions to vacate the judgment pronounced on that count, and enter judgment thereon as on a conviction of burglary of the second degree." Id. at 232, 404 P.2d at 589. The time at which appellant committed the burglary was relevant "only to a determination of the degree of the offense," distinguishing first from second degree burglary. Id. at 230, 404 P.2d at 588. "The time of day does not change the crime from burglary to something else. Nighttime only aggravates the offense, and is material only to the higher degree." Id. (internal citations omitted). Because the only doubt regarding the sufficiency of the evidence "concern[ed] the time of day when the offense was committed," that doubt did "not affect in the least the finality or conclusiveness" of the jury's conclusion that a burglary was committed, even if in the daytime and therefore a second degree burglary. Id. at 232, 404 P.2d at 589. The Court concluded that "the verdict must be given effect as a verdict of guilty of burglary of the second degree." Id.

These cases reflect a rule widely accepted in other jurisdictions, both federal and state:

> A jury's finding of guilt on all elements of the greater offense is necessarily a finding of guilt on all elements of the lesser offense, since a lesser-included offense consists of some of the elements of the greater offense and does not require the proof of any element not present in the greater offense. A trial court therefore has

> authority to enter a judgment of conviction on a lesser-included offense when it finds that an element exclusive to the greater offense is not supported by evidence sufficient to sustain the jury's finding of guilt on the greater offense. When the evidence is insufficient to support the greater offense, but sufficient to support a conviction on the lesser-included offense, an appellate court may vacate the sentence and remand for entry of judgment of conviction and resentencing under the lesser-included offense.

Gov't of Virgin Islands v. Josiah, 641 F.2d 1103, 1108 (3d Cir. 1981) (citations omitted). See also, e.g., United States v. Skipper, 74 F.3d 608, 612 (5th Cir. 1996) (where evidence was insufficient to support conviction for greater offense of possession with intent to distribute, remanding with direction to enter judgment as to lesser offense of simple possession because "the jury necessarily found all of the elements of simple possession in rendering its verdict"); United States v. Lamartina, 584 F.2d 764, 767 (6th Cir. 1978) ("Where, as here, there is sufficient evidence to support a conviction on the lesser included offense, but insufficient evidence to support a conviction on the greater offense, the sentence should be vacated and the case remanded for resentencing under the lesser included offense."); Shields v. State, 722 So.2d 584, 585 (Miss. 1998) ("[W]hen the jury convicts of a greater offense, which is invalidated on appeal for want of sufficiency of the evidence, no new trial is required and the defendant may be remanded for sentencing upon the lesser included offense where the proof establishes proof of the lesser offense.") (collecting cases); Bowen v. State, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012) ("Here, the State has met its burden by proving the essential elements of the offense of misapplication of fiduciary property beyond a reasonable doubt, but the amount of property shown to have been misapplied, an aggravating element of the offense, was legally insufficient to support a first-degree felony conviction. The value of the property misapplied was approximately $103,344, which supports a felony conviction in the second degree. Accordingly, the judgment must be reformed to reflect a second-degree felony conviction." (internal footnotes omitted)); State v. Byrd, 385 So.2d 248, 252 (La. 1980) ("Ordering entry of a judgment of guilty of the lesser and included

offense of attempted simple robbery in the present case accords with the overwhelming treatment of this problem by other jurisdictions" because the jury's verdict, though addressed to greater offense, "necessarily found the elements of a lesser and included offense had been proved beyond a reasonable doubt").[5]

"This procedure does not constitute interference with the function of the trial judge or jury in a criminal trial, but rather constitutes action in accordance with the findings of the trier of fact." Byrd, 385 So.2d at 252. It does not deprive a defendant "of his right to have a trial judge or jury decide on the proof of the elements of the lesser and included offense, but rather recognizes that the trier of fact has already made that decision." Id. Finally, "[t]his procedure also does not subject defendant to double jeopardy, because there will be no new proceedings in which the state will be given an opportunity to relitigate his guilt." Id.

[5] Though in dicta, the United States Supreme Court has approved of this procedure. *See* Rutledge v. United States, 517 U.S. 292, 306 (1996) ("Consistent with the views expressed by the District of Columbia Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. This Court has noted the use of such a practice with approval." (internal citations omitted)). The Supreme Court has also explicitly considered the application of a similar procedure, though in a different context. In Morris v. Mathews, 475 U.S. 237 (1986), the defendant first pleaded guilty to an aggravated robbery and was later charged, tried, and convicted of aggravated murder, "aggravated" because it was committed in the course of the aggravated robbery to which the defendant had already pleaded guilty. Id. at 238-41. On appeal, the defendant successfully argued that the aggravated murder conviction violated the Double Jeopardy Clause. Id. at 242. The remedy endorsed by the state court of appeals was to "modif[y] the conviction of aggravated murder to murder" based on its view that the jury's guilty verdict on the aggravated murder charge necessarily constituted a guilty verdict on a lesser included murder charge. Id. at 243. On appeal to the Supreme Court, the defendant argued that it was improper to reduce the conviction to a lesser offense. Id. at 244. The Supreme Court held that where a conviction is barred by double jeopardy, but "it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense," the conviction can be reduced to that lesser included offense. Id. at 247. To avoid that result, the defendant must "demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense." Id. at 246-47. A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.

Malicious injury to property requires the state to prove beyond a reasonable doubt that the defendant (1) maliciously, (2) injured or destroyed, (3) personal property not his own. I.C. § 18-7001. Beyond those elements, Idaho Code section 18-7001 then "specifies that the offense of malicious injury to property may be either a misdemeanor or a felony, depending upon the value of the damage." Hughes, 130 Idaho at 702, 946 P.2d at 1342. It is a felony if the value of the damage exceeds $1,000 and a misdemeanor otherwise. I.C. § 18-7001. The instructions provided to the jury regarding the felony malicious injury to property charge were precisely the instructions the jury would have received for a misdemeanor charge, but with the addition of the requirement that the state establish that the value of the damage caused by Mr. Flowers exceeded $1,000. (Tr., p.238, L.2 – p.239, L.12.) Idaho Criminal Jury Instruction 1302 (Malicious Injury to Property) differs from Idaho Criminal Jury Instruction 1301 (Felony Malicious Injury to Property) only in that the latter, and not the former, requires that the state establish that the value of the damage exceeds $1,000.

The jury unanimously found Mr. Flowers guilty of felony malicious injury to property. (Tr., p.270, L.7 – p.272, L.10.) The jury's finding that Mr. Flowers maliciously injured or destroyed property belonging to Ms. Snooks and that the value of that damage exceeded $1,000 necessarily implies a finding that he maliciously injured or destroyed property belonging to Ms. Snooks, whatever the value of that damage. That is so even if this Court concludes that the evidence below was insufficient to support the additional conclusion that the value of that damage exceeded $1,000. See Haggard, 89 Idaho at 230, 404 P.2d at 588 ("[A] verdict finding the defendant guilty of burglary of the first degree is also a verdict finding the defendant guilty of burglary of the second degree."). But for its finding that the value of the damage he caused exceeded $1,000, Mr. Flowers has not argued on appeal that the jury's verdict was inadequately

supported by the evidence. As in <u>Haggard</u>, the challenge to the sufficiency of the evidence concerns only a finding that "aggravates the offense, and is material only to the higher degree." <u>Id.</u> at 230, 404 P.2d at 588. Because that challenge "does not affect in the least the finality or conclusiveness" of the jury's finding that Mr. Flowers committed malicious injury to property, whether graded a misdemeanor or a felony, and because it is a misdemeanor if it is not a felony, this court should at most "give effect" to the jury's verdict by reducing the conviction from a felony to a misdemeanor. <u>Id.</u> at 232, 404 P.2d at 589.

Finally, Mr. Flowers will not be unfairly prejudiced by the reduction of his conviction to a misdemeanor. He argues that the district court erred by denying a motion for judgment of acquittal under Idaho Criminal Rule 29 because the state failed to present sufficient evidence as to the value of the damage he caused. Rule 29(a) provides that "[i]f the court dismisses an offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense." Rule 31(c) provides that a defendant may be found guilty of any offense necessarily included in the offense charged. Even if the district court had agreed with Mr. Flowers that the state failed to present sufficient evidence as to the value of damage he caused, the court would then have determined that he could be convicted of a misdemeanor, it would have instructed the jury accordingly, and, as the jury's verdict demonstrates, the jury would have convicted. Mr. Flowers cannot reasonably contend that the jury would not have found that he maliciously injured Ms. Snooks' property if only the district court had provided an additional instruction—an instruction to which he and he alone objected—identical to the one already received by the jury but without the requirement that the state establish that the value of the damage exceeded $1,000. The reduction of Mr. Flowers' felony conviction to a misdemeanor would therefore place him in precisely the position he would have been had the district court agreed that the state failed to

present sufficient evidence regarding the value of the damage he caused and had granted his Rule 29 motion.

Mr. Flowers briefly addresses his request for a remand for entry of a judgment of acquittal in a footnote in which he attempts to distinguish Hughes. (Appellant's brief, p.16, n.4.) As Mr. Flowers notes, the jury in Hughes "had been instructed on the lesser included offense of misdemeanor malicious injury to property," though it convicted on the greater offense of felony malicious injury to property. (Id. (quoting Hughes, 130 Idaho at 704, 946 P.2d at 1344).) The Court of Appeals then held that the jury's guilty verdict on that greater offense required reducing the felony to a misdemeanor. Hughes, 130 Idaho at 704, 946 P.2d at 1344. Here, though the district court was prepared to give an instruction as to misdemeanor malicious injury to property, Mr. Flowers objected to the inclusion of that instruction (Tr., p.228, L.20 – p.232, L.4), and the district court removed the instruction based on that objection (Tr., p.232, L.11 – p.233, L.14).

Though that is a distinction between this case and Hughes, it is not a distinction that makes a difference. While some courts in other jurisdictions have held that an appellate court may properly reduce a conviction for a greater offense to a lesser included offense only if the jury was instructed as to the lesser included offense, that rule does not appear to apply in Idaho and should not be adopted. There is no indication in Sprouse, for instance, that the jury was instructed as to manslaughter before the Idaho Supreme Court reduced a first degree murder conviction to a conviction for that offense. See generally State v. Sprouse, 63 Idaho 166, 118 P.2d 378 (1941). In Haggard, it seems clear that the jury was instructed as to the lesser offense, as the defendant was also convicted for that offense on other counts, but the Court's discussion makes no reference at all to that instruction and does not rely in any way on the fact that it was given. Haggard, 89 Idaho at 230-32, 404 P.2d at 588-89.

Where courts have required that the jury receive an instruction on the lesser included offense before an appellate court may reduce a conviction on the greater offense, they have done so for one of several reasons that do not apply here.

In State v. Myers, for instance, the Supreme Court of Wisconsin emphasized the "crucial distinction between an appellate court finding evidence in the record sufficient to support a jury verdict and a jury finding the evidence sufficient to prove guilt beyond a reasonable doubt." State v. Myers, 461 N.W.2d 777, 782 (Wis. 1990). "Even though the record contains evidence sufficient for an appellate court to uphold a jury verdict of guilty of the lesser included felony of attempted aggravated battery, a properly instructed jury would not necessarily find the evidence persuasive of guilt of this crime beyond a reasonable doubt." Id. While that may have been a legitimate concern in Myers—where the court refused to reduce a conviction for aggravated battery to attempted aggravated battery—the reduction of Mr. Flowers' conviction does not require any appellate court to "find[] evidence in the record." When"[t]he statutory elements" for the lesser included offense are explicitly incorporated in the instruction of the greater offense, and the jury finds each of those statutory elements, it "necessarily" finds the lesser included offense. State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993) (reducing conviction from murder to reckless homicide where elements of lesser included offense were incorporated in greater offense). In such cases, as here, there is no uncertainty or searching of the record required by the appellate court; the appellate court need only affirm what the jury already found.

Next, the court in Myers expressed concern that permitting the practice would reward gamesmanship by incentivizing the state to avoid requesting lesser included offense instructions on the premise that, even if the conviction is reversed on appeal for insufficient evidence, the conviction would still be reduced to the lesser included offense. Myers, 461 N.W.2d at 782. It is

important to note, first, that there is no gamesmanship here. Mr. Flowers, not the state, objected to the inclusion of an instruction on misdemeanor malicious injury to property. (Tr., p.228, L.20 – p.232, L.4.) Second, a defendant always has the right to request an instruction on a lesser included offense, requiring the court to give the instruction if a reasonable view of the evidence would support it. I.C. § 19-2132. Third, as discussed above, application of the remedy can be cabined to cases in which each of the elements of the lesser included offense are explicitly included in the instruction for the greater offense. In such a case, the jury has effectively been given the instruction on the lesser included offense.

"Since all the elements of the lesser and included offense of [misdemeanor malicious injury to property] have been proved beyond a reasonable doubt, this Court should not strike down all of those adequately supported findings merely because the evidence did not reasonably support the conclusion that an additional element also existed." State v. Byrd, 385 So.2d 248, 251 (La. 1980). See also Shields v. State, 722 So.2d 584, 587 (Miss. 1998) (holding that, in determining whether to reduce a greater to a lesser offense, it is irrelevant whether instruction on lesser offense was given); United States v. Lamartina, 584 F.2d 764, 767 (6th Cir. 1978) (holding that, though no jury instruction had been provided on the lesser included offense, "[w]here, as here, there is sufficient evidence to support a conviction on the lesser included offense, but insufficient evidence to support a conviction on the greater offense, the sentence should be vacated and the case remanded for resentencing under the lesser included offense"); United States v. Motley, 940 F.2d 1079, 1083 (7th Cir. 1991) (same); Bowen v. State, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012) (discussing and rejecting view that the reduction of a conviction for a greater offense to a lesser offense is appropriate only where the jury was instructed as to the lesser offense).

II.
Mr. Flowers Failed To Show That The District Court Abused Its Discretion In Sentencing Him

A. Introduction

Mr. Flowers contends the district court abused its discretion by sentencing him to a unified sentence of five years with one year fixed for his conviction for malicious injury to property, and a unified sentence of ten years with four years fixed for his conviction for burglary, those sentences to run concurrently. (Appellant's brief, pp.16-21.) He has failed to show an abuse of sentencing discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Anderson, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. Mr. Flowers Has Not Shown That The District Court Abused Its Sentencing Discretion

Where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). Mr. Flowers does not contend that the sentences at issue here fall outside the statutory limits. To show that the sentences imposed by the district court are a clear abuse of discretion, Mr. Flowers must show that they are excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). "Not all of the sentencing factors, even the most important factor of protection of society, need be advanced by a sentence if the sentence is appropriate in

light of one or more than one such criterion." State v. Wersland, 125 Idaho 499, 504, 873 P.2d 144, 149 (1994). The Court reviews the whole sentence on appeal and presumes that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Mr. Flowers argues that the district court abused its sentencing discretion because it "did not adequately consider mitigating factors." (Appellant's brief, p.18.) In particular, he points to his alleged "remorse and acceptance of responsibility" (id., p.18), his support for his daughter (id., 19), and his "work ethic, both in employment and in volunteering" (id.).

Contrary to Mr. Flowers' claim, the district court adequately considered these factors. Prior to sentencing Mr. Flowers, the district court stated that it considered the Presentence Investigation Report ("PSI"), arguments made at the sentencing hearing, statements from both Mr. Flowers and Ms. Snooks, Mr. Flowers' prior criminal history, the evidence presented at trial, and the factors set out in Idaho Code section 19-2521. (Sentencing Tr., p.234, L.17 – p.235, L.2.[6]) In imposing the sentences it did, the district court focused on "concerns with regard to [Mr. Flowers'] risk to reoffend . . . ." (Sentencing Tr., p.235, Ls.3-6.) The court noted: (1) that Mr. Flowers appeared to have "little insight with regard to his criminal behavior," continued to "justify" what he did, and did not accept full responsibility (Sentencing Tr., p.235, Ls.12-15); (2) that "a lesser sentence in this particular case would depreciate the seriousness of the crime," which, though "not a crime of violence," was akin to one in that it "expressed something towards" Ms. Snooks through

[6] Citations to "Sentencing Tr." are to the transcript of the sentencing hearing in this matter, held November 6, 2017, and contained in the file titled "Reporter's Transcripts Flowers 45597."

the violation of her personal privacy and the malicious destruction of her personal property (Sentencing Tr., p.235, L.19 – p.236, L.2); and (3) that "imprisonment will provide an appropriate punishment and deterrence," particularly in light of the fact that these offenses were committed while Mr. Flowers was on parole from a felony conviction and he had "three felony convictions now on [his] record" (Sentencing Tr., p.235, Ls.6-7; p.236, Ls.3-6).

The concerns that motivated the district court's sentences are more than adequately reflected in the record. While Mr. Flowers claims that his "remorse and acceptance of responsibility" should constitute a mitigating factor, the district court properly recognized that Mr. Flowers never fully accepted responsibility, instead deflecting blame and minimizing his crimes. In the PSI, Mr. Flowers admitted to breaking into Ms. Snooks' home, but shifts blame to Ms. Snooks for cancelling plans and suggests that he broke into her home to check on her. (PSI, p.6.[7]) At his sentencing hearing, Mr. Flowers' attorney elaborated on this "explanation" of Mr. Flowers' conduct by stating that "he thought that he was actually doing a good thing by trying to ascertain whether she was there, whether she was out intoxicated, or in need of some help, and, of course, when she wasn't, he met the mother there and then left." (Sentencing Tr., p.230, Ls.14-22.) Mr. Flowers then claimed that he "take[s] full responsibility" for his actions, but did not specify what those actions were. (Sentencing Tr., p.231, Ls.8-10.) He did not mention, much less take responsibility for, the malicious destruction of Ms. Snooks' property; the taking of property from Ms. Snooks' home; the threats that he made to embarrass and humiliate Ms. Snooks with friends, family, and her employer (Tr., p.48, L.19 – p.49, L.4; p.50, Ls.1-7); or the physical or verbal abuse he directed towards Ms. Snooks (Tr., p.49, Ls.17-20). Instead, he leaves the false impression that

[7] Citations to "PSI" are to the Presentence Investigation Report, contained in "Confidential Certificate of Exhibits Flowers 45597," and page references are to the pages in the electronic file.

he merely broke into Ms. Snooks' home out of concern for her well-being and not, as the evidence at trial established, to destroy and steal property out of anger, vindictiveness, and to intimidate Ms. Snooks.

The author of the PSI, like the district court, expressed doubt regarding the extent to which Mr. Flowers was remorseful for and took responsibility for his crimes:

> During the interview he took responsibility for his crimes, but did not appear remorseful. He did not seem to want to talk about his crimes and his answers were short and emotionless. He admitted it was wrong to enter a home without permission, but he was waiting for his "date" with Ms. Snooks and she would not answer his texts or her door. He was upset that they had agreed to go out together and she was not home.

(PSI, p.17.) At the sentencing hearing, Mr. Flowers' attorney argued that "[p]erhaps his general low-key demeanor or lack of emotion is why [the presentence investigator] said he felt no remorse." (Sentencing Tr., p.224, L.25 – p.225, L.2.) No facts regarding Mr. Flowers' demeanor can explain his repeated failure to candidly acknowledge the nature of his conduct, however. In addition, the district court clearly agreed with the PSI regarding Mr. Flowers' lack of remorse. Even if that judgment was only based on the district court's evaluation of Mr. Flowers' demeanor, it would be entitled to deference in light of "the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant." State v. Aragon, 107 Idaho 358, 369, 690 P.2d 293, 304 (1984).

The district court next correctly recognized that Mr. Flowers' conduct was borne out of a desire to harm and intimidate Ms. Snooks and is, in that sense, akin to a crime of violence. (Sentencing Tr., p.235, L.19 – p.236, L.2.) At the sentencing hearing, the district court heard from Ms. Snooks regarding the manner in which Mr. Flowers' conduct has affected her. She stated that

for several months following December 31, 2016, she was unable to stay at her home because she "didn't feel comfortable staying in [her] place by [herself]." (Sentencing Tr., p.210, Ls.10-16.) Mr. Flowers' conduct has also affected her work and thrust her personal life into public view, with random customers commenting on the matter. (Sentencing Tr., p.210, L.21 – p.212, L.14.) She left one of her jobs because she "just couldn't handle working there" after Mr. Flowers showed up looking for her, despite having been told by police not to have any contact with Ms. Snooks. (Sentencing Tr., p.210, L.21 – p.211, L.5; p.231, Ls.13-16; PSI, p.3.) The court noted that "a lesser sentence in this particular case would depreciate the seriousness" of Mr. Flowers' crimes. (Sentencing Tr., p.235, Ls.19-21.)

Finally, the district court recognized that Mr. Flowers was on parole from a felony conviction when these crimes occurred and that he has a substantial criminal history involving like crimes and allegations. Mr. Flowers "has seven misdemeanors, which include battery, unlawful entry, stalking in the second degree, no contact order violations, and criminal mischief. He received his first felony in 2008 and was sentenced to a prison term of five years determinate, fifteen years indeterminate. He was on felony parole when he received these offenses." (PSI, p.9.) The district court cited this criminal history as an additional reason why the sentences imposed were appropriate. (Sentencing Tr., p.235, Ls.6-9 ("You committed these crimes while you were on parole. I feel like correctional treatment is appropriate in this particular case."); p.236, Ls.3-6 ("I also feel imprisonment will provide an appropriate punishment and deterrence. You have got a record. And this is now – you have three felony convictions now on your record.").

In December of 2016, Mr. Flowers was on parole for raping a sixteen-year-old girl in violation of Idaho Code section 18–6101(1). (PSI, p.8; Sentencing Tr., p.208, L.14 – p.209, L.3.) He pleaded guilty to that crime in October of 2008 and, pursuant to that plea agreement, two other

charges were dropped—committing "lewd conduct upon a fourteen-year-old girl in violation of Idaho Code § 18–1508 and attempting to commit lewd conduct upon a fifteen-year-old girl in violation of Idaho Code §§ 18–306 and 18–1508." State v. Flowers, 150 Idaho 568, 570, 249 P.3d 367, 369 (2011). In that case too, Mr. Flowers argued that his sentence was excessive in light of allegedly mitigating factors. In affirming a fifteen year sentence with five years fixed, the Idaho Supreme Court stated:

> During a seven-day period, Defendant aggressively sexually molested two under-age girls and aggressively attempted to sexually molest a third. He had a mental-health evaluation in preparation for sentencing, and the evaluator stated that "it is unlikely that [Defendant] is suffering from a severe and reliably diagnosable mental illness." The evaluator concluded: "[Defendant's] unresolved issues primarily appear to be his resentment towards authority and poor boundary issues with females. He reports prior behavioral patterns of destroying females' property after challenging issues emerged during the relationship." His criminal record included convictions for criminal mischief and residential entry in 2001 in Indiana; criminal mischief, resisting law enforcement, and two batteries, one of a law enforcement officer, in 2003 in Indiana; battery in 2007 in Bannock County, Idaho, with an unlawful entry charge dismissed; using the telephone to harass in Bannock County in 2007; malicious injury to property in Bannock County in 2007; stalking in Bannock County in 2007; and violation of a no-contact order in Bannock County in 2008, with a battery charge dismissed. The probation violation in Indiana was absconding from supervision by leaving the state. Prior to imposing sentence, the district court stated that it was considering the deterrence of Defendant and others, the need to protect society, rehabilitation, and the effect of Defendant's conduct on the victim. Defendant has not shown that the district court abused its discretion in imposing sentence.

Flowers, 150 Idaho at 575, 249 P.3d at 374. The Idaho Supreme Court affirmed the sentence based on Mr. Flowers then-existing criminal history and in light of his "poor boundary issues with females" that has resulted in "behavioral patterns of destroying females' property after challenging issues emerged during the relationship." Id. As the prosecutor noted here, "the same conduct they talked about back in 2011, is the same conduct we're seeing today, and what is concerning to the state is we don't know when this conduct is going to escalate to something worse." (Sentencing Tr., p.207, L.20 – p.208, L.2.)

"A sentence is reasonable if it appears at the time of sentencing that confinement is necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." State v. Espinoza, 133 Idaho 618, 622, 990 P.2d 1229, 1233 (Ct. App. 1999) (internal quotation marks omitted). The sentences imposed by the district court here are reasonable, notwithstanding the supposedly mitigating factors identified by Mr. Flowers. The district court correctly recognized that Mr. Flowers has failed to take full responsibility for his conduct; that the crimes he committed were cruel, hurtful, and intended to intimidate Ms. Snooks; and that he has a significant criminal history, including a pattern of behavior reflecting unhealthy interactions with women. The district court considered the sentences warranted to protect society from the risk that Mr. Flowers would reoffend, to ensure that the serious nature of the crimes would not be depreciated by a more lenient sentence, and to serve the sentencing goals of retribution and deterrence. (Sentencing Tr., p.235, L.3 – p.236, L.11.) The district court's sentences constitute a reasonable and appropriate attempt to further those sentencing goals. See State v. Felder, 150 Idaho 269, 276, 245 P.3d 1021, 1028 (Ct. App. 2010) ("[T]o the extent that Felder argues that the court did not give proper weight to these [supposedly mitigating] factors by imposing a lesser sentence, he has not shown that the court abused its discretion. As pointed out by the state, while the mitigating factors identified by Felder may have some relevancy to sentencing, a court is not required to assess or balance all of the sentencing goals in an equal manner.").

CONCLUSION

The state respectfully requests that this Court affirm Mr. Flowers' conviction for felony malicious destruction of property, as well as his sentences for that conviction and his related burglary conviction. If this Court determines that the district court erred in denying Mr. Flowers' Rule 29 motion, the state respectfully requests that the Court remand to the district court with orders to vacate that conviction and order the entry of a conviction for misdemeanor malicious injury to property and resentencing for that conviction.

DATED this 20th day of February, 2019.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of February, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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AVW/vr