

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PAUL MICHAEL PHANG II,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2025-1498

[September 2, 2026]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas James Coleman, Judge; L.T. Case No. 062023CF009369A88810.

Daniel Eisinger, Public Defender, and Ethan R. Goldberg, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Jessenia J. Concepcion, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GERBER, C.J., MAY and SHAW, JJ., concur.
GERBER, C.J., concurs specially with opinion.

GERBER, C.J., concurring specially.

Many drivers have experienced the frustration of encountering an unmanned malfunctioning exit gate. That frustration is intensified when the gate has a posted phone number to call for assistance, yet no one answers when that phone number is called. That frustration can seem intolerable when occurring at two o'clock in the morning.

That was the situation which Paul Phang—a rideshare driver—encountered after he had dropped off a customer inside of a gated residential community. When Paul attempted to exit the sideways-rolling

metal gate at two o'clock in the morning, the gate would not open. Paul called the posted phone number four times over a sixteen-minute period, but the phone rang repeatedly with no answer.

Rather than calling the local police's non-emergency number, Paul literally took matters into his own hands.

Paul got out of his car and, using his bare hands, began pushing and pulling the entrance gate forward, causing the gate's sideways-pointing wheel to repeatedly become stuck in the asphalt.



After about twenty-four seconds of pushing and pulling the entrance gate to no avail, Paul began pushing the exit gate, causing the gate's sideways-pointing wheel to also become stuck in the asphalt.

Finally, Paul leaned heavily into the exit gate with great force, causing it to bend and allowing him to scrape the gate's wheel across the asphalt.



After Paul had created what he thought was just enough space for his car to squeeze through the exit gate, Paul got into his car and drove off.



Therein lies the problem. The gate was designed to only roll open sideways along a track. The gate clearly was not designed to be pushed and bent forward against the asphalt. By exerting a great amount of force to move the gate forward, Paul broke a gate post and bent the gate itself.

The community spent \$1,360 to repair the damaged post and gate. The community's manager, after reviewing the video to determine how the damage had occurred, attempted to contact Paul's rideshare company to demand reimbursement. The rideshare company required a police report to process a damages claim. So the manager called the police.

The police then tracked down Paul at his apartment. Paul not only denied his own identity, but also denied that he owned the car shown on the video—even though that car was parked outside of Paul’s apartment, and had, on the front passenger side, transfer paint matching the gate.

The community’s manager requested the police to pursue a criminal prosecution against Paul. So the police charged Paul with criminal mischief for having damaged the gate. Because the damage was greater than \$1,000, the state charged the criminal mischief as a felony.

On the day of trial, the state extended a final offer to reduce the charge to first-degree misdemeanor criminal mischief, to which if Paul pled guilty, he would receive a withhold of adjudication, be placed on the maximum twelve months’ probation, and be ordered to pay restitution of \$960 to the community. The circuit court conducted a thorough colloquy with Paul, ensuring he understood the risk of rejecting the state’s plea offer, including being adjudicated as a convicted felon if the jury found Paul guilty. Paul knowingly, intelligently, and voluntarily rejected the state’s plea offer.

So the case proceeded to a jury trial. After the state rested, and after all evidence was presented, Paul moved for a judgment of acquittal, arguing that the state had not presented sufficient evidence that he had damaged the gate “maliciously,” as section 806.13(1)(a), Florida Statutes (2023), requires be proven. The circuit court denied the motions.

The jury convicted Paul as charged. The circuit court adjudicated Paul guilty, placed Paul on twenty-four months’ probation and, as a condition of probation, ordered Paul to pay restitution of \$1,360 to the community. As the circuit court had advised Paul when he had rejected the state’s plea offer before trial, the circuit court advised Paul that if he were to violate his probation, he would be facing five years maximum in state prison.

Paul now appeals to us for relief.

We are compelled by our duty of enforcing the law as written to affirm Paul’s felony criminal mischief conviction.

As the jury was instructed based on standard criminal jury instruction 12.4, as derived from section 806.13(1)(a), Florida Statutes (2023):

To prove the crime of Criminal Mischief, the State must prove the following three elements beyond a reasonable doubt:

1. [The defendant] injured or damaged real or personal property.
2. The property injured or damaged belonged to [the community].
3. The injury or damage was done willfully and maliciously.

Fla. Std. Jury Instr. (Crim.) 12.4. (2023).

As the jury was further instructed from standard criminal jury instruction 12.4, “maliciously” means “wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.” *Id.*

However, standard criminal jury instruction 12.4’s “maliciously” element does not require the actor to harbor “ill will or hatred” in causing the damage. As the Fifth District explained in *Sanchez v. State*, 909 So. 2d 981 (Fla. 5th DCA 2005):

The traditional common law concept of malice, within the context of the crime of malicious mischief, incorporated the general notion that the offense was committed out of ill will or hatred toward the owner of the property. The element of malice also contemplated that the malicious intent could, alternatively, be directed toward the property of the owner.

The common law offense of malicious mischief evolved into the statutory crime of criminal mischief. Without recounting every step in the evolutionary process, suffice it to say that the malice requirement morphed from inclusion of ill will or hatred toward the owner of the property into a statutory element that specifically requires willful and malicious intent to injure or damage the property of the owner. Hence, although malice was incorporated into the provisions of section 806.13 as an element of the offense of criminal mischief, the mischief criminalized under this statute requires that the defendant specifically intend to damage or destroy the property of another[.]

Id. at 985 (emphases added) (internal citations omitted).

Thus, the question in this appeal is not whether sufficient evidence existed to show Paul harbored “ill will or hatred” when he damaged the gate. On the contrary, the lack of such evidence is irrelevant.

Instead, the question is whether, after viewing the evidence in the light most favorable to the state, sufficient evidence existed for a jury to determine that Paul's damage of the gate was committed "wrongfully, intentionally, without legal justification or excuse and with the knowledge that injury or damage will or may be caused to [the gate]." Fla. Std. Jury Instr. (Crim.) 12.4. See also *Jackson v. State*, 25 So. 3d 518, 531 (Fla. 2009) ("In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.") (citations omitted).

Here, such sufficient evidence existed. The security video clearly shows that when Paul began pushing and pulling the entrance gate forward, the gate's sideways-pointing wheel repeatedly became stuck in the asphalt. After about twenty-four seconds of pushing and pulling the entrance gate to no avail, Paul began pushing the exit gate, causing its sideways-pointing wheel to also become stuck in the asphalt. Finally, when Paul leaned heavily into the exit gate with great force, the gate bent and allowed him to scrape the gate's wheel across the asphalt. The jury, after watching the security video, could conclude that a reasonable person in Paul's position would have known that pushing the gate with such great force in a direction for which the gate was not designed would damage the gate.

Further, Paul damaged the gate "without legal justification or excuse." In both the circuit court and our court, Paul argued he was justified in damaging the gate because he felt "trapped" behind the unmanned malfunctioning gate at two o'clock in the morning, with no means to exit.

To the extent Paul was attempting to describe the legal justification or excuse of "duress" or "necessity," Paul did not request the circuit court to provide the jury with any such defense instruction, perhaps because the standard jury instruction makes clear the defense would not apply here:

It is a defense to the (crime charged) (lesser included offenses) if the defendant acted out of [duress] [necessity]. To find the defendant committed the (crime charged) out of [duress] [necessity], you must find the following eight elements:

It is a defense to the (crime charged) (lesser included offenses) if the defendant acted out of [duress] [necessity]. To find the defendant committed the (crime charged) (lesser included offense) out of [duress] [necessity], you must find the following eight elements:

1. The defendant reasonably believed [a danger] [an emergency] existed.

2. The defendant reasonably believed the [danger] [emergency] would cause death or serious bodily harm to [himself] [herself] [another].

3. The perceived harm of death or serious bodily injury was imminent and impending.

4. The defendant did not intentionally or recklessly place himself in a situation in which it was probable that [he] [she] would be forced to choose the criminal conduct.

5. The defendant had no reasonable means to avoid the [danger] [emergency] except by committing the (crime charged) (lesser included offenses).

6. The (crime charged) (lesser included offenses) was committed out of [duress] [necessity] to avoid the [danger] [emergency].

7. The perceived harm that the defendant avoided outweighed the harm caused by committing the (crime charged) (lesser included offenses).

8. The defendant ceased [his] [her] criminal conduct as soon as the necessity or apparent necessity for the criminal conduct ended.

“Imminent and impending” means the [danger] [emergency] is about to take place and cannot be avoided by using other means. A threat of future harm is not sufficient for this defense to apply.

The reasonableness of the defendant’s belief that [a danger] [an emergency] existed should be examined in the light of all the evidence.

In deciding whether it was necessary for the defendant to commit the (crime charged) (lesser included offenses), you must judge the defendant by the circumstances by which [he] [she] was surrounded at the time the crime was committed.

The [danger] [emergency] facing the defendant need not have been actual, however, to justify the commission of the (crime charged) (lesser included offenses), the appearance of the [danger] [emergency] must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the [danger] [emergency] could be avoided only by committing the (crime charged). Furthermore, the defendant must have actually believed the [danger] [emergency] was real.

Fla. Std. Jury Instr. (Crim.) 3.6(k) (2023).

Paul's final argument focuses on standard criminal jury instruction 12.4's inclusion of the words "wrongfully" and "intentionally" to describe the definition of "maliciously" in the criminal mischief statute. According to Paul, because his intent was not to damage the gate, but merely to exit from the malfunctioning gate, his damaging of the gate was neither "wrongful" nor "intentional" as a matter of law, thus deserving of a judgment of acquittal.

We disagree. As the state argued in the circuit court and here, Paul could have attempted to contact the local police's non-emergency number for assistance rather than attempting to open the gate himself. Or at worst, when Paul realized the gate was putting up a fight against being opened manually, and was likely to break upon further force being applied, Paul could have stopped trying to force open the gate. Given these alternatives, a sufficient question of fact existed for the jury to determine whether Paul's continued application of great force to open the gate and gain his exit was both "wrongful" and "intentional."

In rendering this opinion, we do not mean to minimize the frustrating circumstances which Paul faced that night. However, many people have faced that predicament under various scenarios, and chose either a better solution, or the patience, to avoid damaging a malfunctioning gate.

Unfortunately, Paul chose to damage the gate so he could exit the property. Paul certainly did not improve his fate by denying any involvement, much less his identity, when the police arrived at his apartment. Paul also did not improve his fate by rejecting the state's reasonable offer to accept a withhold of adjudication to a misdemeanor charge and pay restitution to the community for damaging the gate.

While some may question the fairness of Paul having a felony conviction on his record, that outcome is beyond our purview. Ultimately, Paul's poor choices led to that outcome. The circuit court, the jury, and we have performed our duty to follow the law as written in deciding this case.

* * *

Not final until disposition of timely-filed motion for rehearing.