

64647-8

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No. 64647-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

S.S,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

The Honorable Julia Garratt

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In the juvenile respondent S.S.'s adjudicatory hearing on a charge of second degree arson, the evidence was insufficient to prove every essential element of the offense beyond a reasonable doubt.

2. The juvenile court's entry of a determination of guilt in the absence of sufficient evidence violated S.S.'s right to due process under the Fourteenth Amendment.

3. The juvenile court erred and violated the defendant's Sixth Amendment and state constitutional right to confrontation, in refusing to sever the prosecution of S.S. from that of his co-respondent K.W.

4. The erroneous denial of the motion to sever was not harmless beyond a reasonable doubt and requires reversal of S.S.'s arson conviction.

5. The juvenile court erred in entering JuCR 7.11(d) finding of fact 13.

6. The juvenile court erred in entering JuCR 7.11(d) conclusion of law VI(c).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence was insufficient to prove every essential element of the offense of second degree arson beyond a reasonable doubt, where there was no evidence of malice.

2. Whether the juvenile court erred in refusing to sever the prosecution of S.S. from that of his co-respondent K.W., under Bruton v. United States¹ and CrR 4.4(c)(1(i), where the co-respondent's statement could not be adequately redacted.

3. Whether the failure to sever respondents requires reversal where the erroneously admitted evidence was not cumulative, and where the remaining evidence of guilt was not overwhelming.

C. STATEMENT OF THE CASE

On February 12, 2009, King County Sheriff's Office fire investigator Tom Devine responded to a location in Burien to investigate a fire that apparently started on a utility golf-style cart, spread to a "conex" storage facility, damaging it, and caused smoke damage to a bowling alley and portions of the Wizards

¹Bruton v. United States, 391 U.S. 123, 128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Casino. CP 2; 7/16/09RP at 41-44. According to the affidavit of probable cause,

[a] fire was set to the vinyl and foam padded seat of a Cushman golf cart with the resulting fire extending to the cedar wood fence enclosure and a metal conex. The heat transfer from the fire to the conex resulted in igniting the combustible materials in the conex. The smoke from the fire entered the ventilation system of the nearby Bowling Alley and then into the common occupied areas located approximately 60 feet to the north of the fire.

CP 2. Upon arrival at the facility, Devine viewed a security camera videotape that showed two males leaving the area of the golf cart and conex enclosure shortly before the blaze. 7/16/09RP at 73-74. While still at the facility, Devine observed the respondents S.S. and K.W. walking in an adjacent area; facility employees said they were the males in the earlier video, and Devine approached and arrested them. 7/16/09RP at 81.

After orally advising S.S. and K.W. of their Miranda² rights, the investigator began questioning the respondents, and they denied any knowledge of the fire. 7/16/09RP at 90. Upon further, separate questioning at the scene, each respondent admitted that

²Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the two of them had been in the enclosure, smoking cigarettes, and igniting various plastics and flammable over-the-counter medications. These burning materials which dripped onto the seat of the golf cart and burned the seat. 7/16/09RP at 91-92.

After securing these admissions, Devine subsequently took tape-recorded statements from both respondents. 7/16/09RP at 92-94. The respondents' attorneys stipulated to the admissibility of the juveniles' statements. 7/16/09RP at 93-94.

S.S. and K.W. were ultimately charged by a second amended information with one count of Second Degree Arson pursuant to RCW 9A.48.030. CP 7. The information alleged that appellant S.S., "together with another . . . did knowingly and maliciously cause a fire and explosion which damaged a golf cart, fence, and items in a metal conex, property located at 15733 Ambaum Boulevard Southwest[.]" CP 7.³

³Pursuant to RCW 9A.48.030, the felony crime of arson in the second degree is defined as follows:

A person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion which damages a building, or any structure or erection appurtenant to or joining any building, or any wharf, dock, machine, engine, automobile, or other motor vehicle, watercraft, aircraft, bridge, or trestle, or hay, grain, crop, or timber, whether cut or standing or any range land, or pasture land, or any fence, or any lumber, shingle, or other timber products, or any property.

The court denied S.S.'s motion to sever the respondents for separate adjudicatory hearings based on the respondent's implication of each other in their respective statements. 7/16/09RP at 17-18, 31, 100, 144; see Part D.1, infra. Investigator Devine, along with employees of the casino, testified at the adjudicatory hearing, and the respondents' statements to Devine were admitted unredacted following several redacted versions. 7/16/09RP at 17-18, 31, 40, 153, 189; Supp. CP ____, Sub # 34A (Exhibits 13-18).

Following the hearing, the juvenile court issued an oral ruling and subsequently entered JuCr 7.11(d) findings of fact and conclusions of law. 7/16/09RP at 231; CP 19-24. The juvenile court concluded on the basis of the facts found that the respondents S.S. and K.W., in violation of RCW 9A.48.030, "caused a fire which damaged property located at or near 15733 Ambaum Boulevard Southwest" and that the "fire was caused knowingly and maliciously." CP 22-23.

S.S.'s motion for revision was denied. CP 8, CP 10. The

RCW 9A.48.030(1).

juvenile court entered a disposition of confinement for time served, and 12 months community supervision. CP 11-17. S.S. timely appealed. CP 18.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT S.S. COMMITTED SECOND DEGREE ARSON.

a. Conviction for second degree arson requires proof of malice. Evidence is sufficient as required for a criminal conviction by the 14th Amendment's Due Process Clause, if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); U.S. Const. amend. 14. When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the States evidence, and all reasonable inferences therefrom are drawn in favor of the State. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). However, the reviewing court will reverse a conviction for insufficient evidence if no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d

559 (2005).

Pursuant to RCW 9A.48.030, arson in the second degree is defined as follows:

A person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion which damages a building, or any structure or erection appurtenant to or joining any building, or any wharf, dock, machine, engine, automobile, or other motor vehicle, watercraft, aircraft, bridge, or trestle, or hay, grain, crop, or timber, whether cut or standing or any range land, or pasture land, or any fence, or any lumber, shingle, or other timber products, or any property.

RCW 9A.48.030.

b. S.S. contends there was no proof of malice. It is correct that malice, under RCW 9A.04.110(12)'s definition of the term as meaning to vex, annoy, or injure another person, does not require ill will. State v. Nelson, 17 Wn. App. 66, 69-72, 561 P.2d 1093 (1977) (for purposes of arson, malice does not require evidence of personal ill will toward the owner of the damaged property). Malice may be inferred from circumstantial evidence that a fire was deliberately set. State v. Clark, 78 Wn. App. 471, 481, 898 P.2d 854 (citing State v. Simmons, 28 Wn. App. 243, 247, 622 P.2d 866 (1980), review denied, 95 Wn.2d 1015 (1981)), review

denied, 128 Wn.2d 1004, 907 P.2d 296 (1995).

However, S.S. contends that the present case fails on the question of malice. He contends the trial court used evidence that he set a fire on the seat of the golf cart to conclude that he intentionally and maliciously set fire to the entirety of the structures that were burned and damaged. See CP 20-23 (findings of fact). S.S. contends that he had no intent other than to burn the seat of the golf cart.

Therefore, he urges, the juvenile court should properly have found him guilty only of the lesser included offense of Reckless Burning, per RCW 9A.48.040, which provides for guilt if the respondent "recklessly damages a building or other structure." S.S. argues that he was only reckless as to the greater damage caused, and argues that malice does not follow beyond a reasonable doubt from conduct which is merely reckless or negligent. See State v. Johnson, 23 Wn. App. 605, 596 P.2d 1047 (1979).

**2. THE JUVENILE COURT VIOLATED
RESPONDENT S.S.'s SIXTH AMENDMENT
RIGHTS UNDER BRUTON AND JuCR
4.4(c)(1), REQUIRING REVERSAL.**

Prior to and during the adjudicatory hearing, the juvenile court denied S.S.'s twice-renewed motion to sever the respondents' prosecutions, which motion was brought under authority of CrR 4.4; Bruton v. United States; and the confrontation clauses of the Sixth Amendment and Article 1, § 22 of the Washington Constitution.

S.S.'s counsel recognized that the deputy prosecutor contended that the dictates of Bruton do not apply to juvenile bench trials. The State argued that no redaction was required because the juvenile court, in the joint bench trial of the respondents, could properly ignore any implicatory and otherwise inadmissible statements made by the respondents with regard to each other. 7/16/09RP at 33-34.

a. Bruton and the powerful prejudice of the implicatory statements of a co-accused. S.S. argued below and argues on appeal, that Bruton v. United States, and CrR 4.4(c)(1)(i), which is mandatory, required severance of S.S.'s adjudicatory hearing from that of his co-respondent K.W., because of the impossibility of

adequately redacting the statement provided to the police by K.W.
7/16/09RP at 31-32.

In the seminal case of Bruton v. United States, 391 U.S. 123, 128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that a co-defendant's confession implicating his co-defendant, if admitted at a joint trial of both accused, is prejudicial error regardless of any cautionary manner in which the trier of fact is directed to ignore the co-accused's statements about the other defendant. Bruton v. United States, 391 U.S. at 128.

Although one of the Court's concerns was a lay jury's inability to ignore a trial court's cautionary instructions in this context, the Court's language throughout its opinion speaks to the powerfully inculpatory and seemingly facially inherently reliable nature of a co-defendant's 'fingering' of another as a perpetrator. Bruton v. United States, 391 U.S. at 135-36.

b. CrR 4.4 required severance, rather than redaction, in the present case. In the present case S.S. argued that the prejudice caused by presentation of the co-respondent K.W.'s implicatory statements, in the adjudicatory hearing of the other respondent, was so constitutionally offensive that compliance with

Bruton was necessary for a fair trial. 7/16/09RP at 31-32.

In addition, the defense argued that CrR 4.4 makes severance or redaction mandatory, rather than discretionary. 7/16/09RP at 31-32. To comply with Bruton, the Washington Supreme Court adopted CrR 4.4, which requires separate trials unless the defendant's confession is redacted to exclude references implicating the co-defendant. The result in Bruton was squarely mandated by the Sixth Amendment's and the state constitution's confrontation guarantees. U.S. Const. amend. 6; Wash. Const. art. 1, § 22. Thus CrR 4.4(c) provides in pertinent part as follows:

CrR 4.4

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

* * *

(c) Severance of Defendants.

(1) A defendant's motion for severance on the ground that an out-of-court statement of a

codefendant referring to him is inadmissible against him shall be granted unless:

- (i) the prosecuting attorney elects not to offer the statement in the case in chief;
- or
- (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

CrR 4.4. As noted supra, S.S. properly moved for severance under Bruton and renewed the motion several times before the close of evidence. 7/16/09RP at 17-18, 31, 100, 144.

The constitutional authority requiring adoption of CrR 4.4 is a recognition that a co-defendant's confession may in fact, despite its inherent persuasive prejudice when interjected into the fact-finder's consideration, be presumptively unreliable as to passages that detail the defendant's conduct or culpability, because such passages may be the product of the co-defendant's desire to shift or spread blame, curry favor, or divert attention to another. See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Bruton v. United States, 391 U.S. at 128. And of course, the gravamen of the constitutional error is the fact that the defendant is unable to cross-examine the co-defendant – who effectively becomes a witness against the defendant – because of

the co-defendant's Fifth Amendment privilege against being compelled to be examined at his trial. Bruton v. United States, 391 U.S. at 128.

Thus, the failure of the trial court to exclude the incriminating statement of a non-testifying co-defendant may violate a criminal defendant's constitutional right to confront adverse witnesses, as well as his right to a separate trial under the provisions of CrR 4.4(c)(1). State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002); State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980).

Specifically, CrR 4.4(c)(1) provides that a defendant's motion for severance on the ground that an out-of-court statement of a co-defendant referring to him is inadmissible against him, will be granted unless either the prosecuting attorney elects not to offer the statement in the case in chief or deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement. CrR 4.4(c)(1).

In the present case, the parties virtually agreed that, because 'sanitizing' of K.W.'s confession by elimination of references to the respondent S.S. and alteration of plural pronouns changed the meaning of the statements, and because Bruton

redaction also resulted in removal of exculpatory material. Therefore, redaction was constitutionally inadequate, and severance was required in the interests of justice. 6/17/09RP at 16-19. The State argued only that redaction was entirely unnecessary because the court was the trier of fact. 6/17/09RP at 18-19.

Under the rule, the defendant must move for severance in order to force an election by the prosecution. The prosecution must then elect to (1) abandon the statement as evidence in the case in chief, (2) admit the statement only after editing all references to the defendant, if editing can avoid prejudice, or (3) try the moving defendant separately. Editing of the confession is the alternative to severance, for in this way the confession can be used against the maker without the added expense of separate trials. State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2001).

There are situations, however, in which such editing is not possible. The references to the other defendant may be so frequent or interrelated with references to the statement maker's conduct that the statement would be rendered useless after editing; moreover, merely deleting the defendant's name may not eliminate

prejudice. If the statement indicates that another unnamed party is involved in the crime, the trier of fact is likely to infer that the other defendant is that party. See, e.g., State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2006) (alterations of confession's language did not satisfy goal of Bruton's redaction requirement).

Here, in the agreed absence of the ability to adequately redact the co-respondent's statement, severance was required. CrR 4.4(c)(1)(i).

c. The failure to sever the respondent's adjudicatory hearing requires reversal. S.S. contended that CrR 4.4(c)(i) mandated severance since the court was going to be unable to adequately redact the co-respondent K.W.'s confession given to investigator Devine. 7/16/09RP at 31.

Here, the prosecutor simply urged that the juvenile court could properly ignore any parts of the co-respondent K.W.'s confession that implicated S.S. 7/16/09RP at 35. The juvenile court in turn stated that it would not, and that it did not, consider either of the co-respondent's statements in its adjudications of guilt. CP 19. S.S. contends that these reassurances were inadequate.

In this case, it became quite clear that ignoring the

implicatory nature of K.W.'s confession was not so easily accomplished. The deputy prosecutor himself was unable to resist using the co-respondent's confession statements to implicate S.S. See 7/16/09RP at 193 (defense objection to deputy prosecutor's reference to statements made by K.W. in arguing against S.S.'s motion to dismiss following close of State's case).

Bruton errors may be harmless, but only if a high standard is met. If it is shown beyond a reasonable doubt that no prejudice to the defendant resulted from the admission of the co-defendant's implicatory statement, the Bruton error is harmless. State v. Peyton, 29 Wn. App. 701, 630 P.2d 1362 (1981).

The cumulative nature of evidence introduced erroneously under Bruton, along with the presence of other overwhelming evidence of guilt, may suffice for harmlessness. Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (Bruton error harmless where evidence cumulative, and evidence of guilt overwhelming).

Here, however, the juvenile court's finding of guilt as to S.S. was predicated on the findings of fact, which are almost entirely a review of statements made by both respondents. S.S. contends

that, despite the court's statement that it did not consider the statements of either respondent with respect to the other, these statements were so inculpatory that no trier of fact could completely disregard their incriminating nature as to the other co-respondent. S.S. admitted he purchased drugstore tooth medication. CP 20 (Finding of fact 5).

However, the critical finding that S.S. had burned the plastic swabs from the tooth medication and dripped the burning plastic onto the seat of the golf cart was based on an admission that plainly came from either the other respondent or both of the respondents. CP 20 (finding of fact 7). Throughout the findings, it is generally the case that the inculpatory statements came from both respondent's statements, and the juvenile court did not or could not separate the statements and attribute them to one particular accused.

In addition, the other evidence in the case, which was testimony that the respondents were seen on videotape leaving the area, is not overwhelming. In an older Washington case, an arson verdict was sustained on a sufficiency challenge, based on circumstantial evidence including the fact that the defendant was

present near several fires under very suspicious circumstances.

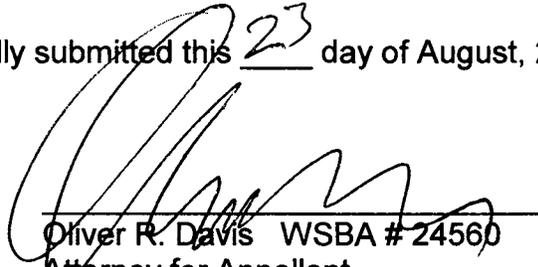
State v. Turner, 58 Wn. 2d 159, 161, 361 P.2d 581 (1961).

However, simple evidentiary sufficiency is not the standard for
harmlessness of this constitutional error. Reversal is required.

E. CONCLUSION

Based on the foregoing, S.S. respectfully requests that this
Court reverse the judgment and sentence of the juvenile court.

Respectfully submitted this 23 day of August, 2010.



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