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COURT OF APPEALS
STATE OF WASHINGTON
2010 OCT -1 AM 10:37

No. 64831-4-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

SAUL LIRA, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the information charging Lira with malicious mischief in the first degree was deficient because it substantively misstated the value of damage required under the statute.
2. Whether convicting Lira of two separate crimes, malicious mischief in the first degree and arson in the first degree violate double jeopardy even though each of these crimes targets distinct behavior and are comprised of different elements.
3. Whether this case should be remanded for a new restitution hearing because Lira was not present at the hearing below as required by the terms of his judgment and sentence and because the amended order substantively changed the amount of restitution ordered.
4. Whether Lira's judgment and sentence should be corrected to reflect the correct community custody provision.

C. FACTS

On August 12th, 2009, Saul Lira was charged via information with one count of arson in the first degree (DV), one count of malicious mischief in the first degree (DV) and five counts of felony harassment (DV) in violation of RCW 9A.48.020(1), 9A.48.070(1)(a) and 9A.46.020(1)(a)(i) and (2)(b). On November 9th, 2009 the prosecutor filed

an amended information charging Lira with arson in the first degree, malicious mischief in the first degree and only one count of felony harassment. CP 66-67.

At trial Lira testified he started the fire on August 7th, 2009 at 2525 Verona street in Bellingham, Washington after he repeatedly was flicking a lighter on a feather comforter in an upstairs bedroom. RP 200. Lira lived in this house with his girlfriend Leah Vandermeulen, his cousin Anna and another cousin Ignacio Flores and Flores's brother Poncho. RP 61-62. On the evening of the fire, Lira got into a heated argument with his girlfriend who wanted to go out and party, instead of staying home with her daughter and friend, who were visiting. RP 201, 203. The argument escalated to the point that Lira and Vandermeulen were screaming and pushing each other around. RP 87. Vandermeulen finally left and Lira, still angry, stayed upstairs in the home with his cousin Ignacio. RP 88. Ignacio tried to calm Lira down but was unsuccessful. RP 88-89. Lira, who was intoxicated, began threatening Ignacio, hitting himself and then messing around with a "bic" lighter. RP 88-91, 201-203, 222. Lira began flicking his "bic" lighter toward a feather blanket on top of

Vandermeulen's bed until a small fire would start and then Ignacio would pat it out. RP 92, 217. Ignacio estimated he extinguished three to five fires started by Lira. RP 92.

Eventually, Ignacio went downstairs and told all of the children to get out of the house and called his uncle to come help calm Lira down because he was worried Lira would do something outrageous. RP 92-93. When Ignacio returned upstairs he found Lira in the bedroom watching as the bed burned. RP 93. This time, neither Lira nor Ignacio could extinguish the fire. RP 93-96. Lira explained at trial he didn't meant to start the fire, he just wanted to hurt himself or hurt something. RP 219.

Following a jury trial Lira was convicted of arson and malicious mischief in the first degree but acquitted of the felony harassment charge. CP 27, 28, 67 and 15-24. Lira received a standard range sentence of 42 months for the arson in the first degree offense and 6 months for the malicious mischief conviction. CP 15-24. Lira was also sentenced to 18-36 months community custody for the arson conviction. Id.

D. ARGUMENT

- 1. The information charging Lira with malicious mischief in the first degree omitted an essential element pertaining to value of damages. Lira's conviction should be reversed.**

Lira asserts for the first time on appeal that the information charging him with malicious mischief in the first degree is deficient because it omitted an essential element of the crime. Specifically, the information erroneously set out the dollar value of the damage allegedly caused to support the charge of malicious mischief in the first degree. The State concedes error and requests Lira's conviction for malicious mischief reversed and this matter remanded for dismissal of this charge without prejudice.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003).

When a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. Kjorsvik, 117 Wn.2d at 105. In contrast, when an information is challenged before the verdict, “the charging language must be strictly construed.” State v. Taylor, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). The two distinct standards of review are intended in part to “encourage defendants to make timely challenges to defective charging documents to discourage ‘sandbagging’” Id at 237. This Court should employ the liberal construction standard of review because Lira did not challenge the sufficiency of the information until now.

Under the liberal construction rule, the question is whether the missing element may be fairly implied from the language within the information. Id. If so, whether the defendant has shown he or she was actually prejudiced by the insufficient language that caused the lack of notice. Kjorsvik, 117 Wn.2d at 105-06. An information challenged on appeal need not use the exact words of the statute, “so long as the words used adequately convey the same meaning.” State v. Trensenriter, 101 Wn.App. 486, 492, 4 P.3d 145 (2000), *citing* State v. Ralph, 85 Wn.App. 82, 85, 930 P.2d 1235 (1997). *See also* RCW 10.37.050(6) regarding

sufficiency of the charging information "... that the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what was intended."

The information charging Lira with malicious mischief stated:

That on or about the 7th day of August, 2009, the said defendant, SAUL LIRA, then and there being in said county and state, did, knowingly and maliciously cause physical damage in an amount exceeding one thousand Five hundred dollars (\$1,500.00) to the property of another in violation of RCW 9A.48.070(1)(a), which violation is a Class B felony.

CP 66. The malicious mischief statute was amended in 2009 to increase the value element required from \$1,500.00 to \$5000.00. *See* LAWS 2009, Ch. 431, §4. This new statute was in effect, July 26th, 2009 before Lira committed this crime. *Id.* Therefore, the information charging Lira with malicious mischief erroneously misstates the value element that is required for malicious mischief in the first degree. Consequently, the information is deficient. *See, State v. Moavenzadeh*, 135 Wn.2d 359, 956 P.2d 1097 (1998) (Information for second degree theft constitutionally defective because the property value element was omitted). The State respectfully concedes error. Lira's conviction for malicious mischief should be

reversed and this matter remanded to the trial court for dismissal of the charge without prejudice.

2. Lira's convictions for malicious mischief and arson in the first degree do not violate the prohibition against double jeopardy because the legislature defines these offenses distinctly and separately.

Lira contends his convictions for malicious mischief in the first degree and arson in the first degree violate the prohibition against double jeopardy because both offenses are based on the same conduct. In light of the State's concession that Lira's mischief conviction should be reversed due to a charging error, this Court need not reach this issue. If this Court chooses to reach this issue however, Lira's double jeopardy argument should be rejected because malicious mischief in the first degree and arson in the first degree are separate and distinct offenses.

The double jeopardy clause of the Fifth Amendment and Washington State Constitution Art 1, §9 prohibit multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). If a defendant's conduct supports charges under multiple criminal statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes at issue. *Id.* If the statute

expressly authorizes multiple punishments, there is not double jeopardy violation.

If the statutes do not expressly authorize multiple punishments for the same act, courts turn to the “same evidence” rule of construction. State v. Hughs, 166 Wn.2d 675, 681, 212 P.2d 558 (2009). Multiple convictions violate double jeopardy under the same evidence test if these offenses are the same “in law” as they are “in fact.” State v. Calle, 125 Wn.2d at 777. Even if the two statutes pass the “same evidence” test, multiple convictions may violate double jeopardy if there is clear evidence the legislature intended to only pose one punishment for the particular act. Id. at 778-81. Alleged double jeopardy violations are reviewed de novo. State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

Lira was convicted of knowingly and maliciously causing a fire or explosion which was manifestly dangerous to human life and or which damaged a dwelling and/or a building in which there was at the time a human being who was not a participant in the crime. CP 29-55, RCW 9A.480.020. Lira was also convicted of malicious mischief in the first degree predicated on his knowingly and maliciously causing physical

damage to another person's property in an amount exceeding \$5,000.00.

RCW 9A.48.070(1)(a).

Under the "same evidence test" if there is an element in each offense which is not included in the other and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy provisions of the constitutions do not preclude convictions for both offenses. State v. Calle, 125 Wn.2d at 777. The statutory elements of these two crimes in this case differ substantially- arson requires a person to *cause a fire* or explosion which is dangerous to human life or damages a dwelling or to a building in which there was a person inside. The malicious mischief conviction conversely requires Lira cause physical damage to another person's property in excess of \$5000.00. Because each of these offenses requires proof of a different element not found in the other and proof of one offense would not prove the other, these two offenses are not legally the same for constitutional purposes and the double jeopardy clause does not preclude convictions for both offenses.

Lira argues however, that the "same evidence" test is not dispositive and that these two convictions violate double jeopardy even

though there are different legal elements for each offense. Br. of App. at 8. Specifically, Lira asserts the legislature only intended to impose one punishment for these two offenses because each statute is directed at the same evil and are included in the same chapter of the criminal code.

In State v. Valentine, 108 Wn.App. 24, 29 P.3d 42 (2001), the court concluded that even though second degree assault and murder do not have the same elements, convictions for both offenses violates double jeopardy because it determined the legislature could not have intended to create multiple punishments for the same assaultive conduct. Here however, contrary to Valentine and contrary to cases relied on by Lira, there are two different evils addressed in the separate statutes Lira was charged with-knowingly and maliciously causing property damage as distinguished from knowingly and maliciously causing a fire dangerous to human life or to a building occupied by a person. Lira did both. He maliciously caused significant damage to the house by destroying it with fire and he maliciously caused a fire that was dangerous to human life. Under these circumstances, despite these statutes falling within the same chapter of the Washington criminal code, it is clear the legislature intended

to authorize punishment for both these crimes to deter both evils.

Consequently, there is no double jeopardy concern.

3. The ex parte order amending the amount of restitution should be vacated and the matter remanded for a restitution hearing giving Lira' notice and an opportunity to respond to the state's request to substantively amend restitution.

At sentencing, Lira was ordered to pay restitution in the amount of \$55, 933.00 to Mary Vanderveen, owner of the home damaged in the fire.

CP 22. In this same judgment and sentence, Lira indicated he refused to waive his right to be present "at any restitution hearing." CP 20. On March 9th, 2010 the state filed an Motion and affidavit for Order to Amend Payee and Restitution Amount seeking to substantively amend the restitution to reimburse both State Farm Insurance and the Vanderveens. CP 78-85. Specifically, the state sought to amend the restitution order to require Lira to pay an increased amount in restitution in the amount of \$64, 723.72 to State Farm Insurance and \$500.00 to the Vanderveens. Id.

On April 1st, 2010 a hearing was held without Lira's presence. CP 77. Lira's attorney, Lance Hendrix was also not available for the hearing and another attorney, Peterson, from Hendrix office stood in. Id. Peterson objected to the State's proposed order and requested a continuance to

allow Lira's trial attorney to handle the matter. *Id.* The trial court denied this request and entered the order amending the amount of restitution owed and the payees. CP 75-76.

Lira contends he had a constitutional right to be present at the subsequent restitution hearing. Br. of App. at 14. Regardless of whether there is or is not a *constitutional* right to be present at this particular restitution hearing, Lira was as a matter of due process, entitled to notice and the opportunity to be present at the hearing below pursuant to the terms of his judgment and sentence and because the state was seeking to substantively increase the amount of restitution owed within the judgment. State v. Hotrum, 120 Wn.App. 681, 684, 87 P.3d 766 (2004). In Hotrum, ex parte restitution orders entered to extend jurisdiction pursuant to statute did not violate due process or necessitate the defendant's presence at a hearing below because the orders did not substantively modify the terms of the original judgments. In contrast, the State in this case was seeking to modify the quantity of restitution owed. The State therefore agrees the amended order of restitution should be vacated and this matter remanded to the trial court for a restitution hearing to give Lira notice and the

opportunity to respond to the State's request to amend the order on restitution.

4. This matter should be remanded to the trial court to correct the community custody provisions in Lira's judgment and sentence.

Lira contends the court erroneously imposed 18-36 months of community custody at sentencing. The State agrees, pursuant to RCW 9.94A.701(2) the court was only authorized to impose 18 months community custody term at sentencing. See, Br. of App. at 19-20. RCW 9.94A.701(2) was amended in July 2009 to reflect that those person's convicted of a violent offense were subject to a determinant 18 month term of community custody. See, LAWS of 2009, ch.375, §5. The State concurs in Lira's request to remand this matter to the trial court to correct the community custody term of his judgment and sentence. In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). [W]hen a sentence has been imposed for which there is no authority of law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." Id.

E. CONCLUSION

For the reasons set forth above, the State requests Lira's conviction for arson in the first degree be affirmed, his conviction for malicious

mischief be reversed and remanded for dismissal without prejudice and this matter be remanded for restitution hearing and correction of the community custody provision of Lira's judgment and sentence.

Respectfully submitted this 30 day of September, 2010.

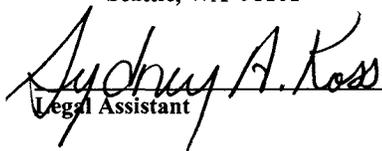


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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Maureen Cyr, addressed as follows:

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Legal Assistant

09/30/2010
Date