

72452-5

FILED
May 28, 2015
Court of Appeals
Division I
State of Washington

72452-4

No. 72452-5-I

King County Superior Court No. 14-1-03526-4

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

CESAR RAMOS-AVILA,
Defendant-Appellant.

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

The Honorable Richard McDermott, Judge

APPELLANT'S OPENING BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....3

 A. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT
 THE JURY ON THE LESSER DEGREE OFFENSE OF
 SECOND DEGREE ARSON3

V. CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	4
<i>State v. Hobart</i> , 34 Wn. App. 187, 659 P.2d 557, <i>review denied</i> , 99 Wn.2d 1017 (1983)	4, 5
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997)	4
<i>State v. Southerland</i> , 109 Wn.2d 389, 745 P.2d 33 (1987)	4

Statutes

RCW 10.61.003	4
RCW 10.61.010	4
RCW 9A.04.110	3
RCW 9A.48.020	1, 3, 5
RCW 9A.48.030	3

Other Authorities

13A.Wash. Prac. § 106	4
WPIC 80.05	2

I.
ASSIGNMENTS OF ERROR

The trial court erred in failing to instruct the jury on the lesser degree offense, second degree arson, when there was substantial evidence that the defendant only set fire to a building rather than a dwelling.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Where the defendant was charged with first degree arson of a “dwelling,” but the evidence demonstrated that the defendant set fire to the exterior portion of an apartment doorway, did the trial court err in failing to instruction the jury on second degree arson, a lesser degree crime?

III.
STATEMENT OF THE CASE

Cesar Ramos-Avila was charged with one count of first degree arson in violation of RCW 9A.48.020(1)(b); that is, knowingly and maliciously causing a fire to a dwelling. CP 2.

On the night of May 17, 2014, Pablo Ramirez had a physical altercation with Ramos-Avila in a store parking lot. 8/14/14 RP 68. During that altercation, he lost his wallet. 8/14/14 RP 72. Ramirez did not know Ramos-Avila, but later identified him from a photo montage. 8/14/14 RP 74; 8/18/14 RP 61.

The next day, a fire was set outside the front door of Ramirez's apartment. 8/14/14 RP 66. Ramos-Avila was seen running from the scene. 8/14/14 RP 7-56. He was arrested a short distance away. 8/14/14 RP 95.

The fire damaged a stairwell and the metal exterior door to Unit 12, where Ramirez lived. 8/18/14 RP 41; Exhibits 11-14. After burning three to five minutes, the fire was extinguished by another resident. 8/18/14 RP 43.

At the close of trial, Ramos-Avila proposed instructions regarding second degree arson. Supp. CP ___¹; WPIC 80.05. The trial judge held that:

Lesser included offense instructions must be given if each element of the lesser offense is a necessary element of the offense charged, and there is evidence to support an inference that the lesser crime was committed. And then it goes on to talk about arson in the first degree definition. It is clear to me, in reading over this case and in looking at the instructions, and reading over the WPIC's and the comments, that arson in the first degree is intended to cover the instance when a dwelling, such as an apartment building, is set fire, someone sets fire to it, and there are people in that dwelling. And therefore, the life of those people is placed in danger, which is much different if you set fire to an apartment building and no one is there.

8/18/14 RP 99. Thus, he concluded that no jury could reasonably return a verdict for second degree arson. *Id.*

¹ A supplemental designation of clerk's papers was filed in the King County Superior Court on May 28, 2015.

The jury later convicted Ramos-Avila as charged. Judgment and sentence were entered. CP 56-64. This timely appeal followed. CP 55.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER DEGREE OFFENSE OF SECOND DEGREE ARSON

First degree arson – as charged in this case – required the State to prove Ramos-Avila set fire to a “dwelling.” RCW 9A.48.020(1)(b). A dwelling is defined as “any building or structure that is used or ordinarily used by a person for lodging.” RCW 9A.48.030. Second degree arson requires the State to prove that the defendant set fire to a “building.” A building includes any “dwelling.” RCW 9A.04.110.

Here, the trial judge erred because the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense.

A defendant has a statutory right to have lesser degree offenses presented to a jury when:

- (1) the statutes for both the charges offense and the proposed inferior degree offense “proscribe but one offense”;
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and
- (3) there is evidence that the defendant committed only the inferior offense.

State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997); *see also State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000); *see also* RCW 10.61.003, RCW 10.61.010. The failure of the trial court properly to instruct the jury is presumed to be prejudicial to the defendant unless the error affirmatively appears harmless. *State v. Southerland*, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987).

In this case, viewing the evidence in a light most favorable to the defendant, a jury could have reasonably concluded that Ramos-Avila committed only the lesser offense. The evidence demonstrated conclusively that Ramos-Avila damaged a portion of a building, and the jury could have reasonably concluded that persons do not ordinarily “lodge” in the stairwell of the building. Thus, the evidence supported instruction on the lesser degree crime. Under these circumstances, the error is not harmless.

Although the State relied on *State v. Hobart*, 34 Wn. App. 187, 659 P.2d 557, *review denied*, 99 Wn.2d 1017 (1983), the commentators have concluded that the case was erroneously decided. 13A.Wash. Prac. § 106, fn.25. There, the Court of Appeals overlooked the fact that one can be convicted of a lesser degree of the crime charged, even though the lesser degree involves different elements. The trial judge fell into the same trap here. He utilized the test for determining whether or not a jury should

be instructed on a lesser included offense, not the test for lesser degree crimes.

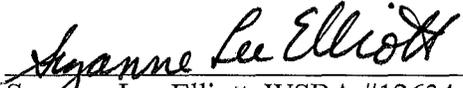
Further, the trial court's rationale for failing to give the instructions was faulty in a different way. He determined that the lesser degree instruction was inappropriate because "the life of those people (residents of the apartment) is placed in danger." But the State did not charge Ramos-Avila with RCW 9A.48.020(1)(a) or (c). Thus, the presence of the persons in the building at the time of the fire was irrelevant to either the first degree arson, as charged, or second degree arson. Under the peculiar charging circumstances here, the trial court was also required to instruct the jury under the lesser included offense test. All of the elements of the greater crime are included in the lesser crime because – notwithstanding the reasoning in *Hobart* – the statutes clearly state that a building may also be a dwelling for purposes of second degree arson.

V. CONCLUSION

For the reasons stated above this Court should reverse and remand for a new trial.

DATED this 28th day of May, 2015.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Cesar Ramos-Avila

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

Mr. Cesar Ramos-Avila #377820
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

05/28/2015
Date


Peyush Soni