

No. 38690-9-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

WAYNE ANTHONY MURPHY,

Appellant.

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STATE OF WASHINGTON  
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On Appeal from the Pierce County Superior Court  
Cause No. 07-1-04577-7  
The Honorable John Hickman, Judge

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OPENING BRIEF OF APPELLANT

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*pin 8/15/09*

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to present substantial evidence to support each of the alternative means of arson charged in the information and included in the instructions to the jury.
2. The State failed to present substantial evidence to prove that the fire was “in a building.”

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Should Appellant’s arson conviction be reversed, where the State failed to present any testimony or evidence that the fire was “in a building,” one of the two alternative means charged and instructed in this case? (Assignments of Error 1 & 2)
2. Where the State’s evidence showed that the fire originated outside, burned only the outside of the apartment building, and any damage to the interior of the building was caused by heat or smoke, not the fire itself, did the State fail to present substantial evidence to support the “in a building” alternative means of arson? (Assignments of Error 1 & 2)

## **III. STATEMENT OF THE CASE**

### **A. Procedural History**

The State charged Wayne Anthony Murphy in Pierce County Superior Court with one count of first degree arson (RCW

9A.48.020(1)(b), (c)) and one count of felony harassment (RCW 9A.46.020). (CP 19-20) Before trial, Murphy alleged that the prosecutor had intimidated the alleged victim into giving incriminating statements against him. (RP1 8-10; RP3 69-72; RP4 255-61; CP 13-17)<sup>1</sup> The trial court held a hearing, and determined that the testimony did not support Murphy's allegation of prosecutorial misconduct or his allegation that the State had tried to influence the victim's testimony. (RP3 166-83; RP4 207-50, 261-64)

Following a CrR 3.5 hearing, the trial court ruled that statements made by Murphy to the arresting officer, and Murphy's subsequent tape-recorded statement given to the investigating officer, were admissible because they were given after a knowing and voluntary waiver of his rights. (RP2 22-36; RP3 62-65, 83-92, 156-60) The prosecutor played Murphy's statement to the jury during the investigating officer's trial testimony. (RP5 328) But after discovery of new case law holding that the procedure used in recording Murphy's statement was improper, the trial court and both

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<sup>1</sup> Citations to the transcripts containing pre-trial and trial proceedings, numbered volumes I-XVI (1-16) will be to the volume number (RP#) followed by the page number. Citations to the transcript containing the sentencing hearing on 11/21/08 will be to the date of the proceeding followed by the page number.

parties agreed that the recording should not have been played to the jury, and that the only appropriate remedy was a mistrial. (RP6 480-91)

Following a second trial, the jury found Murphy guilty of arson and of misdemeanor harassment. (RP16 1040-41; CP 88-90, 107) The trial court imposed a standard range sentence totaling 140 months. (11/21/08 RP 7; CP 97, 100, 107-11) This appeal timely follows. (CP 112)

B. Substantive Facts

In the summer of 2007, Rebecca Seabert and her daughter Angelica Seabert, lived in an upstairs unit of a Tacoma four-plex apartment building. (RP10 543, 544, 642) Their close friend, Clainea Williams, and Wayne Murphy lived together in one of the downstairs units for a short time, before they were evicted in July of 2007. (RP10 547; RP11 776) Although Williams claimed that she and Murphy only slept together one time, the Seaberts believed that they had dated, and that Murphy was having trouble accepting their subsequent break-up. (RP10 549; RP11 788-89)

Williams testified that Murphy had accused her of owing him \$300.00 after they were evicted, and had demanded that she repay the entire sum immediately. (RP11 777-78) Beginning on August

9, 2007, Murphy began leaving threatening messages on William's cellular phone voice mail. (RP11 672, 778-79, 783) Williams called the police, who made tape recordings of approximately 26 messages. (RP11 759, 761-62, 779-80) Williams testified that she was concerned for her safety because Murphy said that people were going to hurt her if she did not repay the money. (RP11 779)

According to the Seaberts, Murphy came to their apartment in the early morning hours of August 12, 2007. (RP10 548, 550, 645) He demanded to know where he could find Williams. (RP10 550) When Rebecca told him that she did not know, Murphy became angry. (RP10 550) Rebecca testified that Murphy began getting louder, so she had to move her sleeping grandson into another room so that Murphy would not wake him up. (RP10 550)

The Seaberts testified that Murphy threatened to burn down the apartment building. (RP10 551, 646) Rebecca did not take Murphy seriously, and told him that she did not think he would do that while her two grandchildren were there with them. (RP10 551) According to Rebecca, Murphy said he did not care, and that he would "show them." (RP 551)

Murphy left, and a few minutes later Rebecca saw a red glow coming from outside the window. (RP10 553, 557) She went

to the window, and saw that the building was on fire, and noticed Murphy walking down the alley away from the building. (RP10 553) She yelled for Angelica to get out, and they picked up Rebecca's two grandchildren and left the apartment. (RP 554, 646-47) Angelica called the fire department on her cell phone. (RP10 674)

A second fire occurred the following night, which burned a tree outside Angelica's bedroom window. (RP10 555, 649) Angelica was able to put this fire out using a fire extinguisher. (RP10 649)

Fire investigators determined that both fires were intentionally set, although they were unable to determine exactly how. (RP11 693, 722, 726, 801, 802-03, 805-06) The first fire burned the exterior of the apartment building, from nearly ground level up to the roof-line. (RP11 716-17) The second fire was contained to the exterior plantings. (RP11 802-03, 811, 813)

Murphy was living with family members in a South Tacoma home in August of 2007. (RP12 850, 851, 915, 916) His niece and nephew, who lived in the same house, testified that he was at home with them during the period of time when the first fire occurred. (RP12 856, 861, 862-63; RP13 918, 919)

#### IV. ARGUMENT & AUTHORITIES

The State alleged that Murphy committed first degree arson by “knowingly, and maliciously [causing] a fire or explosion[.]” (RP 19) The State alleged two alternative means of committing first degree arson: (1) that the fire “damaged a dwelling[;]” or (2) that the fire was “in a building . . . in which there was at that time a human being who was not a participant in the crime[.]” RCW 9A.48.020(1)(b), (c). (CP 19) The State did not elect which alternative means it would rely on for conviction, and the jury was instructed on both alternatives. (CP 75-76; RP13 942) The jury was informed that it must unanimously agree as to the alternative means, but the jury was not required to explicitly state which alternative it agreed upon.<sup>2</sup> (RP 76)

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the

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<sup>2</sup> During closing arguments, the State specifically elected the first fire as the incident it would rely on for the first degree arson charge. (RP13 941)

prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. U.S. Const. amd. VI; Wash. Const. art. 1 § 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where a statute creates alternative means of committing a single offense, either the State must elect which of the means it intends to prove, or the record must contain substantial evidence supporting each alternative. State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). If the evidence is insufficient as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. See State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999).

In this case, substantial evidence does not support the second alternative charged and instructed in this case: that the fire

was “in a building.” (CP 19, 75-76) During closing arguments, the prosecutor told the jury that “we could quibble about whether or not the fire was actually in the building or outside the building.” (RP13 942) This statement is a transparent attempt to gloss over the complete lack of evidence that the fire was “in a building.”

The fire originated outside the building, and burned only the exterior corner, roof and gutters of the apartment building. (RP10 647, RP11 716-17) Rebecca Seabert testified that there was no fire inside her apartment. (RP10 591) The damage to the interior of the apartment was limited to the melting of the window covers caused by the heat, not by the flames. (RP10 591) And neither fire inspector found any indication that the fire burned the interior of the apartment building. (RP11 726, 813) The record in this case simply does not contain sufficient evidence to prove the “in a building” alternative means of arson, and Murphy’s conviction for this offense must therefore be reversed.

## **V. CONCLUSION**

The State’s evidence failed to establish that the fire occurred “in a building.” Because the State failed to elect which alternative means it would rely on for conviction, and because there is no way to know which alternative means the jury unanimously agreed

upon, Murphy's conviction must be reversed.

DATED: August 17, 2009



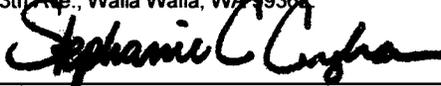
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**CERTIFICATE OF MAILING**

I certify that on 08/17/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; (2) Wayne A. Murphy, DOC# 633365, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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