

NO. 41745-6-II

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

ca

STATE OF WASHINGTON,
Respondent,

v.

ARTHUR E. SHAW,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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BY: 

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STATEMENT OF CASE

On June 11, 2010, Todd Parrish, who lives at 220 Ensign Avenue in Ocean Shores, Washington, was in his living room with his oldest son, when he heard an explosion that came from outside. He remembered that this was at 7:25 a.m. and the explosion shook his house. RP 48. He believed that a car had hit his residence. *Id.*

Mr. Parrish went outside to see what had occurred and he saw that his neighbor's house was on fire. RP 50. This house belonged to Arthur Shaw, the appellant. *Id.* The explosion was so violent that it knocked one of the walls out of the house. *Id.*

The two houses were approximately 30 feet apart, but despite this distance fire still caused damage to Mr. Parrish's home. *Id.* The damage included blistering his roof, peeling the paint off of his house, warping some windows, and burning a tree in his back yard.

This explosion was also heard by James Dillinger, who worked for the Ocean Shores Fire Department for twenty years. RP 59. He stated that he felt a soft concussion and heard a loud concussion and then heard sirens. He looked out his window and saw smoke rising. RP 59. He described the concussion as a "whoosh." Based on his experience as a firefighter he stated the "whoosh" sound was that normally associated with accelerant being lit and traveling. RP 60.

Paul Griffiths was driving to work when the fire occurred. He saw a man wearing a dark jacket and a hat jump the fence dividing Ensign

Avenue from Point Brown Avenue and fleeing the scene. When presented with a photo montage Mr. Griffiths identified the appellant as the person who jumped the fence. He stated at trial that he was 90 percent sure that the appellant was in fact the person he saw jumping the fence at the time of the fire. RP 63.

The Ocean Shores Fire Department was called and Lieutenant Brian Ritter responded and was in charge of the scene. RP 114. He described the fire as being “fully involved” when he arrived on scene. This means that the house was three quarters engulfed in flames. RP 114. The Ocean Shores Fire Department was able to put down the flame after approximately 45 minutes, during which time the house collapsed. RP 118. Brian Ritter testified that the fire was a danger to his men because of its magnitude. RP 123.

The defendant’s truck was observed in a vacant lot approximately 150 feet from his residence. Officer Jeff Elmore of the Ocean Shores Police Department investigated the truck and observed two gas cans in the interior of the vehicle. RP 91. These cans were retrieved and found to be empty.

At approximately 11:30 a.m. on that day, Mr. Shaw was located hiding in some brush behind the structure on the vacant lot. *Id.* Officer Elmore observed that the appellant appeared to have been burned. He observed that the skin on the back of his hands was red in color and that the hair on his wrists and head were singed. RP 113.

The appellant was also interviewed by Officer Don Wertanen of the Hoquiam Police Department. RP 60. He also observed singed hair and took photographs. RP 68. When asked why his hair had been burnt, the appellant denied that he was burned at all. RP 72.

An arson investigator, Dane Whetsel, testified at trial that the fire at the house was a result of an explosion similar to that associated with a natural gas explosion. RP 195. The only difference was that the explosion seemed to emanate from the floor, and not the ceiling, which would be common in a natural gas explosion. *Id.* He explained that this indicated that the accelerant was a heavier hydrocarbon vapor. *Id.*

After obtaining a search warrant, Officer Elmore located a receipt indicating the purchase of gasoline in the appellant's truck. On the receipt was a handwritten note stating gas can. With this evidence the Ocean Shores police were able to locate where the appellant had purchased the gasoline. A video was presented at trial depicting the defendant purchasing a gas can and filling it up.

The appellant's residence was in foreclosure and due to be auctioned off the day that it was burned. RP 270.

ARGUMENT

All of the appellant's claims of error are being raised for the first time on appeal. As a general rule a appellant may not raise an issue for the first time during an appeal. RAP 2.5(a). In order to preserve an issue, regarding evidence admitted at trial, for appeal the appellant must make a

timely motion to suppress. *State v. Slighte*, 157 Wash.App. 618, 623, 238 P.3d 83, 85 (2010). A criminal defendant may raise an issue for the first time during appeal if that issue is manifest error affecting a constitutional right. *Id.* The Washington State Supreme Court has stated that the exception to the general rule that issues cannot be raised for the first time on appeal “is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251, 1256 (1995). The issue must be “truly of a constitutional magnitude.” *Id.* Moreover, if the facts “necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* With the exception of the claims of ineffective assistance of counsel and lack of evidence, this analysis applies to all of the appellant’s claims of error.

1. THE STATE OBTAINED A WARRANT BEFORE SEARCHING THE DEFENDANT’S VEHICLE AND RESIDENCE.

Counsel for the appellant claims that law enforcement in this case searched his residence without a warrant. This is simply not true. A warrant was obtained which included his vehicle and the residence. This warrant was mentioned at trial. RP 238. Counsel for the appellant noted this fact in her brief. One can only assume that she exercised due

diligence and read the warrant before she made this false claim. If so, this is a deliberate misrepresentation to this Court.

Regardless, the warrant exists and a certified copy has been provided to the Superior Court of Grays Harbor, which will be forwarded to the Court of Appeals.

No hearing was ever held regarding this warrant, which covers the search of the vehicle and the residence, so no record exists regarding the specifics of its execution. For this reason the appellant's claim of error should be denied because facts "necessary to adjudicate the claimed error are not in the record on appeal." Therefore, if there is some error it is not a manifest.

2. LAW ENFORCEMENT HAD PROBABLE CAUSE TO ARREST THE APPELLANT.

This claim of error should not be allowed for the first time on appeal. Without litigation at the trial court level this Court cannot make a finding based on the trial record that there was a lack of probable cause at the time of arrest. This is because probable cause can be based on inadmissible evidence. Moreover, the timing of the discovery of evidence is relevant to the issue of probable cause, but not necessarily the issue of guilt. Evidence presented at trial certainly established probable cause, but the record is unclear as to precisely when the evidence was obtained. For these reasons the court cannot make a finding of lack of probable cause for

arrest based on the testimony at trial, and should find that if error exists it is not manifest.

If this court does consider this issue it should find that probable did exist at the time of arrest for the crime of Arson. The offer's statement that the defendant was under arrest for criminal trespass does not foreclose the finding that he had probable cause to arrest the appellant for Arson.

Even if the officer's stated belief regarding probable cause was not well founded, the validity of his or her arrest is determined by objective facts and circumstances. *State v. Huff*, 64 Wash.App. 641, 826 P.2d 698 (1992). "An arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists." *Id.* The eighth circuit court of appeals has stated: "The law cannot expect a patrolman unschooled in the technicalities of criminal and constitutional law to always be able to immediately state with particularity the exact grounds on which he is exercising his authority." *McNeely v. United States*, 353 F.2d 913, 918 (8th Cir.1965). Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. *State v. Fricks*, 91 Wash.2d 391, 588 P.2d 1328 (1979);

In the case at bar, officer Elmore stated that he witness as massive fire in the residence of the appellant. A short time latter he found the

appellant's truck seemly hidden a distance away from the fire, with gas cans inside of it. He then found the defendant hidden in a place where he might have been able to watch the fire. And the defendant appeared to be burned. When questioned the defendant denied being at the scene of the fire.

Based on these facts alone anyone would have a justified suspicion that the defendant set the fire to his residence.

3. THE ADMISSION OF DOG TRACK EVIDENCE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Lack of foundation for evidence is not a matter of constitutional magnitude, therefore cannot be raised for the first time on appeal. *State v. Sanders*, 66 Wash.App. 380, 385, 832 P.2d 1326 (1992).

4. THE APPELLANT'S RELIANCE ON *LADSON* IN THIS CASE IS MISPLACED.

State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999), deals with the issue of pretextual stops, not arrest. An arrest is valid if it is supported by probable cause, and, the officer's stated reason for the arrest is not controlly on the issues. An arrest can be still valid if supported by facts relating to a crime other than that stated by the arresting officer.

State v. Huff, 64 Wash.App. 641, 826 P.2d 698 (1992). Therefore, pretextual analysis is irrelevant to this case.

5. TESTIMONY REGARDING THE DEFENDANT’S SMELL AND APPEARANCE WAS NOT IMPERMISSIBLE OPINION OF GUILTY

Testimony that is not a direct comment on the guilt of the appellant and is otherwise admissible is not an impermissible comment on guilt. *City of Seattle v. Heatley*, 70 Wash.App. 573, 578, 854 P.2d 658 (1993). This case was a DUI litigation, where the arresting officer testified that Heatley was “obviously intoxicated” and “could not drive a motor vehicle in a safe manner.” *Id.* at 577. The main issue of the case was whether the defendant of under the influence of intoxicates. The Court of Appeals Held that these was not a direct comment on the defendant guilt. It went on to explain that: “The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” *Id.* at 579.

Here the appellant complains that an officer’s statement of fact that the defendant smelled of “accelerant” verses “gas,” and an officer describing the defendant as looking like a barbecue exploded in his face are impermissible opinions as to guilt.

The word “accelerant” is used by law enforcement, incorrectly, as a general term to describe a number of chemicals that can be used to start a fire. The term is used because naming specific chemicals, such as gasoline, draws objections for lack of scientific basis. In this case an objection would have been likely because the arsonist was alleged to have used gasoline in starting the fire. An objection could be made to naming a specific liquid hydrocarbon when the smell could have been from a number of similar substances.

Neither, statement during testimony was a direct comment of the appellant’s guilty. The statement’s made in *Heatley* more directly embrace the ultimate issue of the case and were held to be appropriate statements of facts. Moreover, if the statement were admitted in error it is not manifest.

6. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN HIS PERFORMANCE IN THIS CASE.

This claim of error is based on Appellant’s counsel false assertion that no warrant was obtained prior to search the appellant’s truck and residence.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct.

2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

It would have been complete frivolous for trial counsel to object to the search for lack of a search warrant, because a warrant existed. If trial counsel failed to discover this it would indicate that he did not preform the most basic of investigation that professional ethics demands.

7. SUFFICIENT EVIDENCE WAS PRESENTED A TRIAL TO MAINTAIN A CONVICTION.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, “credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Counsel claims that the State failed to establish the time of fire. Time of the arson is not an element of the crime. The State did prove that the defendant’s house exploded, and that explosion was caused by a heavy gas vapor such as that caused by gasoline. The explosion caused damage to an occupied dwelling, and that the fire was a danger to the firefighters. A short time later, appellant’s truck was found seemingly hidden a distance away from the fire, with gas empty cans inside of it. The appellant was hidden in a place where he might have been able to watch the fire. The appellant appeared to be burned, and purchased a new gas can shortly before the fire. And, that the house was being auctioned off that day. This is sufficient evidence that the defendant caused this explosion and that the explosion caused damage to a dwelling and was a danger to human life.

8. THE APPELLANT FAIL TO DEMONSTRATE HOW HIS IS PREJUDICED BY THE LACK OF A MISSING WITNESS INSTRUCTION.

The Appellant must show that he was prejudice in order to claim ineffective assistance of counsel. The timing of the fire is inconsequential to the element of manifest danger to human life. The argument made at trial was not that the Mr. Parrish and his children were outside at the time

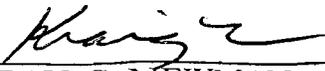
of the fire, but that they could have been. If the fire started a half hour earlier, these people would still be at home. If it happened earlier they may have been asleep and dispatch might not have been called and their house could have burned to the ground with them in it. The fact the fire spread to a tree in Mr. Parish's backyard proves that his house was at risk and with his children in it, their lives.

CONCLUSION

For the reasons stated above the state asks this Court to deny all of the appellant's claimed errors.

DATED this 25 day of October, 2011.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

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7 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
8 DIVISION II

9 STATE OF WASHINGTON,

10 Respondent,

No.: 41745-6

11 v.

DECLARATION OF MAILING

12 ARTHUR E. SHAW,

13 Appellant.

14
15 **DECLARATION**

16 I, *Karela Jennings* hereby declare as follows:

17 On the *25th* day of October, 2011, I mailed a copy of the Brief of Respondent
18 and copy of Search Warrant to Jordan B. McCabe, McCabe Law Office, P. O. Box 6324,
19 Bellevue, WA 98008, by depositing the same in the United States Mail, postage prepaid.

20 I declare under penalty of perjury under the laws of the State of Washington that the
21 foregoing is true and correct to the best of my knowledge and belief.

22 DATED this *25th* day of October, 2011, at Montesano, Washington.

23
24 *Karela Jennings*
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