

NO. 46351-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL S. SCHEEF,
Appellant.

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

THE HONORABLE GORDON GODFREY, JUDGE

BRIEF OF RESPONDENT

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T A B L E S

TABLE OF CONTENTS

RESPONDENT’S COUNTER STATEMENT OF THE CASE 1

RESPONSE TO ASSIGNMENTS OF ERROR..... 4

 1. Defendant’s false statement need not have been relied upon to be material and criminal, but it was material..... 4

 A statement need not be relied upon to be material..... 4

 The statement was material and relevant and serious..... 5

 2. The record does not indicate who made the notes on the jury instructions, but circumstantial evidence suggests jurors did..... 6

 Defendant bears the burden to prove matters of fact..... 6

 Circumstantial evidence suggests the jurors made the notes..... 7

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

State v. Daugherty, 102 Wash. 501, 173 P. 437 (1918)..... 7

State v. Godsey, 131 Wn. App. 278, 127 P.3d 11 (2006) 4, 5

State v. Sylvia, 195 Wash. 16, 79 P.2d 639 (1938)..... 6

Statutes

RCW 9A.40.020..... 5

RCW 9A.48.030..... 7

RCW 9A.48.040..... 7

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On September 30, 2013 a fire occurred about six tenths of a mile up the Wynoochee Valley Road, just outside the Montesano city limits. Verbatim report of Proceedings, 5/13/14, 6-7. Both a residential structure and a motor home were on fire. VRP at 21.

Deputy Wecker of the Grays Harbor Sheriff's office, a fire investigator, responded and observed the fire being put out. VRP 42-43. He noticed that there was nothing burned between the motor home and the house fire, and he found it odd that nothing would be burned between the two fires. VRP 44-45.

Deputy Wecker returned the next day with a warrant to search the scene. VRP 46. Because there was no scorching between the two fires, Deputy Wecker formed the opinion that the fires were separate. VRP 52.

Deputy Wecker made telephonic contact with Defendant on October 3rd. VRP 60. He arranged to meet with Defendant, who was not a suspect at that point. *Id.* They met at the scene. VRP at 61. A fire investigator for the insurance company, an adjustor, Defendant's father, and retired Deputy Steve Smith were also there. *Id.*

Deputy Smith spoke with Defendant and his father first. *Id.* Defendant said he had been abducted by three men, and had to walk back

from Shelton, which took him two days. VRP at 62. Deputy Wecker confronted Defendant about his stop at Steve Poch's house, but Defendant denied it, claiming his friends did not have very good memories. VRP at 62-63. In fact, Mr. Poch had testified that Defendant had stopped by the day of the fire, soaked from head to toe, and had stayed for an hour before being given a ride to the bus stop. VRP at 30.

Deputies Smith and Wecker continued to ask Defendant about the wiring of the house to rule out an electrical fault. VRP at 63-64. At one point, Deputy Smith said that Deputy Wecker had some questions, and Defendant said the he knew "where this was going." VRP at 64.

Deputy Wecker told Defendant that he would not take him to jail, then confronted him with the inconsistencies in his story, and told him he just wanted the truth to determine if the fire was accidental or intentional. VRP at 64. Defendant then changed his story, and said that he accidentally caught the house on fire while filling a lantern he used for light in the basement with unleaded fuel. VRP at 64-65. Defendant claimed not to know how the motor home fire started. VRP at 65. Deputy Wecker again told Defendant that his story was unbelievable, and Defendant ultimately said that he had started the motor home on fire because he wanted it to look like he had been run out of town, so he

poured gas on the back window of the motor home and lit it on fire. VRP at 65. Defendant would eventually memorialize his statement into writing, which was admitted as evidence. VRP at 67; Exhibit 1.

The State charged Defendant with Arson in the Second Degree and, in the alternative, Reckless Burning in the First Degree for the fire and destruction of the motorhome, a “Tioga.” Clerk’s Papers at 13-14.

At trial the jury requested a definition of the word “vex.” CP at 38. “Vex” appears in the definition of “maliciously.” CP at 46. “Maliciously” is a requisite mental state of Arson in the Second Degree. RCW 9A.48.030. The jury acquitted Defendant of this charge. CP at 50. Defendant was convicted of Reckless Burning in the First Degree and False or Misleading Statement to a Public Servant. CP at 51-52.

RESPONSE TO ASSIGNMENTS OF ERROR

1. Defendant’s false statement need not have been relied upon to be material and criminal, but it was material.

It is unclear whether Defendant is arguing that his false statement is not material because it was not relied upon, or that it was not material because it was somehow irrelevant. However, the first argument is legally incorrect, the second is factually incorrect.

A statement need not be relied upon to be material.

Defendant cites to *State v. Godsey*. *Godsey* holds that a statement need not be relied upon to be relied upon to be criminally false and misleading, and is applicable to this case.

In *Godsey*, while arresting the defendant, a police officer asked, “Are you Ray Godsey?” *Godsey*, 131 Wn. App. 278, 283, 127 P.3d 11, 13 (2006). The defendant “responded, ‘I am not Ray, I have never been called that.’” *Id.* The police apparently did not rely on this statement, as the defendant was then taken to jail. *Id.* The police found methamphetamine of the defendant. *Id.* The defendant was charged of various crimes, including making a false or misleading statement to law enforcement. *Id.* He was convicted and appealed, claiming that his

statement was not material “because law enforcement knew he was Ray Godsey.” *Id.* at 291.

Division 3 of this court affirmed, finding that the statute “does not require actual reliance” because “the statute provides a statement is material if it is ‘reasonably likely’ to be relied upon by a public servant.” *Id.* (citing RCW 9A.76.175.)

The instant scenario is analogous. Deputy Wecker never believed Defendant’s story, and had advance knowledge that it was untrue, just as the police already knew that the defendant in *Godsey* was Ray Godsey. However, the statement was criminal because it was “reasonably likely” to be relied upon. In fact, the only conceivable reason that Defendant would make this statement is in hopes that the police would rely upon it, and deflect suspicion from him. It should not be a defense to a charge of false statement that the police already know the truth.

The statement was material and relevant and serious.

Defendant’s claim, that he did not set the fires and had been abducted, was both material and relevant. Deputy Wecker was trying to determine how the fire that destroyed the house and a motorhome began. Further, Defendant’s claim that he had been abducted is a serious allegation. It is potentially a class A felony. *See* RCW 9A.40.020.

Defendant's assignment of error, that his conviction for making a false and misleading statement to law enforcement must be overturned because Deputy Wecker knew it was a lie, is without merit. Statements need not be relied upon to be criminal, only "reasonably likely" to be relied upon. His action was criminal and his conviction should be upheld.

2. The record does not indicate who made the notes on the jury instructions, but circumstantial evidence suggests jurors did.

Defendant claims that notes on the jury instructions were made by the judge in his second assignment of error. However, Defendant does not indicate how he comes to the conclusion that it was the judge who made these notes. Indeed, nothing in the record indicates the source of the notes. However, circumstantial evidence suggests that the jurors most likely marked the instructions during deliberations.

Defendant bears the burden to prove the allegation.

An appellant bears the burden of furnishing sufficient facts upon which an assignment of error is predicated, to give an appellate court a full understanding of the case. *State v. Sylvia*, 195 Wash. 16, 21, 79 P.2d 639, 641 (1938) (citing *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 P. 859 and *State v. Hankins*, 93 Wash. 124, 160 P. 307. "Error is never presumed, and, on the contrary, the presumption must be that the proceedings were correct, where the record is susceptible of two

constructions.” *State v. Daugherty*, 102 Wash. 501, 503, 173 P. 437, 438 (1918) (collecting cases).

The burden must continue to lie with party assigning error. Otherwise, the door is opened to any number of meritless claims which there may be no way to disprove.

In the instant case Defendant fails to establish that the judge made these notes on the jury instructions, or even that the notes were made prior to the jury receiving the instructions.

Circumstantial evidence suggests the jurors made the notes.

The word “maliciously” is circled in Instruction No. 7. CP at 43. This is the “to convict” instruction for Arson in the First Degree, for which Defendant was found not guilty. CP at 55.

The word “guilty” is written next to Instruction No. 8, which is the “to convict” instruction for Reckless Burning in the First Degree. CP at 44. The jury convicted Defendant of this charge. CP at 56.

Both the Arson in the Second Degree and Reckless Burning in the First Degree were for the fire and destruction of a Tioga motorhome. *See* CP at 43-44. The major difference between these two charges is the malice requirement of Arson. *Compare* RCW 9A.48.030(1) and RCW 9A.48.040(1).

The most plausible explanation for these marks is that the jurors never doubted that Defendant set fire to the motorhome, but focused on whether “malice” had been proven. To aid in their deliberations, they wrote “guilty” next to the charge they agreed upon, and circled the word on which they could not readily decide. They requested a definition of “vex,” a word in the definition of “malice” to aid in resolving this issue. In the end, they appear to have decided that Defendant acted without malice, and convicted him of Reckless Burning in the First Degree, and acquitted him of Arson in the Second Degree.

The most plausible explanation of the notes on the jury instructions are that the jurors made these notes during deliberations. The notes seem consistent with the issues and the outcome of this case. Defendant has no proof that the judge, or anyone, made the marks. The assignment of error is without merit and the conviction should be upheld.

CONCLUSION

Defendant ignited a Tioga motorhome, then lied to the police about it, and later admitted doing both. His lie was intended to mislead the police, although it did not. His claim that the judge marked the jury instructions is not supported by the record. His conviction should be upheld.

DATED this 9th day of June, 2015.

Respectfully Submitted,

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JW/jfw

GRAYS HARBOR COUNTY PROSECUTOR

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