

NO. 46948-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE ORELLANA-ARITA
Appellant.

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

The Honorable David Edwards and Mark McCauley, Judges

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the elements of possession of an incendiary device: specifically that Arita knew the item was an incendiary device.
2. The state failed to prove that Arita solicited an arson when he asked and shortly thereafter told the person that he did not want a crime committed.
3. Counsel was ineffective for failing to request an instruction defining possession of explosives which contained the element of knowledge that the device was an explosive.
4. Counsel was ineffective for failing to move for a mistrial following the trial court's sustaining an objection to testimony regarding Arita's wife's "confession".
5. Arita was denied his right due process right to a fair trial by the admission of prejudicial hearsay that could not have been cured by a curative instruction.

Issues Related to Assignments of Error

1. Did the state fail to prove the elements of possession of an incendiary device: specifically that Arita knew the item was an incendiary device?
2. Did the state fail to prove that Arita solicited an arson when he asked and shortly thereafter told the person that he did not want a crime committed?
3. Was counsel ineffective for failing to request an instruction

defining possession of explosives which contained the element of knowledge that the device was an explosive?

4. Was counsel ineffective for failing to move for a mistrial following the trial court's sustaining an objection to testimony regarding Arita's wife's "confession"?
5. Was Arita denied his right due process right to a fair trial by the admission of prejudicial hearsay that could not have been cured by a curative instruction?

B. STATEMENT OF THE CASE

Jose Orellana Arita was charged and convicted of solicitation to commit arson in the first degree, alien in possession of a firearm, and unlawful possession of explosives. CP 42-43, 109-119. Arita was charged with possession of a controlled substance with intent to deliver and convicted of simple possession. CP 42-43, 109-119.

1. Solicitation To Commit Arson.

Brandi Haley, Arita's wife told officer Wallace that she asked someone to beat up the Haskey's who owned the trailer that was burned in a fire. RP 133-34. Officer Wallace testified that after he made up a story that Haley confessed to asking someone to burn down the trailer, Arita told him that he asked Gary Taylor to burn down the trailer in exchange for an old truck, but changed his mind and told Taylor he did not want him to burn the trailer. RP 137-39.

Over sustained objections on hearsay grounds, Wallace testified officer Johansson "told me that Miss Haley confessed to—". RP 128, 136.

Counsel argued that Haley only confessed to asking Taylor not to beat someone up not to arson. Counsel did not request a curative instruction or move for a mistrial after the court sustained the objection.

The state presented evidence that witnesses saw a green van driven by Edna Ferry and Gary Taylor driving away from the burning trailer moments after the fire began and that both were suspects. RP 28, 67, 90, 127.

2. Possession of Explosive

Arita told Wallace that Talia left a large firework in Arita's kitchen for Edna Ferry. RP 141. Arita never touched the item and believed it to be a large firework not an incendiary device. RP 141.

This timely appeal follows. CP 121-22.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE INTENT TO COMMIT SOLICITATION, AN ESSENTIAL ELEMENT.

Solicitation is properly analyzed as an "attempt to conspire." *State v. Jensen*, 164 Wn.2d 943, 951, 195 P.3d 512 (2008). The solicitation statute, RCW 9A.28.030(1), provides:

A person is guilty of criminal solicitation when, **with intent** to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

Solicitation is an attempt to persuade another to commit a crime. *Jensen*, 164 Wn.2d at 951 (quoting, *Treatment of Inchoate Crimes In the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy* (pts. 1 & 2), Colum. L. Rev. 571, 621 (1961); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 30 (1989) (characterizing solicitation as an alternative to the double inchoate crime of attempt to conspire).

Solicitation is an anticipatory offense that requires proof of a person's "intent to promote or facilitate" a crime." *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007) (quoting RCW 9A.28.030(1)). Generally, a person is guilty of the offense without regard to whether the criminal act is completed. *Varnell*, 162 Wn.2d at 170. RCW 9A.28.030 seems to require only that the solicitation occurs—that a person offers money or something of value to another person to commit a crime. *Varnell*, 162 Wn.2d at 169.

While there is unquestionably evil in the act of soliciting another to commit a crime, when the solicitor changes his mind and communicates to the person solicited that he no longer wishes to solicit a crime, the actor has done no more than verbalize a desire to do something wrong which is analogous to when a person attempts to commit a conspiracy but voluntarily abandons that attempt before taking a substantial step. *Jensen*, 164 Wn.2d at 951; See 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 370 (1970) ("[D]espite the earnestness of the solicitation, the actor is merely engaging

in talk which may never be taken seriously.’); Colum. L. Rev. at 621-22.

Without a defense, when a person withdraws his request, solicitation imposes criminal liability on an act that presents no significant social danger, and approaches punishing evil intent alone, which under the First Amendment should not be subject to criminal liability. United States Constitution, First Amendment, Fourteenth Amendment; *Black v. Virginia*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); HAWAII REV. LAWS § 248-8 (1955). HAWAII REV. LAWS § 248-8 (1955) provides immunity if “before an offense is attempted in pursuance to an instigation thereto, the instigator repents, and countermands the same, and endeavors to his utmost to prevent the offense.” Colum. L. Rev. at 616.(quoting, HAWAII REV. LAWS § 248-8 (1955)).

Punishing evil intent in a solicitation context “is a recent development in criminal jurisprudence.” Colum. L. Rev. at 621; 26 Harv. J. on Legis 1, 31. In *Regina v. Banks*, 12 Cox Crim. Cas. 393, 399 (Assizes 1873), the court stated that it would be a defense to a charge of solicitation or attempted solicitation if, after mailing the culpable message, the actor intercepted it before it reached the contemplated recipient.

The author of the Colum. L. Rev. at 616 “noted that even where voluntary desistance is not a defense, abandonment by the actor may result in exoneration by negating a criminal intent... even where voluntary desistance is not a defense, abandonment by the actor may result in exoneration by negating a criminal intent.” Colum. L. Rev. at 618. This is a just result because the purpose of the Criminal code is to deter

and punish crime, not to deter and punish those who decide not to commit a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S.Ct. 554, 9 L.Ed.644 (1963).

Here, Arita asked Gary Taylor to burn down the Haskey's trailer but changed his mind and told Taylor not to do it. Arita was certain that Taylor understood. Arita did not know who actually burned down the trailer, but witnesses saw a green van driven and owned by Taylor and Ferry leave the trailer immediately after the trailer caught fire. RP9-11, 19, 28, 138-39. Arita spoke words which initially constituted the crime of solicitation, but withdrew the request which is made his conversation with Taylor mere talk, analogous to an attempt to commit a conspiracy but voluntarily withdrawing the request-thus negating the intent to commit a crime element of solicitation. Here Arita's request and withdrawal of his request constituted mere talk not a crime which requires this Court to reverse on sufficiency grounds, his conviction for solicitation to commit arson.

2. ARITA WAS DENIED HIS RIGHT TO A FAIR TRIAL BY PREJUDICIAL TESTIMONY THAT COULD NOT HAVE BEEN CURED WITH A CURATIVE INSTRUCTION.

Inadmissible hearsay regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a fair trial, which includes the independent determination of admissible facts directly from witnesses, rather than through inadmissible hearsay. *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d

1255 (2001); ER 801; *State v. Hudlow*, 182 Wn.App. 266, 277, 331 P.3d 90 (2014).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. The use of hearsay impinges upon a defendant’s constitutional right to confront and cross-examine witnesses. *Hudlow*, 182 Wn.App. at 278,(citing *Neal*, 144 Wn.2d at 607).

Our courts have repeatedly held that the admission of prejudicial inadmissible hearsay denies a defendant his right to a fair trial. *State v. Murphy*, 7 Wn.App 505, 509, 500 P.2d 1276 (1975); *See State v. Lowrie* 14 Wn.App. 408,413-14, 542 P.2d 128 (1975); *State v. Aaron*, 57 Wn.App. 277, 280-281, 787 P.2d 949 (1990).

In deciding whether Arita was denied his constitutional rights to a fair and impartial jury, the Court of Appeals does not apply an abuse of discretion standard, but rather, it reviews claims of manifest constitutional error de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

Counsel’s objection to inadmissible hearsay preserved the issue for appeal, and if not, Arita’s due process right to a fair trial is an issue of constitutional magnitude which can be raised for the first time on appeal under RAP 2.4(a)(3); *Hudlow*, 182 Wn.App. at 277.

Inadmissible hearsay evidence admitted at trial can be so prejudicial that once elicited, it often cannot be adequately undone with a

curative instruction. *State v. Romero*, 113 Wn. App. 779, 791, 54 P.3d 1255 (2002). Unfortunately in such circumstances, “[c]ounsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone.” *State v. Curtis*, 110 Wn.App. 6, 15, 37 P.3d 1274 (2002).

Here counsel objected to the inadmissible hearsay which the court sustained under ER 801. The evidence consisted of Wallace’s testimony that officer Johansson “told me that Miss Haley confessed to—”. RP 128. Even though the trial court sustained the objection, trial counsel did not request a curative instruction and none could have mitigated the damage from this inadmissible hearsay. *State v. Miles*, 73 Wn.2d 67, 70-72, 436 P.2d 198 (1968) (police testimony, “concerning an alleged plan to perpetrate a robbery like the one with the commission of which the defendants were charged, was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it. Therefore the defendants were denied a fair trial and a new trial must be ordered.”).

The state was required under RCW 9A.28.030 to prove that Arita solicited the commission of a crime. Neither Arita nor his wife testified. The only evidence that Arita was involved in the solicitation came from Wallace testifying that Arita admitted to asking Taylor to burn the trailer and Arita changing his mind and informing Taylor not to burn the trailer. RP 138-39, 204. This testimony is indicated that Arita ultimately did not intend to engage in solicitation. Haley’s testimony “confessing to...”

allowed the jury to disregard Arita's change of mind and find him guilty along with his wife.

Without the inadmissible hearsay, the state's case against Arita consisted of whether or not he was aware of Haley's having asked Anderson to set fire to the Haskey trailer and/or whether Haley and Arita independently solicited Taylor to set the fire. RP 204. The trial court ruled the evidence inadmissible hearsay, but the evidence was so damaging that no curative instruction could have cured the prejudice because Wallace's hearsay testimony could have supported the essential element of intent in the solicitation charge which rested entirely on circumstantial evidence. RCW 9A.28.030(1).

It is well established that certain types of inadmissible evidence are so prejudicial that only a new trial guarantees the defendant a right to a fair trial. *See, e.g., State v. Powell*, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (in the prosecutorial misconduct arena, a curative instruction will not "unring the bell" of flagrant misconduct), *rev. denied*, 118 Wn.2d 1013 (1992); *State v. Fleming*, 83 Wn. App. 209, 215-16, 921 P.2d 1076 (1996), *rev. denied*, 131 Wn.2d 1018 (1997); *State v. Boehning*, 127 Wn.App. 511, 522, 111 P.3d 899, 905 (2005). Arita was denied his right to a fair trial by the admission of inadmissible hearsay. For this reason, this court should remand for a new trial.

3. TRIAL COUNSEL'S FAILURE TO MOVE FOR A MISTRIAL, DENIED ARITA HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment to the United States Constitution and

article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Trial counsel's failure to move for a mistrial, after admission of Haley's inadmissible hearsay confession denied Arita his right to a fair trial and to effective assistance of counsel.

To successfully raise an ineffective assistance of counsel claim, an appellant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. at 684-86. This requires showing (1) that defense counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant." *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P. 2d 816 (1987).

Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

While there is a strong presumption that counsel's representation

was effective, a party can "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). Both prongs of the test are met here.

Counsel is ineffective when he or she fails to move to object to inadmissible hearsay. *Hudlow*, 182 Wn.App. at 277 (citing *In re Personal restraint Petition of Gentry*, 137 Wn.2d 378, 400-02, 972 P.2d 1250 (1999)). Unlike situations where it is considered a legitimate trial tactic to not object to evidence in order to deemphasize the error before the jury, see, e.g., *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (failure to object to witness's unsolicited remark could be described as legitimate trial tactic to avoid drawing attention to information defense counsel sought to exclude), here once the testimony was in front of the jury, because no curative instruction could have cured the prejudice, counsel should have moved for a mistrial. Counsel should have recognized that Arita could not obtain a fair trial after testimony of Haley's confession and that a new trial was his only option.

As stated supra, the only evidence that Arita was involved in the solicitation came from Wallace testifying that Arita admitted to asking Taylor to burn the trailer and Arita changing his mind and informing Taylor not to burn the trailer. RP 138-39. This testimony indicated that Arita ultimately did not engage in solicitation. Haley's testimony "confessing to..." allowed the jury to disregard Arita's change of mind

and find him guilty along with his wife. To protect Arita's right to a fair trial, counsel was required to move for a mistrial.

Without the inadmissible hearsay it is highly probable that the jury would have acquitted on the solicitation charge because the state's case was weak and based entirely on conflicting circumstantial evidence and there were two other suspects. RP 90, 127. Here, given Arita's constitutional right to a fair trial –meaning a trial based on admissible evidence, there was no tactical reason not to move for a mistrial. *Hudlow*, 182 Wn.App. at 277. Based on the trial court's recognition that the Haley confession was inadmissible, there is a reasonable probability that trial the court would have granted the motion for a new trial and there was no tactical reason not to move for a mistrial after the trial court's ruling.

Accordingly, Arita meets both the deficient performance and prejudice prongs of the *Strickland* test. The remedy is to reverse Arita's conviction for solicitation and remand for a new trial.

4. ARITA WAS DENIED HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST AN INSTRUCTION DEFINING POSSESSION OF EXPLOSIVES, WHICH RELIEVED THE STATE OF ITS BURDEN TO PROVE ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

Arita believed that the explosive device Talia dropped by his house was a large firework; he did not know that it was an incendiary device or explosive. RP 84, 141. Under RCW 70.74.022(1), the state is required to prove that Arita possessed, "any explosive, improvised device, or

components that are intended to be assembled into an explosive or improvised device without having a validly issued license....” Id.

Under RCW 9.40.110(2) and RCW 9.40.120, defining incendiary devices, the state was also required to prove that Arita knowingly possessed an explosive or incendiary device. *Flinn*, 119 Wn.App. at 242.

RCW 9.40.110(2) provides:

Incendiary device” means any material, substance, device, or combination thereof which is capable of supplying the initial ignition and/or fuel for a fire *and is designed to be used as an instrument of willful destruction*. However, no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device for purposes of this section.

Id. RCW 9.40.120 provides:

Every person who possesses, manufactures, or disposes of an incendiary device *knowing it to be such* is guilty of a felony, and upon conviction, shall be punished by imprisonment in a state prison for a term of not more than ten years.

Id. “The language of RCW 9.40.120 clearly means that it is a felony for any person to **knowingly possess** an incendiary device.” (Emphasis added) *Flinn*, 119 Wn.App. at 242.

Even though RCW 70.74.020 is a licensing crime, the state must still prove that Arita knew he possessed an incendiary or explosive device because the definition of possession requires knowledge. *Flinn*, 119 Wn.App. at 242. Here the state did not prove that Arita knew the device was an explosive or incendiary device. Rather the uncontroverted evidence presented regarding Arita’s possession established that a friend dropped

the device off at Arita's house for Turner and Arita believed the device was a large firework. RP 84, 141. This evidence was insufficient to establish that Arita knowingly possessed an explosive or incendiary device. Accordingly, this Court must reverse and remand for dismissal of this charge based on insufficient evidence.

1. Ineffective Assistance of Counsel.

"Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *Hubert*, 138 Wn.App. at 929. Likewise, failure to request an accurate definition of a crime constitutes ineffective assistance of counsel. In *Hubert*, Hubert's counsel failed to identify and present the sole available defense to the charged crime, despite the fact that there was evidence to support that defense. *Hubert*, 138 Wn.App. at 927. The court concluded that Hubert was denied effective assistance of counsel as a result of this failure and the resulting prejudice. *Hubert*, 138 Wn.App. at 929.

Here, counsel failed to require the state to prove knowledge that the device was an incendiary device and failed to require the state to properly define possession of an incendiary device. Because the definition is statutorily defined, counsel's failure to request the instruction cannot be deemed tactical.

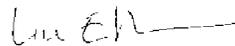
Moreover, the prejudice is evident from the conviction. Had counsel requested an instruction under RCW 9.40.120, the court would have given the instruction and the jury would have been able to acquit because the state did not present any evidence that Arita knew the device

was an incendiary device. *Flinn*, 119 Wn.App at 242. For these reasons, Arita was denied his right to effective assistance of counsel which can only be remedied in this case by reversal and remand for a new trial.

D. CONCLUSION

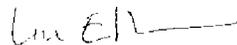
DATED this 11th day of August 2015.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office jwalker@co.grays-harbor.wa.us Jose Arita DOC # 378575 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98502 true copy of the document to which this certificate is affixed, on August 11, 2015, 2015. Service was made electronically.



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