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Division II
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NO. 51776-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

RONALD BENJAMIN WHITE,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The evidence circumstantially proved that the Defendant caused a fire or explosion that damaged his mother's house beyond any reasonable doubt.**

2. **The Defendant did not receive ineffective assistance of counsel because the Defendant himself chose not to pursue a diminished capacity defense and it is unlikely that he would have received a mitigated exceptional sentence.**

3. **Foundation was laid to establish the identification, so there was no due process violation.**

4. **Mrs. Patterson did not express an opinion on the Defendant's guilt, only her opinion on who the person seen in the video was.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the Appellant's recitation of the facts.

ARGUMENT

1. The evidence was sufficient to prove Arson in the First Degree.

The Defendant first challenges the sufficiency of the evidence, claiming the evidence is insufficient to prove that the Defendant knowingly started a fire or explosion. The evidence may have been circumstantial, but the conclusion that the Defendant started the two fires in question is inescapable, especially when viewed in a light most favorable to the State.

Standard of review for a challenge to the sufficiency of the evidence.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

Circumstantial evidence establishes that the figure in the video started the fires.

In the instant case, the Defendant's mother's house inexplicably caught fire on two separate nights. The first fire began in the area of the front porch. RP 2/13/2018 at 109. Electrical faults were excluded as the cause of both fires. RP 2/13/2018 at 110 & 117. The second fire burned up a floor above a crawl space. RP 2/13/2018 at 117-18. That crawl space, like the front porch, is accessible from the outside of the house. RP 2/13/2018 at 67. Because fire and heat rise, this implies that the fire was in the crawl space at some point. RP 2/13/2018 at 118. After watching the video of the second fire the fire investigator opined that the fire was started with an accelerant because of how the fire grew over several hours. RP 2/13/2018 at 124.

However, the same person was seen on video approaching the house just moments before the fires started. *See* Ex. 28 & 29. In both cases, it is the hours of darkness, and the person hurriedly leaves moments before the flames appear. *Id*. In the video of the second fire, the person can be seen carrying something to the house, but does not have the item when he leaves. RP 2/13/2018 at 127. The court determined that the person in the video was the Defendant. RP 2/13/2018 at 172.

As the court pointed out when rending it's verdict, what other conclusion could any rational trier of fact come to, other than the person in the video must have started those fires? RP 2/13/2018 at 173. Seeing a person in the area of an unexplained fire once certainly proves nothing. But twice? And when further evidence showed a strained relationship between the suspect and the victim?

This is certainly circumstantial evidence, but the elements of a crime may be proved by circumstantial evidence. *State v. Dugger*, 75 Wn.2d 689, 690, 453 P.2d 655, 656 (1969).

The Defendant argues that the evidence is lacking because no cause of the fire was ever identified. But because all inferences are drawn in favor of the State, and the evidence is viewed in a light most favorable to the State, the fact the fires were not started by faulty electrical wiring or the gas or some other well-known and easily detectable cause is more proof of an intentional arson.

Because the evidence circumstantially proves that the person seen on the videos must be the cause of the fire, and that person was later identified as the Defendant, the evidence circumstantially proved the Defendant started the two fires. This court ought to uphold the verdict.

2. The Defendant did not receive ineffective assistance of counsel because the Defendant chose not to pursue any mental health defenses and it is unlikely that he would have received a mitigated exceptional sentence.

Opposing council next argues that the Defendant's trial council was ineffective because he did not pursue a diminished capacity defense or make a similar argument at sentencing. However, this argument ignores the fact that the Defendant himself chose not to pursue such mental defenses, there is no evidence in the record to support diminished capacity, and it is unlikely the trial court would have mitigated the sentence, so no prejudice is shown.

Standard of review for ineffective assistance.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination…" *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wash.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a defendant received effective representation at trial." *Id*. Ineffective assistance analysis requires a case-by-case analysis, and is not

generally amenable to *per se* rules. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011, 1015 (2001).

Strickland explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 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. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* 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.*

The defendant bears the "heavy burden" of proof as to both prongs. *Carson* at 210. 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. *Strickland* at 687.

Failure to request a diminished capacity instruction is not *per se* ineffective assistance. *Cienfuegos* at 230.

The Defendant himself chose not to pursue a diminished capacity defense.

At sentencing, the Defendant's trial counsel told the court that the Defendant himself had chosen not to pursue any defenses relating to his mental health, stating,

> The - this - I can't tell the Court anything else that the Court didn't already learn as the fact-finder at trial, other than perhaps a strategic decision that was made at the time when Mr. White wanted to proceed to trial. On one hand he had an option exploring a potential mental - mental defense, he chose not to. He wanted to pursue the – the defense that simple - it simply wasn't him, that was the denial of all criminal conduct. And as a result, any issues regarding his mental health was not introduced at the time of trial.

4/16/2018 RP at 10 (emphasis added.)

The Sixth Amendment requires deference to a criminal defendant's choice of what defenses to present. *See State v. Coristine*, 177 Wash.2d 370, 375, 300 P.3d 400 (2013). Trial council cannot be said to be ineffective for deferring to his client's decision regarding such a defense. This assignment of error is without merit.

It is unlikely that the Defendant would have received a mitigated exceptional sentence.

The next argument, that trial council's performance was deficient for not pursuing a mitigated sentence based on the Defendant's mental illness, overlooks two crucial facts. First, there is no evidence that the Defendant's ability to appreciate the wrongfulness of burning his mother's house down was diminished; and second, that the court imposed an exceptional sentence *upward*.

To support a mitigated exceptional sentence, an agreement that there is an existing mental illness is insufficient. There must be proof of both a significant impairment of a defendant's ability to appreciate the wrongfulness of the act *and* a connection between that impairment and the mental illness. *See State v. Schloredt*, 97 Wn. App. 789, 802, 987 P.2d 647 (1999). In the instant case, there is no evidence that the Defendant could not appreciate the wrongfulness of his acts, only that he suffers from

a mental illness. Opposing council apparently makes an assumption that because the Defendant is mentally ill, his capacity to appreciate the wrongfulness of his acts is *per se* diminished. There is no support for this hypothesis. The Defendant could have been suffering the symptoms of his mental illness when he started those fires, and yet still could have known burning down his mother's house was wrong. A claim of ineffective assistance requires more than speculation.

Secondly, there is no showing of prejudice. Prejudice is not presumed; to succeed on such an argument, an appellate court must be persuaded that the outcome would have differed. *State v. Goldberg*, 123 Wn. App. 848, 854, 99 P.3d 924, 927 (2004). In this case, it is unlikely the court would have granted an exceptional sentence *downward* when, after all the parties told the court of the Defendant's mental illness, the court still imposed an exceptional sentence *upward*. CP at 47, 57-58; RP 4/16/18 at 15.

Additionally, as previously stated, the Defendant chose not to pursue any defense based upon his mental illness. It is very likely he also did not want to pursue mitigation based on his mental illness either.

Because there is no showing of either deficient performance or prejudice, the argument that trial council was ineffective at sentencing fails. This court should uphold the conviction and the sentence.

The remedy for ineffective assistance of council at sentencing would be resentencing, not a new trial.

In arguing that trial council was ineffective at *sentencing*, the Defendant asks for a new *trial*. This is not the appropriate remedy. To any extent trial council's assistance was ineffective at sentencing, the remedy would be a new sentencing hearing.

3. The State laid foundation for Mr. Nostrant's identification.

The Defendant next assigns error to Mr. Nostrant's identification of the Defendant, equating it to an impermissibly suggestive police identification procedures. However, the trial court found Mr. Nostrant's identification credible, since Mr. Nostrant was familiar with the Defendant. The argument equating the identification to an overly suggestive police-aided identification is simply misplaced.

Mr. Nostrant was familiar with the Defendant so his identification is credible.

Mr. Nostrand's testimony establishes that he is familiar with the Defendant, and his habits. Mr. Nostrand testified that he knew the Defendant to be "Ronnie White." 2/13/2018 RP at 74 – 75. Mr. Nostrant

testified that he has seen the Defendant come and go from his mother's house at all times of day to pick up food and clean clothes. RP at 92. The Defendant had been homeless for months, and went to his mother's house five days out of seven during that time. RP 2/13/2018 at 38. The Defendant walks with a distinctive gait. RP 2/13/18 at 174.

Clearly during that time, the Defendant was near Mr. Nostrand's house, and Mr. Nostrant had ample opportunity to observe him. Mr. Nostrant did say that he had never been *introduced* to the Defendant,[1] but this does not mean that the Defendant was unknown to him.

The identification at trial was no stranger identification, but one by a person who knew the Defendant as the court observed in its ruling. RP 2/13/2018 at 173. This is, in essence, a credibility determination, and therefore not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, 997 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).)

Because the trial court found Mr. Nostrant's identification of the Defendant credible, this court should uphold the conviction.

[1] RP at 75.

There is no evidence Mr. Nostrant identified the Defendant to the police.

The Defendant claims Mr. Nostrant's identification of the Defendant is unreliable, in part, because "[i]n the intervening time between seeing this video and trial, Mr. Nostrant was provided with a substantial amount of information suggesting the person he saw in the video was Mr. White." Brief of Appellant at 29. However, there is no evidence in the record that the police told Mr. Nostrant about who the suspect was, or used any identification technique whatsoever to identify the Defendant. The officer who was sent to retrieve the video from Mr. Nostrant had no other involvement with the investigation, and was simply sent because he was good with retrieving video. RP 2/13/2018 at 147. Detective Cox testified that they did not even take statements from Mr. Nostrant when they obtained the videos. RP 2/13/2018 at 148.

In fact, it appears that the police did not talk to Mr. Nostrant about the identity of the person *enough*, given that Mr. Nostrant only revealed he had identified the Defendant earlier in the video until the day before trial. RP 2/13/2018 at 91-92. If the police had spoken to Mr. Nostrant about his beliefs of who the video depicts before trial, it is likely this information would have come to light sooner.

There is no evidence that there were impermissibly suggestive identification methods in this case. Mr. Nostrant simply knew who was in the video. This court should find there was no error and uphold the conviction.

4. Mrs. Patterson expressed an opinion as to the identity of the person seen on the video, not the guilt of the Defendant.

The Defendant next argues that Mrs. Patterson improperly opined on the guilt of the Defendant. She did not. She simply opined that the figure in the video's movements and posture strongly resembled her son's, the Defendant.

Standard of Review.

Appellate courts review decisions to admit evidence under an abuse of discretion standard. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Dennison*, 115 Wash.2d 609, 627–28, 801 P.2d 193 (1990).) "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *Id*. (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).)

Witnesses may opine on matters that embrace an issue that must be decided by the trier of fact.

No witness, whether lay or expert, may give an opinion on a defendant's guilt. *State v. Black*, 109 Wash.2d 336, 348, 745 P.2d 12

(1987) (citing *State v. Garrison*, 71 Wash.2d 312, 427 P.2d 1012 (1967).) However, the fact that an opinion *supports* a finding of guilt does not make the opinion improper. *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012) (citing *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658, 661 (1993).) ER 704 specifically allows for opinion testimony that embraces an ultimate issue that is to be decided by the trier of fact. And ER 701 allows opinion testimony that is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge…" ER 701.

In the instant case, Mrs. Marlene Patterson believed that the figure on the videos strongly resembled her son. The Court noted this was *an* important piece of testimony for identification purposes, but that it was not necessarily proof beyond a reasonable doubt that the figure on the video was the Defendant. RP 2/13/2018 at 174.

Far from being improper opinion of guilt, Mrs. Patterson's testimony was one helpful piece of testimony that led the court to conclude that the Defendant was the figure in the videos that burned down Mrs. Patterson's house. Twice. It was not an impermissible opinion on guilt. The conviction should be upheld.

CONCLUSION

The assignments of error in this case are without merit. The first, that the evidence is insufficient to prove that the fires were set knowingly, is untrue. No rational trier could watch the videos and come to any other conclusion. It is obvious that the person who sneaks to a house in the middle of the night, then hurriedly leaves moments before a fire started on two separate occasions, must have been involved in the beginning of those fires.

The Defendant himself decided to forego any potential mental health defense, and instead focus on challenging the identity of the person on the video. It was not ineffective assistance; it was the Defendant's choice.

Likewise, it was not ineffective assistance to not request a downward exceptional sentence because there is no evidence that the basis – a lack of ability to appreciate the wrongfulness of the act – existed. What is more likely is that the Defendant did not wish to use his mental illness as a defense wither at trial or at sentencing.

It was also not error to admit Mr. Nostrant's identification of the Defendant. There is no evidence of suggestive identification methods. Mr. Nostrant simply knows who the Defendant is. The Defendant had

been visiting Mr. Nostrant's neighbor at all times of the day and night for some time; it is no wonder he could identify him.

Finally, Mrs. Patterson's opinion was that the person in the video strongly resembled her son, the Defendant. That is not an impermissible opinion on guilt, although the State would agree with the Defendant's implied conclusion that identifying the person in the video is tantamount to identifying the person who set the fires.

There was no error. The verdict ought to be upheld.

DATED this __22nd__ day of January, 2019.

Respectfully Submitted,

BY: _____

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JFW / lh

GRAYS HARBOR PROSECUTING ATTORNEY

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