

FILED
Court of Appeals
Division II
State of Washington
6/19/2020 9:20 AM

NO. 54210-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOHN H. HANN,

Appellant.

BRIEF OF APPELLANT,
JOHN H. HANN

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
THE HONORABLE LAUREN ERICKSON, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
IV.	STATEMENT OF THE CASE.....	2
V.	ARGUMENT	5
	A. The Trial Court Violated Due Process by Instructing the Jury on the Law Without Providing Mr. Hann the Opportunity to Object, Requiring a Mistrial.....	6
	1. The trial court violated Mr. Hann’s constitutional right to counsel.....	7
	2. The remedy for this constitutional error must be reversal and a new trial.	10
	B. The State Failed to Prove that the Fire was “In a Building.”	12
VI.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Goehle v. Fred Hutchinson Cancer Research Ctr.</i> , 100 Wn. App. 609, 1 P.3d 579 (2000).....	8
<i>People v. Williams</i> , 29 Cal.3d 392, 628 P.2d 869 (1981).....	9
<i>Schmidt v. Cornerstone Inv., Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	8
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	10-11
<i>State v. Agtuca</i> , 12 Wn. App. 402, 529 P.2d 1159 (1974).....	7
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	13
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980).....	7, 8
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	13
<i>State v. Evans</i> , 177 Wn.2d 186, 298 P.3d 724 (2013).....	13
<i>State v. Frederiksen</i> , 40 Wn. App 749, 700 P.2d 369 (1985).....	9
<i>State v. Heddrick</i> , 166 Wn.2d 898, 215 P.3d 201 (2009).....	7
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	10

<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	12, 14
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	11
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	11
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	13
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005).....	7
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	9
<i>State v. Sengxay</i> , 80 Wn. App. 11, 906 P.2d 368 (1995).....	9, 10
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	8
<i>State v. Sweany</i> , 74 Wn.2d 909, 281 P.3d 305 (2012).....	12, 13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	7

Court Rules and Statutes

CrR 6.15.....	1, 2, 5, 7-10
RCW 9A.48.020.....	12, 13

///

///

Constitutions

U.S. Const. amend. VI 7

Wash. Const. art. I, § 22..... 7

Other Authority

11 Wash. Prac., Pattern Jury Instr. Crim.
WPIC 1.01 (4th ed. Oct. 2016) 6, 8

Merriam-Webster Unabridged Online
(June 18, 2020), <https://www.merriam-webster.com/dictionary/in>..... 13

I. INTRODUCTION

In June 2019, a small fire caused minor damage to the wall of a covered hallway outside of an apartment building. When questioned by police, John Hann admitted to setting off a firecracker outside of his friend's apartment to celebrate his birthday. The state charged Mr. Hann with arson in the first degree. He was convicted and sentenced to nearly four years in prison.

At trial, the court instructed the jury venire about the elements of the charge and about the reasonable doubt standard before voir dire. The court included optional "abiding belief" language to describe this standard. Outside the presence of the jury venire, Mr. Hann's attorney moved for a mistrial because he did not have the opportunity to object to this instruction pursuant to CrR 6.15(c). The court denied the motion. This Court should reverse because the trial court violated Mr. Hann's right to effective assistance of counsel.

At the conclusion of trial, the court instructed the jury on two alternative means of first-degree arson: that a fire or explosion (1) "damaged a dwelling" or (2) "was in a building in which there was at the time a human being who was not a participant in the crime." This Court should reverse because the state failed to prove that Mr. Hann caused a fire "in" any building.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by instructing the jury on the “abiding belief” reasonable doubt standard before counsel had the opportunity to object.

Assignment of Error 2: The trial court erred by denying Mr. Hann’s motion for a mistrial.

Assignment of Error 3: Insufficient evidence supported a conviction of first-degree arson because Mr. Hann did not start a fire “in” a building.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did the trial court violate CrR 6.15(c) and due process by instructing the jury about the “abiding belief” reasonable doubt standard before counsel had the opportunity to object?

Issue 2: Did the trial court err by denying Mr. Hann’s motion for a mistrial after burdening his constitutional right to effective assistance of counsel?

Issue 3: Did the state present sufficient evidence to prove that Mr. Hann caused a fire “in” a building when Mr. Hann lit a firecracker outside of an apartment building?

IV. STATEMENT OF THE CASE

On June 15, 2019 at about 8AM, a fire alarm was activated at the Tempest, an apartment building in Port Angeles, Washington. RP 103. Lieutenant Bryant Kroh, a paramedic with the Port Angeles Fire

Department, responded to the alarm. *Id.* The Tempest was a converted motel, operated as transitional housing by Serenity House. RP 104, 113. The apartments shared outdoor, covered stairwells and breezeways. RP 105.

Lietenant Kroh did not see any smoke or fire when he got to the scene. RP 104. He went to the second floor and found the alarm on a wall outside apartment 10. RP 105. The wall was charred and there was fluid splashed on it. *Id.* Lietenant Kroh found a can of linseed oil in a garbage can in the exterior stairwell. RP 107. Linseed oil is a combustible liquid that can catch fire. RP 110. The bottom of the can was blown out and it was burned. RP 132.

Officer Luke Brown with the Port Angeles Police Department also responded to the scene. RP 131. He saw the can and the scorch marks on the outside wall, and he smelled linseed oil on the wall. RP 132-33. After speaking with Lietenant Kroh, Officer Brown concluded that someone placed the can on the fire alarm, lit it, and caused it to explode. RP 133.

Officer Brown also spoke with Amber Tatarek, the property manager. RP 135. The Tempest had 13 units, 11 of which were filled. RP 114. In total, 12 people lived there in June 2019. *Id.* The Tempest also had security cameras. RP 115. The footage shows that at about 7:40AM, a man went to the second floor, placed an object on the fire alarm, and then left.

A fire started, the alarm went off, and the residents left the apartments. RP 120-23; Ex. 8. A staff member is usually present at the building, but not at 7:40AM because it was between shifts. RP 125.

The residents who lived in unit 10 were William “Bill” Hossell and his partner. RP 124. John Hann socialized with these residents. *Id.* Reviewing the footage, Officer Brown recognized Mr. Hossell leaving the apartment by the fire soon after the alarm went off. RP 140. Officer Brown also recognized Mr. Hann in the video. *Id.*

Mr. Hann was arrested and Mirandized. RP 146. He spoke with Officer Sean Ryan about the events of June 15, 2019. *Id.* Mr. Hann said that he lit a firecracker to celebrate his friend Bill’s birthday. *Id.* He denied using linseed oil, stating that the can was dry. *Id.* Mr. Hann said that he put hand sanitizer in the can prior to lighting the firecracker. RP 149.

The state charged Mr. Hann with arson in the first degree. CP 108. The information alleged that he caused a fire that damaged a dwelling or that was in a building containing other human beings who were not participants to the crime. *Id.* The jury was instructed on both alternate means. CP 46; RP 180.

Prior to voir dire, the trial court instructed the jury about reasonable doubt. RP 71. The court stated: “If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a

reasonable doubt.” *Id.* Outside the presence of the jury venire, defense counsel objected and moved for a mistrial. RP 73. Counsel argued that the court had instructed the jury about the law before the parties had an opportunity to object to any instructions. RP 76. The court denied the motion. RP 77.

Mr. Hann also objected to the court’s final written instruction regarding reasonable doubt, arguing that the “abiding belief” language was not necessary. RP 156-57. The court overruled this objection and included the language. RP 157. Mr. Hann asked the court to instruct on second-degree arson and second-degree reckless burning. RP 165-66. The court determined that these were not lesser-included offenses and did not include them in its instructions. RP 167.

The jury convicted Mr. Hann of arson in the first degree. RP 205-06. He was sentenced to 46 months incarceration and 18 months community custody. RP 216; CP 16-29. Mr. Hann appeals. CP 14.

V. ARGUMENT

This Court should reverse and remand for a new trial, for two reasons. First, the trial court erred by instructing the jury on the law before Mr. Hann’s attorney had the opportunity to object. This violated CrR 6.15(c) and burdened Mr. Hann’s constitutional right to effective assistance of counsel. Second, insufficient evidence supported Mr. Hann’s conviction

for first-degree arson. The state failed to prove both alternative means because Mr. Hann did not cause a fire *in* a building, he caused a small fire outside of a building.

A. The Trial Court Violated Due Process by Instructing the Jury on the Law Without Providing Mr. Hann the Opportunity to Object, Requiring a Mistrial.

Before voir dire, the trial court in this case read instructions to the jury. RP 69-73. These instructions, based upon WPIC 1.01, described the elements of the charge and defined reasonable doubt. RP 71. The court specifically included bracketed language in WPIC 1.01 stating: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” *Id.* According to the note on use for WPIC 1.01, this bracketed language “should be used if it will be included in the final written instructions to the jury.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (4th ed. Oct. 2016).

After the court’s instructions, outside the presence of the jury venire, defense counsel objected to the court’s inclusion of the bracketed “abiding belief” language. RP 73. Counsel explained that the court had not yet finalized its written jury instructions, and the parties had not had the opportunity to object to those instructions. RP 76. Counsel moved for a mistrial, which the trial court denied. RP 73, 76-77.

This Court must reverse because the trial court's actions violated Mr. Hann's right to effective assistance of counsel. Counsel has the right to object to potential instructions. CrR 6.15. Failure to properly object to instructions can amount to ineffective assistance. *See State v. Ermert*, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980) (counsel was ineffective by failing to object to instruction that incorrectly set out the elements of the offense). Here, Mr. Hann's attorney did not have a meaningful opportunity to object because the "abiding belief" instruction was read to the jury before voir dire. The trial court thus violated Mr. Hann's constitutional right to effective counsel, and the appropriate remedy was a mistrial.

1. The trial court violated Mr. Hann's constitutional right to counsel.

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'" *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (quoting *State v. Agtuca*, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

Effective assistance of counsel includes objecting appropriately to jury instructions. Counsel must object to instructions in order to preserve the issue for appellate review. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 162-63, 795 P.2d 1143 (1990); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 615-17, 1 P.3d 579 (2000) (counsel had a duty to formally object even if instructions were discussed during an informal hearing). Failure to object to jury instructions can amount to ineffective assistance of counsel. *Ermert*, 94 Wn.2d at 849-50.

The right to object to jury instructions is protected by statute as well. According to CrR 6.15, before instructing the jury, the trial court “**shall** afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions.” CrR 6.15(c) (emphasis added); *see also State v. Sublett*, 176 Wn.2d 58, 75, 292 P.3d 715 (2012) (discussing CrR 6.15(c)). WPIC 1.01 echoes this principle. When discussing the bracketed “abiding belief” language, the notes on use for WPIC 1.01 specify that this language “should be used if it will be included in the final written instructions to the jury.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (4th ed. Oct. 2016). The parties do not know whether the “abiding belief” language will be included in the court’s final written instructions until they have had the opportunity to review the instructions and object pursuant to CrR 6.15.

The parties also would not expect the bracketed language to be included in the court's instructions prior to voir dire. The purpose of voir dire is to select an impartial jury, not to “educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, *or to instruct the jury in matters of law.*” *State v. Frederiksen*, 40 Wn. App 749, 752, 700 P.2d 369 (1985) (emphasis added) (quoting *People v. Williams*, 29 Cal.3d 392, 628 P.2d 869, 877 (1981)).

In dicta, a Division 3 case stated that “[t]he right to object to jury instructions is afforded by court rule [CrR 6.15(c)], not constitutional law.” *State v. Sengxay*, 80 Wn. App. 11, 16, 906 P.2d 368 (1995). In *Sengxay*, the Court concluded that the accused actually had the opportunity to object but failed to do so before or after jury instructions. *Id.* Mr. Sengxay thus failed to preserve the issue for review. *Id.* (citing *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988)). It does not appear from the record that Mr. Sengxay argued ineffective assistance of counsel. *Id.* The Court concluded that CrR 6.15(c) did not create a constitutional right to object to jury instructions and declined review pursuant to RAP 2.5(a) (permitting appellate review despite failure to object of a manifest error affecting a constitutional right). *Id.* at 15-16.

Here, unlike in *Sengxay*, Mr. Hann’s attorney immediately objected and renewed his objection when the final jury instructions were discussed, preserving the issue for review. RP 73, 76, 166-67. Further, the Court in *Sengxay* acknowledged that CrR 6.15(c) creates a statutory right to object to instructions of law before they are read to the jury. 80 Wn. App. at 16. By depriving Mr. Hann and his attorney of the opportunity to object, the trial court infringed upon this statutory right. That infringement also burdened Mr. Hann’s constitutional right to effective assistance of counsel because an attorney who cannot object to instructions meaningfully—before they are read to the jury—cannot be effective.

2. The remedy for this constitutional error must be reversal and a new trial.

The remedy for this statutory and constitutional error must be reversal and remand for a new trial. The trial court erred by denying Mr. Hann’s motion for a mistrial.

A trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be fairly tried. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Appellate courts review the trial court’s denial of a mistrial for abuse of discretion. *Id.* Reversal is warranted ““when no reasonable judge would have reached the same conclusion.”” *Id.* (quoting *Sofie v. Fibreboard*

Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). In determining the effect of an irregularity, courts examine “(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Id.* (citing *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

Here, the factors weigh in favor of reversal. First, the right to object before instructions are read to the jury is a significant right implicating due process. Counsel cannot be effective without the opportunity to object. Second, although this situation involves instructions of law rather than evidence, the error was cumulative. Mr. Hann had the opportunity to object to the court’s final written instructions, and did so, by that point the jury had already heard the “abiding belief” language, making it a hollow objection. RP 166-67. Third, the court did not attempt to alter its initial instruction to the jury venire to correct the error. RP 77.

The trial court erred by denying Mr. Hann’s motion for a mistrial, even though the “abiding belief” language has been upheld as constitutional. *See State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (upholding reference to “abiding belief” in a reasonable doubt instruction). The error here is not just the inclusion of the “abiding belief” language; it is instructing the jury on the law before Mr. Hann had the opportunity to object and be meaningfully heard on that objection. The trial court deprived

Mr. Hann of his right to object, thus depriving him of his right to effective assistance of counsel, regardless of the content of the instruction. This Court should reverse and remand.

B. The State Failed to Prove that the Fire was “In a Building.”

This Court should also reverse because insufficient evidence supports Mr. Hann’s conviction for first-degree arson. Specifically, the state failed to prove one of the alternative means alleged in this case: that Mr. Hann caused a fire “*in* any building” in which a human being was present who was not a participant in the crime. RCW 9A.48.020(1)(c) (emphasis added). Mr. Hann caused a small fire in a covered breezeway that minimally damaged an outside wall. RP 105. Under the plain terms of the statute defining this offense, he did not cause a fire “*in* any building.” RCW 9A.48.020(1)(c) (emphasis added).

First degree arson is an alternative means crime. *State v. Sweany*, 74 Wn.2d 909, 914, 281 P.3d 305 (2012). When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether “sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010). “The standard of review for a challenge to the sufficiency of the evidence” is whether, viewing the evidence “in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (internal quotation marks omitted).

Sufficiency of the evidence turns on the correct interpretation of RCW 9A.48.020(1)(c). *Sweany*, 74 Wn.2d at 914 (“Interpretation of this statute [RCW 9A.48.020(1)(d)] is necessary to determine the sufficiency of the State’s evidence.”). This is an issue of statutory interpretation, reviewed de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” *Sweany*, 174 Wn.2d at 914. When possible, courts derive legislative intent solely from the statute’s plain language. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Plain language that is not ambiguous does not require construction. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Here, RCW 9A.48.020(1)(c) is unambiguous and does not require construction. Under this statute, a person commits first-degree arson by “knowingly and maliciously” causing “a fire or explosion ***in any building*** in which there shall be at the time a human being who is not a participant in the crime.” RCW 9A.48.020(1)(c) (emphasis added). “In” is a preposition “used as a function word to indicate inclusion, location, or position within limits.” Merriam-Webster Unabridged Online (June 18, 2020), <https://www.merriam-webster.com/dictionary/in>.

By definition, the outside of a building is not “in” any building. Mr. Hann created a small fire or explosion on a breezeway, outside of the apartments themselves. RP 105. He damaged the outside wall of this structure, but no evidence indicates that the insides of the apartments were damaged in any way. *Id.* Mr. Hann’s actions were serious, but they did not amount to first-degree arson by causing a fire “in” a building. This Court should reverse because the state failed to meet its burden of proving an alternative means for this crime. *See Kintz*, 169 Wn.2d at 552.

VI. CONCLUSION

For the foregoing reasons, Mr. Hann respectfully requests that this Court reverse his conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 19th day of June, 2020.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, John H. Hann

No. 54210-2-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On June 19, 2020, I electronically filed a true and correct copy of the Brief of Appellant, John H. Hann, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Jesse Espinoza (X) via email to:
Clallam County Deputy Prosecuting Attorney jespinoza@co.clallam.wa.us
223 E 4th St, Ste 11
Port Angeles, WA 98362-3000

John H. Hann (X) via U.S. mail
DOC # 735222
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

SIGNED in Tacoma, Washington, this 19th day of June, 2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, John H.
Hann

NEWBRY LAW OFFICE

June 19, 2020 - 9:20 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54210-2
Appellate Court Case Title: State of Washington, Respondent v. John H. Hann, Appellant
Superior Court Case Number: 19-1-00246-7

The following documents have been uploaded:

- 542102_Briefs_20200619091954D2477702_2552.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Hann Brief.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us

Comments:

Sender Name: Stephaie Taplin - Email: stephanie@newbrylaw.com
Address:
623 DWIGHT ST
PORT ORCHARD, WA, 98366-4619
Phone: 360-876-5477

Note: The Filing Id is 20200619091954D2477702