

FILED

SEP 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28860-9-III

Consolidated with No. 28875-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LEYSA LYNN SWEANY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Vic L. Vanderschoor

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 4

THE STATE FAILED TO PROVE THE TRAILER
WAS VALUED AT \$10,000 OR MORE..... 4

1. The State bears the burden of proving each of the
essential elements of the charged offense beyond a
reasonable doubt..... 4

2. The evidence failed to prove the value of the trailer was
\$10,000 or greater. 5

3. The verdict was not based on only one of the charged
alternative means. 8

4. This Court must reverse Ms. Sweany's conviction..... 9

E. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 21 1, 4

FEDERAL CASES

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
(1979) 5

WASHINGTON CASES

McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890)..... 6

State v. Clark, 78 Wn.App. 471, 898 P.2d 854, 859 (1995)..... 4

State v. Flowers, 30 Wn.App. 718, 637 P.2d 1009 (1981), *review denied*, 97 Wn.2d 1024 (1982) 5

State v. Rivas, 97 Wn.App. 349, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013, 5 P.3d 9 (2000), *overruled on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007) 9

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 5

State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) 4

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) 4

State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987) 4

OTHER STATE CASES

Jackson v. State, 818 P.2d 910 (Okl.Crim.App.Ct.,1991)..... 7

STATUTES

RCW 9A.48.020 4, 5, 8, 9

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 7

A. ASSIGNMENT OF ERROR

Ms. Sweany's article I, section 21 right to a unanimous jury was violated where one of the alternative means of committing first degree arson was not supported by substantial evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Article I, section 21 of the Washington Constitution guarantees a unanimous verdict in criminal cases. Where alternative means of committing an offense are charged, all alternative means must be supported by substantial evidence. The State here charged two alternative means but only one alternative is supported by substantial evidence. Is Ms. Sweany entitled to reversal of her conviction for a failure of jury unanimity?

C. STATEMENT OF THE CASE

Juanita Silvers, appellant Leysa Sweany's mother, purchased a 1982 Fleetwood mobile home in 2001 for \$10,500. RP 373-74. Ms. Silvers lived in the trailer until 2008 when she signed it over to Ms. Sweany. RP 375.

Leysa Sweany's husband was killed in a car accident in 1999, leaving her to care for her two children, Zack and Leah. RP 444. From 2001 until January 7, 2009, Ms. Sweany and her

children lived in the trailer in the Santiago Estates in Kennewick.

RP 446. Ms. Sweany had the trailer insured for \$45,000. RP 450.

Ms. Sweany was served with an eviction notice on December 9, 2008. RP 234. She verbally agreed to vacate on December 31, 2008, but was still living in the space in January 2009. On January 7, 2009, firefighters were called to a fire at Ms. Sweany's trailer. RP 14. The fire was quickly extinguished and limited to the kitchen range and island. RP 46-54.

The State charged Ms. Sweany with first degree arson, alleging she started the fire with the intent of collecting the insurance proceeds. CP 4-5. At trial, the State presented evidence that trailers such as Ms. Sweany's built before 1995, sold for anywhere between \$6000 and \$12,000. RP 238. The interior of Ms. Sweany's trailer was described as "dismal" with graffiti on the walls and the paneling on one wall hanging loose. RP 113, 121, 475. The trailer's assessed value was \$8350. RP 330.

The jury was instructed in the "to-convict" instruction:

- (1) That on or about January 7, 2010, the defendant caused a fire or was an accomplice with another who caused the fire;
- (2) That the fire
 - (a) damaged a dwelling or

(b) *was on property valued at ten thousand dollars or more and was with the intent to collect insurance proceeds; and . . .*

CP 38 (emphasis added).

In closing argument, the prosecutor told the jury:

We have to show the defendant's caused, that is the key phrase, caused a fire either acting alone or acting as accomplices. We have to show that the fire was to a dwelling, and there's a legal definition for that word dwelling, but it's pretty obvious it's where a person lives, *or it was a dwelling or it was made for purposes of collecting on insurance on property valued, insurance value more than \$10,000*, and we have to show that this was done knowingly and maliciously.

So, really there's only one key question here. The only real issue is whether the defendant's knowingly caused the fire. It was a dwelling. There's no question about that. *The property was insured for more than \$10,000. We can argue about 65. I'm gonna obviously. They've got documents showing it was \$45,000 the mobile home was insured for. Okay. It was insured for more than that.*

1/14/02010RP 34-35.

The jury subsequently convicted Ms. Sweany as charged.

CP 50.

D. ARGUMENT

THE STATE FAILED TO PROVE THE TRAILER
WAS VALUED AT \$10,000 OR MORE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The defendant's constitutional right to a unanimous jury verdict is violated when the State fails to present substantial evidence supporting each of the alternative means presented. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); *State v. Whitney*, 108 Wn.2d 506, 510-12, 739 P.2d 1150 (1987).

Under RCW 9A.48.020, a person is guilty of first degree arson if she “knowingly and maliciously”:

(d) Causes a fire . . . on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

State v. Clark, 78 Wn.App. 471, 480-81, 898 P.2d 854, 859 (1995).

The multiple methods of committing first degree arson under RCW 9A.48.020 constitute alternative means for which there must be substantial evidence for all charged alternatives. *State v. Flowers*,

30 Wn.App. 718, 722-23, 637 P.2d 1009 (1981), *review denied*, 97 Wn.2d 1024 (1982).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the alternative means under RCW 9A.48.020(1)(d) is not supported by substantial evidence as the State failed to prove the trailer was valued at \$10,000 or more.

2. The evidence failed to prove the value of the trailer was \$10,000 or greater. The State failed to prove an essential element of first degree arson; that the value of the trailer was \$10,000 or greater.

RCW 9A.48.020(d), the statute with which the State charged Ms. Sweany contains the essential element that the “property [was]

valued at ten thousand dollars or more . . .” There are apparently no Washington cases interpreting what constitutes sufficient proof of this element. But cases have indicated that value is an essential element of first degree arson which the State bears the burden of proving beyond a reasonable doubt:

[A]t common law arson was the malicious and willful burning of the dwelling-house of another; the gist of the offense being the danger to the life of persons who were dwelling in the house. It was an offense against the habitation, and regarded the possession rather than the property; and when the burning of any other house than a dwelling-house was included within the offense, as the burning of barns and other outhouses, it was on the theory that the flames would extend to the dwelling and endanger the habitation. Hence the burning of many structures which is arson under our statutes was simply a misdemeanor at the common law. At the common law there was no question of value. It mattered not whether the house burned was worth thousands of dollars or but a few shillings; whether it was a palace or a hovel. It was the safety of the inhabitants of the structure that the law sought to protect. *But a careful reading of our statute leads us to the conclusion that the legislature had in contemplation the protection of property as well as the preservation of life; for in every instance, including even a dwelling-house, a moneyed value is attached, and to secure a conviction for arson under the statute, value would have to be alleged and proven.*

McClaine v. Territory, 1 Wash. 345, 348-49, 25 P. 453 (1890)

(emphasis added).

While no Washington cases have dealt with this element, at least one state court has determined that the “market value” of the property is an appropriate method of proving this element. The Oklahoma Court of Criminal Appeals interpreted its third degree arson statute, which required proof “the property ignited or burned be worth not less than fifty dollars (\$50.00),” to require proof of the market value of the property:

[M]arket value is the usual standard of valuation. “Fair market value” is defined as, “[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” *Black’s Law Dictionary* 597 (5th ed. 1979). Further, *Black’s Law Dictionary* also defines “worth” as, “[t]he quality or value of a thing which gives it value.” *Id.* at 1607.

Jackson v. State, 818 P.2d 910, 911 (Okla.Crim.App.Ct., 1991).

The market value is the appropriate way of determining the value of Ms. Sweany’s trailer since there was evidence establishing that amount. Here, the evidence established that in 2001, the trailer’s market value was \$10,500 based upon Ms. Silver’s purchase for that price. RP 374. But, that value had plummeted substantially in the intervening years, the trailer having an assessed value of only \$8350 in 2009. RP 330. Given the state of the interior of the trailer at the time of the fire as testified to by several

witnesses, the value of the trailer was substantially closer to the \$8350 assessed value, but certainly less than the \$10,000 element the State was charged with proving.

The State was apparently under the mistaken assumption that the value included in RCW 9A.48.020(1)(d) was the insured value of the trailer. 1/14/2010RP 34-35. The prosecutor in closing argument misstated the law by claiming the element stated in RCW 9A.48.020(1)(d) was the insurance value of the trailer instead of the actual value of the trailer. RP 34-35. This argument ignored the plain language of the statute, which required proof that the property was “valued at ten thousand dollars or more.” RCW 9A.48.020(1)(d).

The State simply failed to prove the element of first degree arson that the value of the trailer was at least \$10,000

3. The verdict was not based on only one of the charged alternative means. If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the appellate court can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means. *State v. Rivas*, 97 Wn.App. 349, 351-52, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013, 5

P.3d 9 (2000), *overruled on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

Here it is plain the State attempted to present evidence of both alternative means and did not elect or rely solely on the alternative means of causing a fire which damages a dwelling. RCW 9A.48.020(1)(b). The State proved that the fire was for the purpose of obtaining insurance proceeds but failed to understand it was required to prove the value of the trailer was \$10,000 or greater. In addition, although the jury was instructed on unanimity, there was no special verdict allowing the jury to specify which alternative means it found or whether it found both alternative means. Accordingly, this Court cannot determine that the verdict rested on only one alternative means.

4. This Court must reverse Ms. Sweany's conviction. If the evidence is insufficient to support a verdict on each of the alternative means submitted to the jury, the conviction must be reversed. *Rivas*, 97 Wn.App. at 351-52. As argued *supra*, there was not substantial evidence supporting the alternative means under RCW 9A.48.020(1)(d) as the State failed to prove the trailer was worth \$10,000 or more. Thus, Ms. Sweany's right to a

unanimous verdict was violated and her conviction must be reversed.

E. CONCLUSION

For the reasons stated, Ms Sweany submits this Court must reverse her conviction.

DATED this 30th day of August 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read 'Thomas M. Kummerow'. The signature is written over a horizontal line and extends across the width of the typed name below it.

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)	
Respondent,)	
)	NO. 28860-9-III
v.)	
)	
LEYSA SWEANY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREW MILLER	(X)	U.S. MAIL
BENTON COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
7122 W OKANOGAN PL	()	_____
KENNEWICK, WA 99336		
[X] LEYSA SWEANY	()	U.S. MAIL
(NO VALID ADDRESS)	()	HAND DELIVERY
C/O COUNSEL FOR APPELLANT	(X)	RETAINED FOR
WASHINGTON APPELLATE PROJECT		MAILING ONCE
		ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF AUGUST, 2010.

X _____ 

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