

FILED

SEP 10 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 29053-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CHRISTOPHER MICHAEL LUND,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

FILED

SEP 10 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29053-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CHRISTOPHER MICHAEL LUND,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	ii
STATUTES	iii
ASSIGNMENTS OF ERROR	1
ISSUES RELATING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	6
CONCLUSION	13
APPENDIX "A"	
APPENDIX "B"	
APPENDIX "C"	
APPENDIX "D"	

TABLE OF AUTHORITIES

CASES

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed.2d 694, 86
S. Ct. 1602, 10 A.L.R.3d 974 (1966)..... 4

State v. Green, 94 Wn. 2d 216, 616 P. 2d 628 (1980).....9

State v. Harris, 39 Wn. App. 460, 693 P. 2d 750 (1985).....9

State v. Jordan, 103 Wn. App. 221, 11 P. 3d 866 (2000)..... 11

State v. Plewak, 46 Wn. App. 757, 732 P. 2d 999 (1987).....8

State v. Rempel, 53 Wn. App. 799, 770 P. 2d 1058 (1989)..... 12

State v. Tingdale, 117 Wn. 2d 595, 817 P. 2d 850 (1991).....10

State v. Westling, 145 Wn. 2d 607, fn 2, 40 P. 3d 669 (2002).....7

State v. Young, 87 Wn. 2d 129,550 P. 2d 1 (1976)..... 8

Webstad v. Stortini, 83 Wn. App. 857, 924 P. 2d 940 (1996)8

CONSTITUTIONAL PROVISIONS

Const. art. I, § 22.....1,12,13

United States Constitution, Sixth Amendment..... 1, 12,13

STATUTES

RCW 4.44.160.....11

RCW 4.44.170.....12

RCW 4.44.180..... 12

RCW 4.44.190..... 12

RCW 9A.36.080.....8

RCW 9A.48.020(1).....6

RCW 9A.48.020(1)(a).....9

RCW 9.A.48.030(1).....7

ASSIGNMENTS OF ERROR

1. The trial court erroneously denied Christopher Michael Lund's motion to dismiss the charge of 1st° arson.
2. Mr. Lund could not be convicted of 1st° arson based upon the evidence and the instructions given to the jury.
3. The trial court's removal of juror 8 deprived Mr. Lund of his constitutional right to a fair and impartial jury.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence, beyond a reasonable doubt, to submit the charge of 1st° arson to the jury?
2. Can Mr. Lund be convicted of 1st° arson under the "manifestly dangerous" alternative when the only "victim" is himself?
3. Did the trial court's removal of juror 8 comply with existing law and, if not, did it violate Mr. Lund's right to a fair and impartial trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

STATEMENT OF CASE

An explosion in the early morning hours of January 14, 2009 woke the neighbors in the 800 block of S. Elm in Kennewick. Looking out their bedroom windows they saw a car on fire and a person whose clothing was on fire. (RP 17, ll. 14-22; RP 18, ll. 1-2; RP 34, ll. 20-21; RP 35, ll. 14-21).

Jimmy Nguyen ran outside. The person on fire fled, entered a car and sped away. Mr. Nguyen did not see the person's face. He described him as a bald, white, stocky male. His right arm was on fire and the flames were quite high. (RP 36, ll. 2-9; ll. 16-17; ll. 22-25; RP 37, ll. 10-13).

Stacia Miller believed the person's entire back was on fire. She never saw the person's face. She could not identify anyone for the police. (RP 19, ll. 2-3; RP 20, ll. 16-24; RP 21, ll. 3-5).

John Winchester and Gloria Broschart owned a 2007 Mitsubishi. It was the car that was on fire. Ms. Miller knew that it was not Mr. Winchester who she saw on fire. (RP 18, ll. 19-23; RP 26, ll. 4-5; ll. 8-9; ll. 14-15; ll. 22-23; l. 25).

Mr. Winchester and Ms. Broschart know Mr. Lund. He has been to their house and helped work on a truck that was eventually traded in on a Honda. Mr. Winchester was helping Mr. Lund with regard to a child

custody issue. (RP 30, l. 24 to RP 31, l. 3; RP 32, ll. 3-7; RP 33, ll. 6-10; RP 41, ll. 11-19).

Mr. Lund called Mr. Winchester at 10:35 p.m. on January 13, 2009. The conversation centered on whether or not Mr. Winchester intended to testify on Mr. Lund's behalf. Mr. Winchester refused. Mr. Lund got upset. (RP 42, ll. 8-11; RP 42, l. 24 to RP 43, l. 9).

Officers from the Kennewick Police Department recovered a partially burned jacket at the scene. Mr. Winchester could not identify the jacket. (RP 66, l. 25 to RP 67, l. 1)

Mr. Winchester identified Chad Schmasow as a person the officers might want to contact. They contacted the Schmasow home and learned that Mr. Schmasow did not have any burns on any portion of his body. (RP 52, ll. 12-15; RP 56, ll. 4-13; RP 92, ll. 18-22; RP 103, ll. 2-6).

While at the Schmasow home Mr. Schmasow's father received a telephone call from Mr. Lund's wife. She advised Mr. Schmasow that Mr. Lund had been injured and was at Kennewick General Hospital. (RP 54, ll. 15-25; RP 55, ll. 10-13; RP 57, l. 16 to RP 58, l. 4; RP 92, ll. 11-17).

Officer Rosane went to the hospital to contact Mr. Lund. Mr. Lund was being treated by Doctor Loera. Mr. Lund had second and third degree burns to his face, the back of his head, chest, abdomen, arms and hands. (RP 82, ll. 5-6; RP 82, l. 22 to RP 83, l. 8; l. 12; RP 108, ll. 24-25; RP 109, l. 18; ll. 22-24).

Captain Terpenning is an arson investigator for the Kennewick Fire Department. He determined that the fire started in the “cab” (interior) of the car. He found two quart size mason jars inside the car. One was broken on the passenger side floorboard and the other was on the passenger side seat. (RP 117, ll. 12-14; RP 120, ll. 16-17; RP 122, ll. 22-25).

Captain Terpenning also located a flare cap on the passenger seat. Officers had previously found two road flares. One had been used and was near the driver’s side door. The unburned flare was further away. (RP 71, ll. 5-7; RP 123, ll. 20-21). It was Captain Terpenning’s opinion that Mr. Lund’s burns were consistent with a flash back from a flammable liquid. (RP 130, ll. 7-8).

Sherri Jenkins is a forensic scientist at the WSP Crime Lab. She tested certain items and determined that the accelerant used in the fire was gasoline. (RP 141, ll. 8-9; RP 144, l. 23 to RP 145, l. 1).

Detective Hamilton, who is now retired from the Kennewick Police Department, obtained a search warrant for Mr. Lund’s residence. A garbage bag was located. It contained a plastic container and funnel. The plastic container was one of the items tested by Ms. Jenkins. It had contained gasoline. (RP 157, ll. 4-7; RP 159, ll. 10-18).

Detective Hamilton interviewed Mr. Lund on February 25, 2009. Mr. Lund was advised of his *Miranda*¹ warnings. He claimed that his clothes caught on fire when he lit up a cigarette. His clothes had been

¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966)

used to wipe up various petroleum products when he had been working on a car. (RP 165, ll. 10-21; RP 166, ll. 3-15; RP 200, ll. 10-15; RP 201, l. 14 to RP 202, l. 4; RP 203, ll. 10-24).

Mr. Lund denied that the burned jacket belonged to him. Claudia Lund, his wife, and John Lund, his brother, said that they never saw the jacket before. (RP 184, l. 1; RP 186, ll. 8-10; RP 188, l. 25; RP 198, ll. 6-7; RP 208, ll. 11-12).

Mrs. Lund testified that she did not see anything to indicate that a fire had occurred inside or outside her residence. (RP 198, l. 19 to RP 199, l. 1).

An Information was filed on March 19, 2009 charging Mr. Lund with 2nd° arson. The Information was amended on May 3, 2010. It charged Mr. Lund with 1st° arson, or, 2nd° arson in the alternative. (CP 1; CP 20)

On the second day of trial juror 8 advised the Court she recognized Mr. Lund. A colloquy was conducted. Upon the State's motion, and over Mr. Lund's objection, the Court removed juror 8 from the panel. (RP 111, l. 23 to RP 115, l. 20).

Defense counsel moved for dismissal of the 1st° arson charge on the basis that there was insufficient evidence that the fire was "manifestly dangerous" to human life. The motion was denied. (RP 226, ll. 11-24).

Mr. Lund did not object to the Court's instructions. Instructions 6, 7 and 8 encompass the to-convict and definitional instructions for 1st° arson. (CP 38; CP 39; CP 40; Appendices "A", "B" and "C").

The jury found Mr. Lund guilty of 1st° arson. (CP 51).

Mr. Lund was sentenced on May 12, 2010. He filed his Notice of Appeal the same date. (CP 52; CP 61).

SUMMARY OF ARGUMENT

The State failed to establish, beyond a reasonable doubt, that the car fire was "manifestly dangerous" to another person.

Mr. Lund was denied a fair and impartial trial when the Court removed juror 8 without justifiable cause.

Mr. Lund is entitled to have his conviction of 1st° arson reversed and dismissed. Alternatively he is entitled to a new trial.

ARGUMENT

A. First Degree Arson

RCW 9A.48.020 (1) states, in part:

A person is guilty of arson in the first degree if he or she knowingly and maliciously:

- (a) Causes a fire or explosion **which is manifestly dangerous to any human life**, including firefighters...

(Emphasis supplied.)

The State failed to establish, beyond a reasonable doubt, that the car fire was “manifestly dangerous” to a human life other than Mr. Lund.

Mr. Lund asserts that the State was aware of this deficiency in its case and that was the reason why an Amended Information was filed.

RCW 9A.48.030 (1) provides, in part:

A person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion **which damages ... any ... automobile**, or other motor vehicle... .

(Emphasis supplied.)

It is obvious that the 2007 Mitsubishi was destroyed by the fire and explosion.

The question under consideration is whether or not that fire was “manifestly dangerous” to any human life other than Mr. Lund’s.

It is Mr. Lund’s position that even if the fire was “manifestly dangerous” it was only dangerous to himself. He cannot be both the victim and the offender. As recognized in *State v. Westling*, 145 Wn. 2d 607, 612, fn 2, 40 P. 3d 669 (2002):

“Any” must necessarily be read in the context of the rest of the relevant statutory language, and often will not, by itself, disclose the meaning of the statute.

The only evidence at trial to indicate that the fire was “manifestly dangerous” to human life was Mr. Lund’s own presence at the scene.

The car was parked on a residential street. However, no testimony was presented to indicate the distance to the nearest home.

The neighbors, after hearing the explosion, rushed outside and used garden hoses in an attempt to put out the fire prior to the arrival of the fire department. (RP 22, l. 18 to RP 19, l. 2).

No member of either the fire department or the police department testified concerning any danger to themselves.

None of the neighbors fighting the fire testified to any apparent danger to themselves.

Mr. Lund recognizes that the courts have characterized the phrase “manifestly dangerous” in terms of potential harm. *See: State v. Young*, 87 Wn. 2d 129, 133, 550 P. 2d 1 (1976) (arson fire of a church where a nearby frame dwelling was occupied by an elderly woman on the second floor who needed assistance in evacuating the building); *State v. Plewak*, 46 Wn. App. 757, 763, 732 P. 2d 999 (1987) (arson fire involving a garage where the firefighters had to enter it to determine whether or not any persons were inside, along with the presence of overhead power lines).

Mr. Lund analogizes the fact situation in his case to an attempted suicide. The crime of promoting a suicide attempt requires participation of another person. *See: RCW 9A.36.080*.

In *Webstad v. Stortini*, 83 Wn. App. 857, 866, 924 P. 2d 940 (1996) the Court stated: “...in cases of suicide, the person committing the suicide is in effect both the victim and the actor.”

Keeping in mind the analogy set forth, a careful review of the to-convict and definitional instructions on 1st° arson further support Mr. Lund's position that he cannot be guilty of that offense.

Instruction 6 deletes the word "any" as it is used in the statute. Instruction 6 tells the jury that the fire or explosion must be "manifestly dangerous to human life, including fire fighters."

Instruction 7 defines the words "malice and maliciously." The definition includes intent to direct an action toward "another person."

Instruction 8 defines "manifestly dangerous." The factors set out in the Instruction for the jury to consider were never addressed by the testimony.

Mr. Lund asserts that the overall intent of RCW 9A.48.020(1)(a) is directed at danger to others. The word "any" as used in the 1st° arson statute necessarily implies that another human life must be put in danger by the fire and/or explosion.

Since the testimony only established that the fire and explosion was dangerous to himself, he urges the Court to apply the rule of lenity. "[T]he so called" rule of lenity...provides that a statutory ambiguity in a criminal case should be resolved in favor of the defendant." *State v. Harris*, 39 Wn. App. 460, 464-65, 693 P. 2d 750 (1985).

When evaluating a challenge to the sufficiency of the evidence, the reviewing court must apply the test set forth in *State v. Green*, 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980):

“...[T]he relevant question is whether, after reviewing 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, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979).

The trial court should have granted Mr. Lund’s motion to dismiss the charge of 1st° arson. The jury was only entitled to consider the alternative charge of 2nd° arson.

B. Removal Of Juror 8

“A juror’s acquaintance with a party, by itself, is not grounds for a challenge for cause.” *State v. Tingdale*, 117 Wn. 2d 595, 601, 817 P. 2d 850 (1991).

The trial court’s colloquy with juror 8 follows:

THE COURT: The bailiff reported that you felt you recognized the defendant.

JUROR 8: Yes, I do.

THE COURT: Why don’t you tell me about that? How do you know him?

JUROR 8: I didn’t recognize him at first, and but today when they mentioned that his wife’s name was Claudia I remembered that he goes to our church. I recognized him as her husband.

THE COURT: OK and do you have a personal connection with him at church?

JUROR 8: No, not really.

THE COURT: OK and at church had you learned anything about this case?

JUROR 8: Not specifically, no, although I did remember them talking about the custody of the children and also that there were issues in their life that they would like us to pray for.

(RP 112, ll. 7-24).

The prosecuting attorney then examined the juror. The juror assured the prosecuting attorney that she could send Mr. Lund to jail if the State established its case. (RP 113, l. 18 to RP 114, l. 2).

Defense counsel objected to the State's motion to remove the juror for lack of neutrality. The trial court denied the objection and removed the juror. (RP 114, ll. 12-16; RP 115, ll. 2-17).

Mr. Lund recognizes that he has a constitutional right to be tried by an impartial jury. He asserted that right. He also recognizes that he does not have a right to be tried by a particular juror. *See: State v. Jorden*, 103 Wn. App. 221, 230, 11 P. 3d 866 (2000).

Nevertheless, under the law, the removal of juror 8 cannot be justified.

Even if the juror had recognized Mr. Lund during the course of voir dire, the State could not have removed her for cause. RCW 4.44.160

sets forth general causes for a challenge. Juror 8 does not fit any of the bases set forth in that statute.

RCW 4.44.170 declares that implied bias, actual bias and incapacity are the only bases for a challenge for cause.

The Court's colloquy with juror 8 did not establish implied bias as it is defined under RCW4.44.180. (Appendix "D")

It appears that the Court granted the State's motion to remove juror 8 under RCW4.44.190 which provides, in part:

... [A]lthough it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

Juror 8 specifically stated that if the State proved its case she could find Mr. Lund guilty. Her removal was erroneous. Her removal deprived Mr. Lund of a constitutionally fair trial under the Sixth Amendment to the United States Constitution and Const. art I, § 22. *See: State v. Rempel*, 53 Wn. App. 799, 801-03, 770 P. 2d 1058 (1989).

CONCLUSION

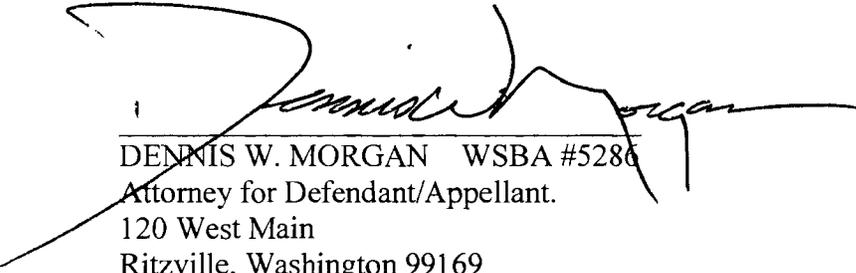
The car fire and explosion was not "manifestly dangerous" to anyone except Mr. Lund. He cannot be both the victim and the perpetrator.

Mr. Lund's conviction of 1st° arson must be reversed and dismissed due to insufficient evidence that that crime was committed.

Alternatively, Mr. Lund is entitled to a new trial based upon removal of juror 8 without cause. Removal of this juror deprived Mr. Lund of a constitutionally fair trial under the Sixth Amendment and Const. art. I, § 22.

DATED this 9TH day of September, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
120 West Main
Ritzville, Washington 99169
(509) 659-0600

APPENDIX "A"

INSTRUCTION NO. 6

To convict the defendant of the crime of arson in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 14, 2009, the defendant caused a fire or explosion;
- (2) That the fire or explosion was manifestly dangerous to human life, including fire fighters; and
- (3) That defendant acted knowingly and maliciously; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

0-000000038

APPENDIX "B"

INSTRUCTION NO. 7

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

0-000000039

APPENDIX "C"

INSTRUCTION NO. 8

"Manifestly dangerous" means that there is a danger that is obvious or evident to the senses and to the mind. Danger is not measured by the harm actually done but rather by the potential for harm. You may consider, among other things, the size of the fire, the location of the fire, the proximity of people, or the danger to responding fire fighters.

0-000000040

APPENDIX "D"

4.44.180 Implied bias defined. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation. [2003 c 406 § 7; Code 1881 § 212; 1877 p 44 § 216; 1869 p 52 § 216; 1854 p 165 § 187; RRS § 330.]