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Court of Appeals
Division III
State of Washington
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No. 35975-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

JOSE ANTONIO CONTRERAS,

Appellant

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

NO. 17-1-01142-1

BRIEF OF RESPONDENT

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WASHINGTON STATUTES

RCW 9A.48.020 (1)(a)2
RCW 9A.48.020 (1)(b)2

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The defense attorney's performance was not deficient. The concession in closing argument that the fire was manifestly dangerous to human life did not cancel the defense attorney's argument for Reckless Burning in the First Degree. There was no evidence to support a voluntary intoxication instruction and that instruction would not have changed the outcome of the trial.
- B. There was no prosecutorial misconduct in arguing that it would be intellectually dishonest for the jury to return a verdict of guilty on Reckless Burning.
- C. The DNA fee and filing fee should be stricken.

II. STATEMENT OF FACTS

A. The activity on October 14, 2017 in the early morning

On October 14, 2017 around 3:00 A.M., Tim Navarro woke up to someone trying to knock his apartment door down. RP at 84. He ran to his door and saw his neighbor, the defendant, messing with his outside light. RP at 84-85. He asked his fiancée to call the police while continuing to look through the peephole. RP at 85. Mr. Navarro noticed it began to get smoky, and he could smell smoke inside his apartment. RP at 85-86.

Exhibit 2 shows the landing between Mr. Navarro's apartment, B-10, and the defendant's apartment, B-12. *See* Ex. 2, RP at 83, 114.

Officer Cory McGee arrived about one minute after he was dispatched. RP at 124. He saw a fire near Mr. Navarro's apartment door and the defendant just staring at the flames. RP at 123. Within a minute, McGee states the flames had climbed possibly four feet high along the door to B-10. RP at 123-24.

Exhibit 3, 4 and 5 show the damage to the door of apartment B-10. See Exs. 3-5.

The defendant retreated into his apartment, B-12, after confronting the police. RP at 101. Officer McGee and Officer Scott, who arrived at the scene shortly after McGee, decided they needed to take immediate action to try to put out the fire because it was rapidly growing. RP at 100-01. Officer Scott was able to stomp out the fire. RP at 102.

Mr. Navarro lives with his father, three children, the youngest being six months old at the time and his fiancée, Regan, who was pregnant at the time. RP at 83. At the time of the trial, roughly six months later, Regan was delivering her baby. *Id.* The family had to be evacuated from the apartment through the bedroom window. RP at 87.

B. The charge and the trial

The defendant was charged with Arson in the First Degree, under RCW 9A.48.020 (1)(a) and/or (b), alleging that he caused a fire that was

manifestly dangerous to human life, or damaged a dwelling, and acted knowingly and maliciously. CP 1-2, 60.

The trial judge engaged in a colloquy with the defendant about his right to testify or not testify. RP at 130. The defendant chose not to testify. RP at 131.

The defense attorney proposed instructions for a lesser included crime of Reckless Burning in the First Degree. CP 67.

The jury found the defendant guilty as charged and found that both prongs of Arson in the First Degree (causing a fire which is manifestly dangerous to human life or damaging a dwelling) were proven beyond a reasonable doubt. CP 76.

The closing statements of both the prosecutor and defense attorney will be discussed in the Argument section.

III. ISSUES

A. Regarding the ineffective assistance claim

1. What is the standard on review?
 - a) Generally
 - b) On making a concession in closing argument
 - c) On failing to request an instruction, and
 - d) On failing to object to the prosecutor's closing argument

2. Concerning the concession that the fire was manifestly dangerous to human life, was this a sound trial tactic, was it inconsistent with the defendant's theory that he should be found guilty of Reckless Burning, and would it have changed the verdict given that the jury also found he damaged a dwelling?
 3. Concerning the failure to request a voluntary intoxication instruction, would such an instruction be given since Arson in the First Degree is not a specific intent crime and there was no direct evidence that the defendant was on methamphetamine?
 4. Concerning the failure to object to the prosecutor's closing, would an objection have been sustained?
- B. Was there any prosecutorial misconduct claim?
1. What is the standard on review?
 2. Does the prosecutor commit misconduct if he tells a jury to consider a lesser crime but reject it?
 3. Did the defendant waive the issue by not objecting?
- C. Should the DNA fee and filing fee be stricken?

IV. ARGUMENT

A. The defendant was not denied effective assistance of counsel.

1. Standard on review

a. Generally

To prevail on a claim of ineffective assistance, the defendant must show both that his counsel's performance was deficient and that he was prejudiced. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *Thomas*, 109 Wn.2d at 226. "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Reviewing courts will not second guess a trial attorney's tactics where they are not manifestly unreasonable. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1 (2001).

b. Concession in Closing Argument

It can be a sound trial tactic to concede guilt on a particular count where the evidence is overwhelming and there is no reason to suppose that

any juror doubts it. This approach may help win the jury's confidence, preserve the defendant's credibility, and lead the jury toward leniency by conceding that the defendant is guilty of a lesser charge. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001).

c. Failure to Request Instruction

To prevail on the basis that trial counsel was ineffective for failure to request a jury instruction, the reviewing court must find that the defendant was entitled to the instruction, that counsel's performance was deficient in failure to request the instruction, and that the failure to request the instruction prejudiced the defendant. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007).

d. Failure to Object to Prosecutor's Closing

Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *In re Cross*, 180 Wn.2d 664, 693, 327 P.3d 660 (2014).

- 2. The defense attorney's concession that the fire was manifestly dangerous to human life was a sound trial tactic, was not inconsistent with the lesser included charge of Reckless Burning, and would not have changed the verdict on the "fire to a dwelling" prong.**

The defense attorney's closing argument emphasized the mental elements. As he pointed out, First Degree Arson requires "Malicious Intent". CP 60, 62; RP at 164. Reckless Burning in the First Degree requires only knowingly causing a fire and recklessly causing damage to a building. CP 67; RP at 164. Therefore, if the State did not prove that the defendant acted knowingly and maliciously, but only knowingly and recklessly, the defendant would be guilty of Reckless Burning. Even if the defendant caused a fire which was manifestly dangerous to human life or damaged a dwelling, he would not be guilty of First Degree Arson if it was not proven that he acted maliciously. There was nothing inconsistent with the defense attorney's closing argument and the request for a guilty verdict on Reckless Burning. Indeed, this was a sound trial tactic.

Also, note the jury found both prongs of First Degree Arson proven beyond a reasonable doubt. Even if this concession can be criticized, the defendant would have been found guilty because he damaged a dwelling.

3. **A voluntary intoxication instruction is not applicable for First Degree Arson because it is not a specific intent crime, there was no evidence supporting the intoxication instruction, and the instruction would not have changed the verdict.**

A criminal defendant is entitled to a voluntary intoxication instruction only if: 1) the crime charged has as an element a particular

mental state, 2) there is substantial evidence of drinking (or drug use), and 3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). The defendant fails to meet any of these elements.

The applicability of a voluntary intoxication defense in First Degree Arson cases was discussed in *State v. Nelson*, 17 Wn. App. 66, 561 P.2d 1093 (1977). That court held that First Degree Arson was not a specific intent crime which intoxication can negate. *Id.* at 72. The use of the term “willful” in the statute refers to the fact that a fire must be intentionally set, not accidentally set. *Id.* Therefore, the court’s refusal to give a voluntary intoxication instruction was not an error. *Id.*

Also note that there is no substantial evidence that the defendant had been using drugs. The defendant did not testify. There was a comment from the victim and neighbor, Tim Navarro, to the police that “this guy is high on meth or something. He was doing just crazy stuff outside my house.” RP at 88. This may have been a correct assumption, but it was nothing more than an assumption. There was no other evidence showing the defendant may have used drugs. Even taking Mr. Navarro’s supposition of the defendant’s drug use at face value, there is no evidence that it affected his ability to set fire to the apartment.

4. **The defense attorney was not ineffective for failing to object to the prosecutor’s comment about the lesser included crime.**
 - a. **The prosecutor did not tell the jury to ignore the Court’s instruction on the lesser included offense.**

The prosecutor stated in his first closing argument that he believed the key issue would be element number 2 of First Degree Arson, that the fire was manifestly dangerous to human life or damaged a dwelling. RP at 155. The remainder of the first closing was mainly describing the evidence supporting these two prongs. RP at 155-159.

The prosecutor then addressed the lesser included and stated, “But I wanted to say one more thing about the reckless burning option and that is an option and, you know, I think you can consider that. You should consider it.” RP at 159.

Possibly still believing that the defense would be attacking whether the State had proved that there was damage to a dwelling or that the fire was manifestly dangerous to human life, the prosecutor continued:

But I have to say that if you find the defendant caused the fire—which is pretty straightforward. He definitely damaged a dwelling and that fire was dangerous, manifestly dangerous to human life. I think it would be more intellectually honest for you to just find the defendant not guilty than find him guilty only of reckless burning.

Id.

As stated above, the defense attorney's closing was not focused on element number 2, the "damage to the dwelling" or the "manifestly dangerous to human life" prongs. Instead, the defense was based on the defendant's mental state and whether the prosecution had proven he acted "knowingly and maliciously."

In the rebuttal closing argument, the prosecutor tried to explain why the defendant had the requisite mental state and why Reckless Burning was not applicable. RP at 169-70.

A fair reading of the prosecutor's closing argument, including the rebuttal, is that the prosecutor told the jury to consider the lesser charge of Reckless Burning, but reject it.

- b. The prosecutor was permitted in closing to state that the jury should either convict as charged or acquit, and an objection would have been overruled.**

The defendant correctly, and ethically, cites *State v. Fortune*, 77 Wn. App. 628, 893 P.2d 670 (1995), as authority against his position. An argument that the jury should not compromise the verdict does not tell the jury to ignore the court's instructions or the defendant's theory of the case. The prosecutor is permitted to advise the jury that the State wants either a conviction as charged or an acquittal, but not a guilty verdict on a lesser charge. *Id.* at 636.

B. There was no prosecutorial misconduct.

1. Standard on review

The defendant has the burden of proving there was prosecutorial misconduct and it had prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

If the defendant did not object to the prosecutor's allegedly improper argument, he is deemed to have waived any error on appeal, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). If the defendant failed to object, he must show on appeal that 1) no curative instruction would have obviated any prejudicial effect on the jury and 2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Id.* at 761.

2. There was no misconduct, much less flagrant and ill-intentioned misconduct.

The State incorporates the argument in Section A, (4) above. The prosecutor asked the jury to consider the lesser included crime of Reckless Burning. The prosecutor said that it would be more intellectually honest to acquit the defendant than find him guilty of this offense. That argument is allowed under *Fortune*, 77 Wn. App.

3. The defendant waived the argument by not objecting.

Again, the State incorporates the argument in Section A, (4) above.

C. The \$200 DNA fee and \$100 filing fee should be stricken.

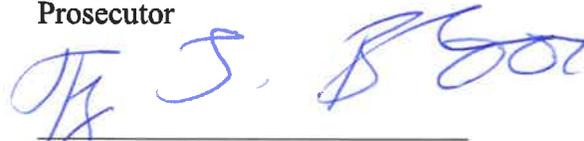
The trial court did not error. At the time the defendant was sentenced, those fees were mandatory. However, with new legislation which applies to pending cases, the fees should be stricken.

V. CONCLUSION

The defendant's conviction should be affirmed. The DNA and filing fee should be stricken.

RESPECTFULLY SUBMITTED on December 17, 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 17, 2018.


Demetra Murphy
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BENTON COUNTY PROSECUTOR'S OFFICE

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