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23247-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

NICOLAS A. BAINARD, APPELLANT/CROSS-RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

CROSS-RESPONDENT'S BRIEF

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A. ISSUES

1. If a person sets fire to a building in which there are the bodies of two persons who were shot and killed several hours earlier, can he be convicted of causing a fire in a building in which there shall be at the time a human being?
2. If the court properly dismisses a charge of first degree arson after the jury has returned a guilty verdict, does the court properly refuse to find the defendant guilty of second degree arson?

B. STATEMENT OF THE CASE

The State charged Nicolas Bainard with first degree arson pursuant to RCW 9A.48.020(1)(c), which provides: "A person is guilty of arson in the first-degree if he knowingly and maliciously . . . causes 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. . ." It is undisputed that Richard and Ella Bainard had been dead for several hours before the fire was set. There was no allegation that any live person was in the building when the fire was set. (7/9/2004 RP 16) The trial court vacated the guilty verdict on the arson charge, finding the state had failed to prove an essential element of the offense because the dead bodies of murder victims

are not human beings within the meaning of the statute. (RP 957) The State has appealed this ruling contending the legislature must have intended the term “human beings” to include dead human bodies.

The State conceded that damage to the building is a necessary element of second degree arson.¹ (RP 950) Accordingly the State withdrew its motion for a conviction of the lesser offense of second degree arson, and the court concurred in the State’s position. (RP 959)

C. ARGUMENT

1. THE TERM “HUMAN BEING”, AS USED IN THE FIRST DEGREE ARSON STATUTE, DOES NOT INCLUDE A DEAD BODY.

The crime of arson has its origins in the common law where it was viewed primarily as a crime against the person, and its primary purpose was to protect the inhabitants of a dwelling “from injury or death by fire.” 3 Wayne R. LaFave, *Substantive Criminal Law*, § 21.3 at 239 (2d ed. 2003); *see McClaine v. Territory*, 1 Wash. 345, 348, 25 Pac. 453 (1890); 5 Am Jur 2d, *Arson and Related Offenses*, § 1 at 782 (1995). Legislative enactment, both in England and in the early years of the United States, broadened the concept of arson to include damage by fire or explosion to many structures other than dwelling houses, and to other kinds of

¹ “(1) A person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion which damages a building . . .” RCW 9A.48.030.

property. LaFave, at 240-41. At one time, legislation in many states reflected an emphasis on the protection of property, but later enactments have expanded the personal protection afforded by arson statutes while retaining provisions protecting property interests as well. *Id.* at 241-42.

[T]he personal protection has occurred by covering a broader range of property likely to be occupied than did the common law and also by taking into account the actual or probable presence of a person in the property, the actual injury or death occurring from the defendant's conduct, or the risk of same created by defendant's conduct.

Id. at 242. These developments are reflected in the development of Washington arson law.

The *McClaine* court, at 348, noted that under the common law, which protected only "the dwelling house of another," an indictment charging McClaine with burning the dwelling house in which he himself lived but which was the property of another would be insufficient to allege the elements of the offense. But the court went on to observe that the extensive list of structures and other property included in the statutes and the inclusion of money value for such property, reflected a legislative intent to protect property as well as the safety of the inhabitants of dwelling houses. *Id.* at 348-49.

Prior to the *McClaine* decision and continuing up to 1909, arson was defined by statute as the act of setting fire to any of a number of

different kinds of property including but not limited to dwellings, business and agricultural structures. *See* Laws 1895, ch. 87, § 1 and Laws, 1886, p.77, § 40. In 1909, the legislature rewrote the arson statutes, creating two degrees of arson.

Every person who shall willfully

- 1) burn or set on fire in the night time the dwelling house of another, or any building in which there shall be at the time a human being; or.
- 2) set any fire manifestly dangerous to any human life, shall be guilty of arson in the first-degree and be punished by imprisonment in the State penitentiary for not less than five years.

Laws 1909 Chapter 9, § 320. Second degree arson was defined to include the burning of various types of structures and property not directly related to human habitation or occupancy. Laws 1909 Chapter 9, § 321.

The effect of the 1909 legislation was to limit first degree arson to “specified person-endangering circumstances” including “(1) the actual or probable presence of a person in the property burned; (2) the risk of death or bodily injury created by the actor’s conduct; and (3) another person was injured or killed by the actor’s conduct.” LaFave, § 21.3(d) at 250-51, n. 108-109; § 21.3(g) at 254. “Most statutes provide that the crime is either first-degree or aggravated arson any time there is a risk to a human life because of malicious and willful burning, with the risk being measured by

potential, not actual, harm to persons.” 5 Am Jur 2d, Arson and Related Offenses, § 5 at 784.

The 1909 statutes have remained the law of Washington up to the present, with only minor changes. See RCW 9A.48.020 and .030. In 1981, the legislature added a fourth way of committing first-degree arson, namely causing “a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.” Laws 1981, ch. 203, § 2. The drafters of the Model Penal Code included a similar “intent to defraud” provision “in view of the great danger of bodily injury from the extensive fires often planned and executed by professionals . . .” LaFave, § 21.3(f) at 253, *quoting* Model Penal Code § 220.1, Comment at 25 (1980).

The history of Washington’s arson statute demonstrates a legislative intent to reserve the most severe punishment for acts that present significant risk of death or bodily injury to living persons, which are therefore included in first degree arson. Acts that endanger property are included in the definition of arson, but are subject to lesser punishment as second-degree arson.

Setting fire to a structure in which the dead bodies of recent murder victims are present, however reprehensible, does not present a significant risk of death or bodily injury to living persons. Potential

emotional pain experienced by their survivors, and any increased difficulty in the investigation and prosecution of the offense, are not among the harms the legislature sought to prevent in enacting the first-degree arson statute.

The Supreme Court of Kansas reached a similar conclusion in *State v. Kingsley*, 252 Kan. 761, 851 P.2d 370, 384 (1993):

[T]he policy behind elevating arson from a class C felony to aggravated arson, a class B felony, when there is a human being in the property must certainly involve the risk to human life and safety. There is no risk to human life or safety when there is no living person in the property. We are not aware of any rational basis to interpret a human being as other than a living person in the context of the aggravated arson statute.

Alan Kingsley went to the home of his landlady, knocked her unconscious, stabbed her five times and slit her throat. After removing some valuable items, he “set fire to a pile of clothes in the bedroom, closed the bedroom door, and left the house.” 851 P.2d at 373. He challenged his aggravated arson conviction, because the evidence showed the victim was dead by the time the fire was started. 851 P.2d at 383. Under the applicable statute, aggravated arson is arson “committed upon a building or property in which there is some human being.” The Kansas court held that a jury instruction permitting the jury to find aggravated

arson “regardless of whether the person in the residence was dead or alive at the time of the damage by fire” was clearly erroneous. *Id.* at 383.

In light of the factual similarity with the instant case, and the similar statutory use of the unqualified term “human being,” the Kansas court’s reasoning is highly persuasive authority for refusing the State’s argument here.

2. THE COURT PROPERLY DECLINED TO ENTER A CONVICTION ON THE LESSER OFFENSE OF SECOND DEGREE ARSON.

The State contends the court erred in failing to make a finding that Mr. Bainard was guilty of second degree arson. The court did not err in failing to grant the state’s request for a conviction on a lesser offense because the request was withdrawn. Moreover, there was no legal basis for the court to enter such a decision.

The jury was not instructed on second degree arson. The failure to give a particular instruction is not reversible error when no request was made for such an instruction. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991), *cert. denied*, 516 U.S. 1160 (1996).

The State did not move to amend the information prior to or during the State’s case, or even prior to the verdict. CrR 2.1(d) provides: “The court may permit any information or bill of particulars to be amended at any time *before verdict* or finding if substantial rights of the defendant are

not prejudiced.” (emphasis added) The prosecution is not free to amend the original charging document absent leave of court. *State v. Alvarado*, 73 Wn. App. 874, 876, 871 P.2d 663 (1994). “An amendment of the original information is a matter addressed to the sound discretion of the trial court.” *State v. Powell*, 34 Wn. App. 791, 793, 664 P.2d 1 (1983) *citing* CrR 2.1(d). The trial court’s ruling on a motion to allow amendment is reviewed for abuse of discretion. *State v. Gutierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

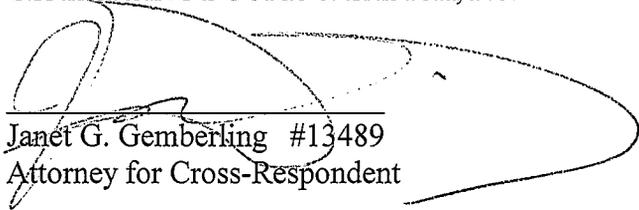
Since the jury was not instructed on the lesser offense of second degree arson, Mr. Bainard could not be convicted of that offense unless the information was amended. Under the court rule, CrR 2.1(d), the charge cannot be amended after the jury has rendered its verdict. Accordingly, the court did not abuse its discretion in refusing to find Mr. Bainard guilty on the lesser, uncharged offense.

D. CONCLUSION

The ruling vacating the arson conviction should be affirmed.

Dated this 10th day of November, 2005.

GEMBERLING DOORIS & LADICH, P.S.


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Attorney for Cross-Respondent

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

Nicolas Bainard
(your name)

Appellant.

82699-4

No. 23247-6-111

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

RECEIVED

FEB 16 2005

I, Nicolas Bainard have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

How can they say I fired the gun when the state crime lab expert testified that he couldn't determine whether or not the gun was operable prior to the fire.

Additional Ground 2

The juror was bias and prejudiced due to prosecutorial misconduct in the juror instruction and witness testimonial on stand examination

#3

Violation of civil constitutional rights on arrest because of violation of due process upon beginning of investigation and questioning. Investigation started after I was arrested and charged prematurely. Ineffective Representation.

Date: 2/14/05

Signature: Nicolas Bainard