

82699-4

No. 23247-6-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

NICHOLAS A. BAINARD,  
Defendant/Appellant.

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. STATEMENT OF THE CASE

On or about June 29, 2003, a fire had occurred at the Bainard residence located in Chelan County, Washington. The defendant, Nicholas Bainard, was present at that fire. (RP Vol. III, pg. 304, ln. 2-5). After the fire was put out, there were two bodies found, those being the bodies of Ella and Richard Bainard, the parents of Nicholas Bainard. (RP Vol. IV, pg. 395, ln. 11-16; RP Vol. IV, pg. 398, ln. 21-25).

Nicholas Bainard was charged with the deaths of Richard and Ella Bainard, his parents. He was also charged with Arson in the First Degree. He was convicted of Murder in the Second Degree for both of his parents and Arson in the First Degree by a jury verdict. (CP 130-136). He was also convicted of a firearm enhancement for the Murder in the Second Degree convictions. The State's theory was that the defendant tried to conceal the murder of his parents by burning up the evidence.

The court set aside the arson conviction but did not set aside the firearm enhancement. (CP 35-38). Mr. Bainard was ultimately sentenced to 220 months on Count I and 230 months on Count II for a total 450 months of confinement. (CP 25-34).

This appeal followed with the defendant bringing forth a single assignment of error. The defendant is asking the court to set aside the two 60-month consecutive sentences for the commission of a felony while armed with a firearm. The State is filing a cross-appeal with regard to the arson charge.

The facts are generally not in dispute in this case.

On or about the late hours of the 29th day of June, 2003, Mr. Toftness, who lived next door to Richard and Ella Bainard, received a call that there was a fire. (RP Vol. III, pg. 301, ln. 4-9). He took his four-wheeler within the next few minutes up to Mr. and Mrs. Bainard's property (RP Vol. III, pg. 302, ln. 19-25) and found the house completely engulfed in fire. (RP Vol. III, pg. 303, ln. 17-25). Mr. Toftness saw Nicholas Bainard standing next to his father's truck. (RP Vol. III, pg. 304, ln. 1-7). Mr. Toftness went back to Wendy Dyal's house, a neighbor who lived close to the Bainards. (RP Vol. III, pg. 251, ln. 1-10).

Wendy Dyal also testified that she heard Nicholas Bainard say he didn't think there would be any bodies there, that there would be just ashes. (RP Vol. III, pg. 245, ln. 4-5).

An investigation into the incident by law enforcement began after an autopsy of the deceased individuals found that both Mr.

and Mrs. Bainard had been shot by a shotgun. (RP Vol. IV, pg. 397, ln. 7-25; Vol. VI, pg. 704, ln. 1-25). Lance Hart, an explosives expert who is a senior special agent with the Bureau of Alcohol, Tobacco and Firearms, testified he conducted an investigation in this case. (RP Vol. II, pg. 48, ln. 4-10; pg. 51, ln. 1-3). Mr. Hart is a certified fire inspector. He found an interesting burn pattern with the odor of petroleum product on a piece of molding and sent it to the laboratory for analysis. (RP Vol. II, pg. 66, ln. 22-25; pg. 67, ln. 1-12). Kevin Fortney of the Washington State Patrol Crime Laboratory also testified and indicated in fact there was a petroleum product used in acceleration of this fire. (RP V, pg. 615, ln. 8-14; pg. 618, ln. 5-8).

Testimony was also garnered from Joy Gear and Suzanne Curry who indicated that Mr. Bainard was a runaway just prior to the incident occurring and he was booked into the Crisis Residential Center of the Chelan County Juvenile Center. (RP Vol. IV, pg. 357, ln. 24-25; pg. 358, ln. 1-12). Mike Mathena, a worker at the Chelan County Juvenile Center, testified that he witnessed an altercation that took place between the defendant and his mother, Ella Bainard. He noted the defendant was angry and as it progressed, Nicholas Bainard became more angry and frustrated.

(RP Vol. III, pg. 337, ln. 1-15). This altercation took place on or about June 25, 2003. (RP Vol. III, pg. 343, ln. 1-7).

The defendant, Nicholas Bainard, made threats to kill his parents. (RP Vol. II, pg. 134, ln. 11-16 (testimony of Nathan Kansky); pg. 142, ln. 1-13 (testimony of Tyson Kansky); pg. 152, ln. 13-19 (testimony of Jacob Simms); pg. 159, ln. 1-7 (testimony of Brian Mrachek)).

Testimony from Roberto Pineda indicated Mr. Pineda was a friend at high school with the defendant, Nick Bainard. (RP Vol. V, pg. 512, ln. 1-12). Mr. Pineda gave a statement to Detective Helvey a few days after the incident. (RP Vol. V, pg. 513, ln. 13-25; pg. 514, ln. 1-7). Mr. Pineda indicated that he had a conversation with Mr. Bainard on the early morning hours of June 30, 2003, and Mr. Bainard indicated to Roberto Pineda that he did it—he finally did it. (RP Vol. V, pg. 514, ln. 1-19). Mr. Bainard further asked Mr. Pineda to follow him back to the house to do what he had to do, and that he wanted Mr. Pineda to give him a ride back down to his house so that he could be Mr. Bainard's alibi. (RP Vol. V, pg. 514, ln. 17-25; pg. 515, ln. 1-5). The defendant, Nicholas Bainard, had discussed that he wished his parents were dead. (RP Vol. V, pg. 515, ln. 24-25; pg. 516, ln. 1-4). Mr. Pineda

indicated that Nick Bainard had crawled through the window at Mr. Pineda's house and that he wanted to spend the night at Mr. Pineda's house that night, but Mr. Pineda said no because Mr. Pineda had to go to work in the morning. Mr. Pineda further testified that Nick told him that his dad had hit him and that his parents were yelling at him and telling him he was no good and he was a worthless disgrace to the family. Further, Mr. Pineda indicated he had smelled alcohol on Nick Bainard. (RP Vol. V, pg. 525-527).

Further testimony in this matter came from Jesse Salazar, an 11-year-old nephew of Roberto Pineda, who also knew Nick Bainard. (RP Vol. V, pg. 534, ln. 12-25; pg. 535, ln. 1). Mr. Salazar indicated that on the early morning hours of June 30, 2003, the defendant, Mr. Bainard, did come to the house and did talk to him and he asked for Mr. Salazar to get Rob because he needed to talk to him because it was an emergency. Mr. Salazar confirmed Nick Bainard was at Mr. Pineda's house that night. (RP Vol. V, pg. 535-536).

At the close of the evidence presented, the jury convicted Mr. Bainard of the lesser included charge of two counts of Murder

in the Second Degree with the deadly weapon enhancement and Arson in the First Degree.

Defense filed a motion for arrest of judgment on Count III of the State's Amended Information, regarding the elements of the offense—that the defendant knowingly and maliciously caused a fire or explosion in a building, at which time there was a human being in the building who was not a participant. The evidence showed that Ella and Richard Bainard were dead at least 3 to 4 hours before the fire was stated and, therefore, they were no longer considered to be "human beings" at the time of the fire—or at the very least, the definition of a "human being" was ambiguous and that it was a material element of arson in the first degree. The court arrested judgment in light of that finding. (CP 35-38). The court ultimately sentenced Mr. Bainard to a total term of confinement of 450 months, which included 120 months for the firearm enhancement which was charged—60 months on each murder count. The jury made a finding that the elements for a firearm enhancement did indeed exist beyond a reasonable doubt. (CP 25-34, 134, and 130).

## II. ISSUES AND ARGUMENT

### A. WHETHER THE SUPREME COURT'S RECENT DECISION, STATE V. RECUENCO, 154 WN.2D 156, 110 P.2D 188 (2005), IS DISPOSITIVE WITH RESPECT TO THE FIREARM ENHANCEMENT?

The Supreme Court's recent decision in Recuenco, supra, differs from the case at bar. In that case, the court found that the imposition of a firearm enhancement was not supported by the jury's special verdict form and violated the Sixth Amendment jury right as defined by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). In Recuenco, the court struggled with three issues: 1) Did the firearm enhancement violate his Sixth Amendment right as defined by the U.S. Supreme Court cases when the jury only explicitly found facts supporting a deadly weapon enhancement? 2) Was the error invited? and 3) If there was error and it was invited, was it harmless? Id., at 161.

In Recuenco, the Supreme Court found that the error was not invited. The court made that finding because in that case, the defendant claimed that the judge's imposition of the firearm enhancement without the jury finding the existence of a firearm was an error violating his due process and jury trial rights. But, he didn't claim any instruction was erroneous. Therefore, the court made a finding that the error asserted was not invited. Recuenco, supra, at 164. In the case at bar, in RP Vol. VII at page 832, the defense attorney took no exceptions to the jury instructions as given by the court. Therefore, to now claim that there was error in Instruction Nos. 25 and 26 is an invited error and violates the invited error doctrine. The invited error doctrine prevents parties from benefiting from an error that they may have caused at trial regardless of the intent. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). This doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the "to convict" instructions. Id., citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990). Therefore, the court should not reverse the 120-month firearm enhancement because of the Recuenco case, as this case differs from that in that the invited

error doctrine prevents the defense from now benefiting from an error to which they could have taken exception.

B. DID THE IMPOSITION OF THE FIREARM ENHANCEMENT VIOLATE THIS DEFENDANT'S SIXTH AMENDMENT JURY TRIAL RIGHT AS DEFINED BY *BLAKELY* AND *RECUENCO*?

This case also differs from Recuenco in the imposition of the firearm enhancement looking at the facts. In Recuenco, the trial court submitted a special verdict form to the jury asking if the defendant Recuenco armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree. However, the Bainard case differs from that, in that the instruction from the trial court to the jury on both counts I and II indicated the following:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in counts I (and II). A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible and readily available for offensive or defensive use. The State must

prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(CP 138-167). So, in Recuenco, the State had presented a deadly weapon instruction which did not define that a firearm is considered to be a deadly weapon. In the Bainard case, the jury was clearly instructed that a firearm is defined as a deadly weapon and had before it the fact that the State was asking for a firearm enhancement. It was included in the Information in this case and there was no doubt the defendant knew what he was defending upon. There is no doubt, based upon the RCW's cited, that the court had before it the proper information and instructions, and the State's intent to prove that the defendant was armed with a firearm at the time the crime was committed and, therefore, the defendant should have been sentenced to the firearm enhancement. (CP 240-242).

C. IF THE ERROR WAS UNINVITED, WAS IT HARMLESS?

This last issue was also addressed by the court in Recuenco. In Recuenco, the error was considered to be uninvited error, but the error couldn't be deemed harmless. The court did this because it felt to do otherwise would have been speculating on the jury's findings. State v. Hughes, 154 Wn.2d 118 (2005). However, in the case at bar, clearly the jury had before it the information that the State was asking for the firearm enhancement, that the definition of a deadly weapon included a firearm, and there was the existence of a firearm during this crime and, in fact, a firearm was used to terminate the lives of Mr. and Mrs. Bainard before the fire was set. Testimony from Dr. Gina Fino, the coroner in the case, in reference to the firearm and the deaths of Mr. and Mrs. Bainard was conclusive. And, as mentioned before, not only was the firearm enhancement specifically identified to the jury, but also there were no exceptions taken to the jury instructions in this case. Error, if any, did not rise to the level of omitting language necessary for the jury to properly perform, and was therefore harmless, in addition to being invited.

D. WAS THE JURY INSTRUCTION INCORRECT BECAUSE THE STATUTE DEFINES A DEADLY WEAPON AS A WEAPON OTHER THAN A FIREARM?

The jury instruction did not incorrectly state the elements of the deadly weapon enhancement. Once again, defense took no exceptions to the court's instructions once compiled. Failure to take exception to a particular instruction to the jury or a failure to propose an instruction generally waives the issue for appeal. State v. Noel, 51 Wn. App. 436, 438, 753 P.2d 1017 (1988).

The court's use of this version of the firearm instruction does not constitute a basis for a reversal here for two reasons. First, any defect was cured by the definition instruction of the firearm enhancement. Second, it was clear to the court that this was a firearm enhancement. RCW 9.94A.533 indicates that the firearm enhancement for a class A felony shall run consecutively to all other sentencing provisions, including a firearm or deadly weapon enhancement, for all offenses sentenced under the chapter. The firearm enhancement does apply to Murder in the Second Degree.

RCW 9.94A.533 and RCW 9.94A.602 refer to a deadly weapon enhancement which is indicated under RCW

9.94A.533(3)(a) as being five years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under section (f) of this same section. Defense in this case indicated that this did not apply to the five year statute. Notice of the intent to seek that statute was clearly given by virtue of the Second Amended Information which indicated that Mr. Bainard was armed with a shotgun, which clearly is defined by RCW 9.94A.602 as being a firearm, and clear notice was given to the defendant. This is not unconstitutionally vague.

In a similar case, State v. Leatherman, 100 Wn. App. 318, 997 P.2d 929 (2000), police found four weapons on the defendant, two of which were characterized as "knives" and two as "daggers," and the trial court imposed the deadly weapon sentencing enhancement. In Leatherman, the deadly weapon statute was not unconstitutionally vague as it applied to the facts of the case because the plain and ordinary meaning of the terms "knife" and "dagger" provided adequate standards of specificity and, therefore, the statute did not invite an inordinate degree of discretion. In the Bainard case, clearly we are talking about a firearm, that being a shotgun, which was pled in the Information and the jury returned a

verdict that the shotgun fit within the special verdict instruction as per the deadly weapon definition instruction. The court can impose the firearm enhancement.

The language of the Information is, ". . . did shoot with a shotgun, thereby causing the death of Richard or Ella Bainard, a human being, and in the commission of the crime the defendant or an accomplice was armed with a deadly weapon, thereby invoking the provisions of RCW 9.94A.533 and/or 9.94A.602, contrary to the form of the statute . . . ." "That the maximum penalty for the above crime is life in prison and/or a \$50,000 fine" making this crime a class A felony. (CP 240-242).

It would make just as much sense if the defendant in his argument would allege that because the Information didn't specifically say "class A felony", it was therefore vague and the defendant could not be held accountable for this crime.

The jury did find that the defendant was armed with a firearm pursuant to the instructions provided by the court, to which the defense attorney did not make any objections. The defense counsel took no exceptions to the court's instructions again once compiled. A failure to take an exception waives that for appeal. State v. Noel, supra. The defendant cannot now argue that the

instructions were wrong when the defense did not make any objections to them at the time they were first presented. Defense is not allowed to harbor error, if any.

Defense counsel concludes by asking the court not to sentence Mr. Bainard to the firearm enhancement based upon Blakely v. Washington, *supra*. The Blakely case held that the statutory maximum was not the maximum sentence a judge may impose after finding additional facts, but the maximum a judge may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment. However, defense ignores the fact that in this case the finding was made by a jury that in fact the deadly weapon/firearm enhancement was used in this case. The defense ignores the fact that this finding was made beyond a reasonable doubt as per the instructions. Whereas exceptional sentences have been overturned, the court has not overturned the use of penalty enhancements.

In State v. Olney, 97 Wn. App. 913 (1999), as pointed out by the defense, the court found under similar argument as made by the defense here that there was no evidence in that case that any

other deadly weapon was used other than a firearm. The jury returned the special verdict form indicating that Olney was armed with a deadly weapon. The trial court sentenced the defendant for the use of a firearm which is a specific kind of deadly weapon. There was no dispute or contrary evidence regarding the type of weapon used (as in the Bainard case). The court further found that to sentence Olney with a lesser enhancement for use of a weapon "other than a firearm would be illogical and unsupported by the evidence." Olney, supra. Therefore, Olney received a deadly weapon enhancement sentence for three years rather than one year as requested by the defense in that circumstance.

It is very clear that the firearm enhancement was properly pled and properly described to the jury. The defense is now claiming error to a perfectly legitimate instruction to which they took no exceptions at the time of trial. Furthermore, this case can be distinguished from the Recuenco case, as the defense clearly had notice of the firearm enhancement based upon the Second Amended Information filed in this case.

### III. CROSS-APPEAL

#### A. THE TRIAL COURT ERRED IN GRANTING THE ARREST OF JUDGMENT ON COUNT III—ARSON IN THE FIRST DEGREE.

On May 17, 2004, a jury rendered a verdict of guilty in this matter to two counts of Murder in the Second Degree and one count of Arson in the First Degree as charged in the State's Second Amended Information. The defendant filed a motion for arrest of judgment as to Count III, the Arson in the First Degree conviction. The defendant asserts that because evidence showed that Ella and Richard Bainard were likely deceased prior to the fire, their status as deceased human beings at the time of the arson, coupled with the fact that no other uninvolved persons were present in the building, precludes a conviction of Arson in the First Degree based on RCW 9A.48.020(1)(c).

RCW 9A.48.020 states:

(1) A person is guilty of arson in the first degree if he knowingly and maliciously:

(a) Causes a fire or explosion which is manifestly dangerous to any human life,

including firemen; or

(b) Causes a fire or explosion which damages a dwelling; or

(c) 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; or

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

(2) Arson in the first degree is a class A felony.

The argument of defense counsel in support of the motion which was granted for arrest of judgment turns simply on semantics. The issue presented to the trial court for purposes of this motion was whether a deceased person constitutes a human being for purposes of RCW 9A.48.020. In the court's findings of fact, the court defined that the term "human" can only refer to live human beings. However, the court ignored the language of the statute.

First, RCW 9A.48.020(1)(c) does not state whether or not a human being must be alive or deceased at the time of the fire or explosion. There is no requirement that there be proof of a human being's condition; rather, just that the said human being is not a participant in the crime. In section (1)(a), the only other place where the word "human" is used in that statute, it is coupled with

the word "life." One can only be convicted of arson in the first degree pursuant to RCW 9A.48.020(1)(a) if the fire or explosion is proven to be manifestly dangerous to any human life.

The legislature could have used the phrase "live human being" in RCW 9A.48.020(1)(c), however, it specifically did not. The legislature should be deemed to have meant what it said.

Other examples of the distinction between live humans and deceased humans exist in the RCW's. Where it is desired to regulate human beings based on whether their condition is alive or deceased, it is typically specified. For example, in RCW 13.34.360(1)(b), "newborn" means a live human being who is less than 72 hours old. Also, in RCW 70.54.330(4), "tattooing" means the indelible mark, figure, or decorative design . . . upon the body of a live human being . . . .

See, also, RCW 68.50.140 which specifies: "Every person who shall remove the dead body of a human being . . . ." There is no question when that statute is applicable.

*Merriam-Webster's Collegiate Dictionary*, 10th Ed., defines the phrase "human being" to be the same as "human." The term "human" in that same dictionary means:

[o]f, relating to, or characteristic of humans; consisting of humans; having human form or attributes; susceptible to or representative of the sympathies and frailties of human nature; a bi-pedal primate mammal; any living or extinct member of the family to which the primate belongs.

*Merriam-Webster's Collegiate Dictionary*, 10th Ed., 1999. In that same resource, the term "person" is defined in part as "the body of a human being." Thus, anytime the term "human" or the phrase "human being" is used, it can refer to either a living or an extinct member of the primate family, or the body of a human being.

Defense may argue State v. Wagner, 97 Wn. App. 344, 984 P.2d 425 (1999). In that case, the court ruled that the individual struck by the defendant's car had to have been alive at the time of the contact in order for the defendant to be found guilty of the crime. What the court focused on in this case was the fact that to be guilty of the crime of felony hit and run as charged by RCW 46.52.020, the struck individual had to sustain an injury or death. Obviously, if that individual is already dead, no death can reoccur. Thus, the statute was interpreted to mean a live individual at the time of contact. That interpretation was rendered by the court to prevent illogical results. Defendant may suggest that Wagner is

precedent for other criminal statutes, but, it is clear that decision has a relatively narrow holding.

Clearly, the arson statute specifically omits the qualification in RCW 9A.48.020(1)(c) that a human being be alive and not dead when the fire or explosion occurs. A deceased human being can be burned to cover up another crime, such as murder as in this specific case. Again, where the statute means to specify live human beings, it is expressly articulated. RCW 9A.48.020(1)(a) specifically uses the phrase "human life."

There is no question that regardless of whether Richard and Ella Bainard were dead or alive at the time of the fire at their home, they indeed burned.

The State is asserting that there is no ambiguity in the arson statute with respect to the way the word "human," and the phrases "human life" or "human being" are used. No illogical results occur by interpreting RCW 9A.48.020(1)(c) to contemplate either live or deceased human beings.

Take, for argument's sake, a murder-arson event where it was scientifically impossible to determine whether or not the individuals killed actually expired and were completely dead before the fire started. Defendant would suggest that, unless another

prong under RCW 9A.48.020 was charged, the defendant could never be convicted of Arson in the First Degree. This would lead to the absurd results of murderers being rewarded for making sure people were totally dead before they lit the first match. At most, they could be convicted only of Arson in the Second Degree, regardless of the fact that the destruction of evidence and the covering up of the crime of the underlying murder was the sole intent behind the fire. Thus, the language of RCW 9A.48.020(1)(c) makes more sense because it indeed does not specify that a human being be either alive or dead at the time of the fire just so Arson in the First Degree can be applicable in situations such as the one just described.

When a statute is clear on its face and unambiguous, the court does not have to engage in an interpretation of the language such as the trial court did in this case. State v. Salavea, 151 Wn.2d 133, 86 P.3d 125 (2004); State v. Q.D., 102 Wn.2d 19, 29, 685 P.2d 557 (1984). Statutory inquiry ends with the plain language of the statute and the court assumes the legislature "means exactly what it says." State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003) (quoting Davis v. Department of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)), (noting that

words and clauses are not added to unambiguous statutes and criminal statutes are interpreted in a literal and strict manner).

B. THIS COURT SHOULD REVERSE THE TRIAL COURT'S FINDING THAT THE STATUTE PERTAINING TO THE TERM "HUMAN BEING" WAS UNCONSTITUTIONALLY VAGUE.

In reference to facial invalidity of a statute, the court should review State v. Plewak, 46 Wn. App. 757, 732 P.2d 999 (1987). Plewak was a juvenile case involving a juvenile conviction on two counts of Arson in the First Degree and affirmed by Division II of the Court of Appeals. The defendant was charged with setting two separate garage fires in Tacoma in February of 1985. Both fires were controlled without major incident, although firefighters at one of the fires were told by someone that there might be someone in the garage and they entered the ground floor while the second floor was still burning but found no one. The defendant was convicted at a bench trial in juvenile court and appealed based upon the arson statute, RCW 9A.48.020, being unconstitutionally vague.

The court in its ruling discussed the validity of constitutional statutes. Statutes are presumed to be constitutional; the

challenger has the burden of proving a statute unconstitutional beyond a reasonable doubt. State v. Maciolek, 101 Wn.2d 259, 676 P.2d 996 (1984); State v. Dixon, 78 Wn.2d 796, 479 P.2d 932 (1971).

In the Bainard case, the ruling of the court did not appear to the State that the challenger proved that the statute was unconstitutional beyond a reasonable doubt. The State is asking the appellate court to reverse the trial court's position. Statutes may be unconstitutionally vague, either on their face or only as to certain applications. Bellevue v. Miller, 85 Wn.2d 539, 541, 536 P.2d 603 (1975). As in the Bainard case, the test is to be applied depends upon the challenge. If the challenge is facial, the defendant's conduct will be ignored and the statute examined to determine whether any conviction under it could be constitutionally upheld. Plewak, at 759. If not, it is facially flawed. Bellevue v. Miller, 85 Wn.2d at 541.

Plewak continues to make the determination that if a defendant's particular conduct is examined when a statute is challenged only as to certain applications, because even though it may be vague as to certain conduct, it still may be constitutionally

applied to one whose conduct clearly falls within the scope of its core. State v. Zuanich, 92 Wn.2d 61, 593 P.2d 1314 (1971).

The court looks at a two-step analysis being required to determine if a statute has facial validity: First, is there adequate notice of the prohibitive conduct, and, second, are there adequate standards to prevent arbitrary enforcement. Plewak, at 760, and Maciolek, 101 Wn.2d at 264. If persons have reasonable understanding, a common intelligence, can understand a statute without having to guess at the meaning, the statute meets the requirement of constitutional due process. State v. Foster, 91 Wn.2d 466, 474, 589 P.2d 789 (1979); Spokane v. Vaux, 83 Wn.2d 126, 129, 516 P.2d 209 (1973). Even possible areas of disagreement about precise meaning does not render a statute wanting in certainty. Vaux, 83 Wn.2d at 129. Further, rules of statutory construction require that each section be construed in connection with the others to produce a harmonious whole. State v. Marshall, 39 Wn. App. 180, 692 P.2d 855 (1984). In Plewak, the defendant built his argument around the claimed vagueness of three words or phrases, as is with the case at bar. Plewak challenged "without just cause or excuse", "annoy," and "reckless." The court found Plewak's attack on the phrase "without just cause

or excuse" was misplaced. Plewak, at 761. The court found that the phrase appeared in the section defining and dealing with allowable inferences regarding malice. (Emphasis mine).

Plewak also claimed that the word "annoy" made the statute vague. However, the court further found that the word did not directly define an element of the crime, but instead dealt with allowable inferences regarding malice and not void for vagueness.

Plewak's further contention was that the definition of "recklessness" included certain elements identical to those regarding malice and that the overlap rendered the arson statute again vague. However, the court, in sum, found that the statute provided adequate notice of the conduct it prescribed and adequate standards to prevent arbitrary and ad hoc enforcement. Plewak, at 762. A person of reasonable understanding and common sense can understand the statute without guessing as to its meaning.

The court was further unpersuaded by Plewak's challenge to the court's finding that the fires had been manifestly dangerous to human life. That in a city such as Tacoma, experience teaches that one of the certainties attendant upon a fire is that firemen will be called and will come; the arsonist can anticipate fireman may be

endangered. Plewak, at 763, citing State v. LeVage, 23 Wn. App. 33, 35, 594 P.2d 949 (1979).

In Bainard, the court's finding creates an absurd result of rewarding a perpetrator in a case where it is scientifically impossible to tell whether the people died before or after an arson was committed. Therefore, if a person were to die in a building which was burned down, under the court's ruling, no Arson in the First Degree conviction could ever prevail. Clearly, Washington courts have decided that there is no more felony murder rule in Washington. By the court in this matter ruling the way it has, it has actually added language to the statute indicating that the arson statute should have the word "live human being" or "dead human being" before it. The trial court has gone too far in making that determination. The statute should be reviewed with a common sense application. Plewak, supra.

This court should reverse the trial court's ruling that in fact the trial court should not have found that the defendant met his burden of proving the statute unconstitutional beyond a reasonable doubt and, therefore, the trial court should reinstate Mr. Bainard's conviction of Arson in the First Degree as found by the jury.

C. IF THIS COURT DOES NOT AGREE, ARSON IN THE SECOND DEGREE CAN BE A LESSER INCLUDED OFFENSE OF ARSON IN THE FIRST DEGREE.

RCW 9A.48.030 states that a person is guilty of Arson in the Second Degree if he knowingly and maliciously causes a fire or explosion which damages a building. The trial court was given a finding that the defendant was guilty of Arson in the Second Degree after setting aside the Arson in the First Degree conviction. The trial court did not do so. A building is defined in RCW 9A.04.110 as follows:

'Building', in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railroad car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

The test in determining whether an offense is a lesser included offense is referred to in State v. Workman, 90 Wn.2d 443 (1978). Workman points out that there is a two-prong test. First, each of the elements of the lesser offense must necessarily be an element of the offense charged, and, second, the evidence in the

case must support an inference that the lesser crime was committed. Workman, at 447-448. The defendant in this case alleges that Arson in the Second Degree does not work with the Workman test. However, clearly, all the elements of Arson in the Second Degree have been shown as a result of the testimony in the case: that the fire was knowingly and maliciously set in a building which was burned to the ground. Therefore, the charge of Arson in the Second Degree would apply. However, the court could also look at the charge of Reckless Burning in the First Degree, RCW 9A.48.040, in which a person damages a building by knowingly causing a fire or explosion. RCW 9A.48.010(b) defines "damages" as follows:

'Damages', in addition to its ordinary meaning, includes charring, scorching, burning, or breaking, or agricultural or industrial sabotage, and shall include any diminution in the value of any property as a consequence of an act.

Although the State would agree that damages are an element of both Arson in the Second Degree and Reckless Burning in the First Degree or Second Degree, if the court finds that damages are not implied, then the court cannot amend.

The court should set aside the trial court's finding of arrest of judgment for the arson conviction. The requirements of the statute had been met by the conviction for the first degree arson charge. But, in the alternative, the trial court should have found Mr. Bainard guilty of the lesser included charge of Arson in the Second Degree.

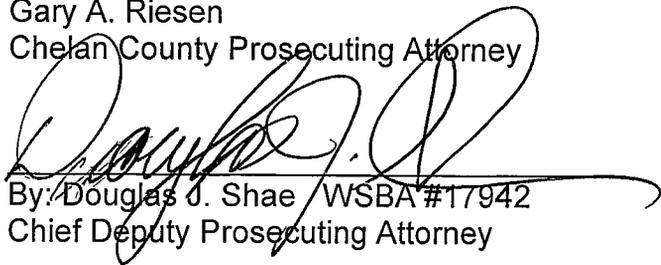
#### IV. CONCLUSION

Mr. Bainard should be sentenced to the firearm enhancement pursuant to the jury's finding that he used a firearm in the murder of both his parents beyond a reasonable doubt. Furthermore, Mr. Bainard should be subject to responsibility for not only killing his parents, but subject to the responsibility for burning down his parents' house with his parents inside in an attempt to cover up his crime of killing his parents.

DATED this 23rd day of September, 2005.

Respectfully submitted,

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