

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28860-9-III

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 BENTON FOR COUNTY

The Honorable Vic L. Vanderschoor

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

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

1. A challenge to the sufficiency of the evidence may be raised for the first time on appeal. Ms. Sweany challenged the alternative means of first degree arson, that the trailer was valued at \$10,000 or more. In its response, the State strangely argues Ms. Sweany cannot raise this issue for the first time on appeal. Brief of Respondent at 5-8. This Court should follow the myriad of decisions that have specifically rejected the State's argument.

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). It is axiomatic that sufficiency of the evidence is a question of constitutional magnitude that a defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). The test for determining the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential

elements of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The evidence failed to prove the value of the trailer was \$10,000 or greater. Ms. Sweany argues the State failed to prove the essential alternative means of first degree arson that the trailer was worth \$10,000 or more. 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 (1995).

In its response, the State provides a number of fanciful arguments claiming the evidence established the value if the trailer exceeded \$10,000, then challenges Ms. Sweany’s interpretation of RCW 9A.48.020. Brief of Respondent at 8-20. Despite the State’s fanciful analogies, the State’s arguments should be rejected as they misconstrue the evidence presented at trial, or simply misunderstand Ms. Sweany’s argument.

The essence of Ms. Sweany’s argument is that there are apparently no cases interpreting what constitutes sufficient proof of this element in Washington. In light of that, Ms. Sweany argued

that that the “market value” of the property is an appropriate method of proving this element, citing *Jackson v. State*, 818 P.2d 910, 911 (Okla.Crim.App.Ct.,1991).

Ms. Sweany argued the market value is the appropriate way of determining the value of Ms. Sweany’s trailer since there was evidence in the record 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’s myriad citations to things such as the movie It’s a Wonderful Life point out perfectly why the market value is the appropriate method for determining the value of an item for the purposes of first degree arson. The State fails to cite to any concrete evidence in the record, merely making bald statements, such as that there was personal property in the trailer, failing to note that it failed to prove the value of that property. Brief of

Respondent at 10-11. The State also notes the asking price of the trailer in 2001 was \$15,000, never admitting that the arson occurred in 2010, and never stating why the asking price nine years ago is a relevant value in light of the fact the trailer was sold in 2001 for \$10,500. Brief of Respondent at 9. In addition, the State argues the mobile park manager *believed* the trailer could sell for \$12,000, never admitting that someone's *belief* is not evidence. *Id.* In the same vein, the State cites the fact the insurance company *must have believed* the trailer was worth \$10,000 since they insured it for that much. *Id.* Again, a *belief* is not evidence.¹ Valuing a piece of property the way the State urges this Court to do necessarily leads to this sort of speculation about the value, leading to the inevitable conclusion that we will just leave it to the individual jurors and what each one of them believe is an appropriate method for determining the value. Such a conclusion would violate a defendant's right to appeal as it would be impossible to review such a verdict.

The market value is the appropriate method of valuing the property since it is most specific and easiest for the State to prove. Here, the State proved that the fire was for the purpose of obtaining insurance proceeds but failed to understand it was required to

¹ The State's argument concerning the value of Barry Bond's 72nd home run is simply not worthy of a response. Brief of Respondent at 17-20.

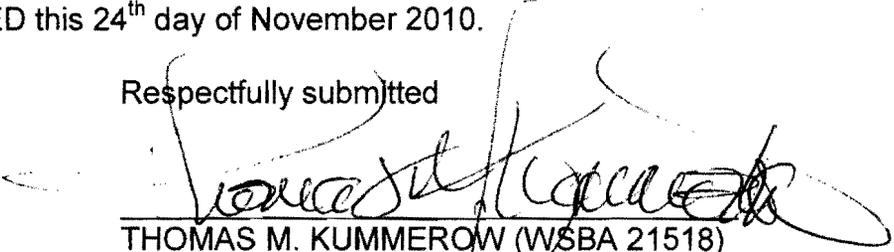
prove the value of the trailer was \$10,000 or greater. In addition, although the jury was instructed on unanimity, there was no special verdict allowing the jury to specify which alternative means it found or whether it found both alternative means. Accordingly, this Court cannot determine that the verdict rested on only one of the alternative means. Ms. Sweany's right to a unanimous verdict was violated and her conviction must be reversed. *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).

B. CONCLUSION

For the reasons stated in the instant reply brief and the previously filed Brief of Appellant, Ms. Sweany requests this Court reverse her conviction.

DATED this 24th day of November 2010.

Respectfully submitted



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