

NO. 288609-III

Consolidated with

NO. 288757-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
OCT 29 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent
v.

LEYSA LYNN SWEANY, Appellant

CONSOLIDATED WITH

THE STATE OF WASHINGTON, Respondent
v.

LEAH LYNN SWEANY, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00376-2

Consolidated with

NO. 09-1-00377-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

ISSUES 1

1. SHOULD THE DEFENDANTS BE ALLOWED TO RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL, WHEN, NOT ONLY DID THEY FAIL TO OBJECT AT TRIAL, LEYSA SWEANY TOOK THE OPPOSITE POSITION AT TRIAL? 1

2. IF THE DEFENDANTS ARE ALLOWED TO RAISE AN ISSUE CONCERNING THE SUFFICIENCY OF THE EVIDENCE REGARDING THE "PROPERTY VALUED AT TEN THOUSAND DOLLARS OR MORE" PROVISION, WHAT IS THE STANDARD ON REVIEW? 1

3. IF THE DEFENDANTS ARE ALLOWED TO RAISE THE ISSUE, AND IF THE COURT ACCEPTS THE DEFENDANTS' INTERPRETATION OF THE STATUTE, WAS THERE SUFFICIENT EVIDENCE THAT THE DEFENDANTS' PROPERTY HAD A MARKET VALUE OF \$10,000.00? 1

A. Was there sufficient evidence that the market value of the mobile home itself was \$10,000.00 or more? 1

B. Should personal property be included in this calculation? 1

C. Are the defendants' assumptions about the assessed value of the mobile home correct? 1

4.	CONSIDERING THE PLAIN LANGUAGE OF THE STATUTE, THE DICTIONARY DEFINITION OF "VALUE", THE CONTEXT OF THE STATUTE, AND THE STRAINED RESULT THE DEFENDANTS' INTERPRETATION WOULD BRING, HAVE THE DEFENDANTS' CORRECTLY INTERPRETED THE STATUTE TO DIVORCE THE VALUE OF PROPERTY FROM THE AMOUNT FOR WHICH IT IS INSURED?	2
	A. What is the result of the legislature's failure to define "value"?	2
	B. What is the common understanding of the word "value"?	2
	C. Is this consistent with the context of the statute, and would a contrary interpretation lead to an absurd result?	2
	STATEMENT OF THE CASE	2
	ARGUMENT	5
1.	THIS COURT NEED NOT ADDRESS THE MERITS OF THE DEFENDANTS' ARGUMENT BECAUSE, NOT ONLY IS IT RAISED FOR THE FIRST TIME ON APPEAL, BUT LEYSA SWEANY TOOK THE OPPOSITE POSITION AT TRIAL	5
2.	IF THE DEFENDANTS ARE ALLOWED TO RAISE THE ISSUE ON APPEAL, THE STANDARD OF REVIEW SHOULD BE THE SAME AS ANY CLAIM REGARDING THE SUFFICIENCY OF THE EVIDENCE	7
3.	THERE WAS SUFFICIENT EVIDENCE THAT THE MARKET VALUE OF THE MOBILE HOME WAS \$10,000.00 OR MORE	8

A.	The defendants are misreading RCW 9A.48.020 by not including personal property in their calculation	10
B.	The defendants are making unsupported assumptions regarding the assessed value of the property ...	11
4.	IN ANY EVENT, EVEN IGNORING THE FACTS SHOWING THE MOBILE HOME, EITHER STANDING ALONE OR ADDING PERSONAL PROPERTY THEREIN, HAD A FAIR MARKET VALUE OF OVER \$10,000.00, THE DEFENDANTS ARE MISINTERPRETING THE STATUTE. IN THE CONTEXT USED IN RCW 9A.48.020, "VALUE" IS THE AMOUNT PROPERTY IS INSURED FOR, NOT "FAIR MARKET VALUE."	12
A.	The statute refers to the "value" of property, not the "fair market value."	14
B.	The usual and ordinary meaning of the word "value" can mean the material worth of property, rather than the fair market value	15
C.	The defendants' interpretation of RCW 9A.48.020(1)(d) in the context of the purpose of that statute would result in an unlikely, absurd, or strained result	16
	CONCLUSION	20

TABLE OF AUTHORITIES

WASHINGTON CASES

Burton v. Lehman,
153 Wn.2d 416, 103 P.3d 1230 (2005) 15

In re Parentage of J.M.K.,
155 Wn.2d 374, 119 P.3d 840 (2005) 16

State v. Flowers,
30 Wn. App. 718, 637 P.2d 1009 (1981) 7, 8

State v. Ford,
137 Wn.2d 472, 973 P.2d 452 (1999) 6

State v. Matthews,
132 Wn. App. 936, 135 P.3d 495 (2006) 8

State v. Nguyen,
165 Wn.2d 428, 197 P.3d 673 (2008) 6

State v. Smith,
159 Wn.2d 778, 154 P.3d 873 (2007) 7

WASHINGTON STATUTES

RCW 9A.48.010 14

RCW 9A.48.020 10, 12, 14, 15, 16

RCW 9A.48.020(1)(d) 10, 13, 14, 16, 17, 19, 21

RCW 9A.48.070 15

RCW 9A.48.080 15

RCW 9A.48.090 15

RCW 9A.48.100 14

RCW 9A.56 15

RCW 9A.56.010(18) 15

RCW 9A.56.010(18)(a) 15

REGULATIONS AND COURT RULES

RAP 2.5 6, 7
RAP 2.5(a)(3) 5

OTHER

Houghton Mifflin, American Heritage
Dictionary of the English Language, 1414
(New College Ed. 1975) 15

Capra, Frank, It's a Wonderful Life,
Liberty Films (1946) 12

www.kgbanswers.com 13

ISSUES

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3. IF THE DEFENDANTS ARE ALLOWED TO RAISE THE ISSUE, AND IF THE COURT ACCEPTS THE DEFENDANTS' INTERPRETATION OF THE STATUTE, WAS THERE SUFFICIENT EVIDENCE THAT THE DEFENDANTS' PROPERTY HAD A MARKET VALUE OF \$10,000.00?
 - A. Was there sufficient evidence that the market value of the mobile home itself was \$10,000.00 or more?
 - B. Should personal property be included in this calculation?
 - C. Are the defendants' assumptions about the assessed value of the mobile home correct?

4. CONSIDERING THE PLAIN LANGUAGE OF THE STATUTE, THE DICTIONARY DEFINITION OF "VALUE", THE CONTEXT OF THE STATUTE, AND THE STRAINED RESULT THE DEFENDANTS' INTERPRETATION WOULD BRING, HAVE THE DEFENDANTS' CORRECTLY INTERPRETED THE STATUTE TO DIVORCE THE VALUE OF PROPERTY FROM THE AMOUNT FOR WHICH IT IS INSURED?
- A. What is the result of the legislature's failure to define "value"?
- B. What is the common understanding of the word "value"?
- C. Is this consistent with the context of the statute, and would a contrary interpretation lead to an absurd result?

STATEMENT OF THE CASE

Going into 2009, the financial outlook for Leysa Sweany and her daughter, Leah Sweany, were bleak. Leysa Sweany had been receiving \$1,000.00 per month in death benefits on behalf of her minor son, pursuant to her late husband's job with the railroad. (RP 01/13/10, 210). Those benefits stopped in August 2008, when her son turned 18. (RP 01/13/10, 210). Leysa and Leah

had to resort to selling their blood or plasma to help make ends meet. (RP 01/13/10, 322). On December 9, 2008, Leysa and Leah were given a 20-day-notice to vacate the mobile home park where they lived at 2105 North Steptoe, Lot No. 105, Kennewick, Washington. (RP 01/13/10, 234). Management verbally gave Leysa and Leah until December 31, 2008 to vacate. (RP 01/13/10, 233). However, it would cost five to \$15,000.00 to move the mobile home, and they did not have that much money. (RP 01/13/10, 325).

However, the mobile home was insured for \$65,000.00, a small outbuilding on the property was insured for \$6,500.00, and their personal property was insured for \$32,500.00. (RP 01/13/10, 219). On January 6, 2009, Leah Sweany spoke to some friends about their problems, and said that they were going to burn down their house for insurance money. (RP 01/13/10, 283). On January 7, 2009, after the smoke detectors were removed from the wall and the batteries taken

out, and after leaving their pets with neighbors, Leysa and Leah Sweany left the residence at around 11:40 a.m. (RP 01/12/10, 18, 47; RP 01/13/10, 283, 322).

Around 1:00 p.m., a neighbor spotted smoke coming from the Sweanys' mobile home and called 911. (RP 01/12/10, 35-36, 46). The origin of the fire was the left-rear burner of the stove according to Kennewick Fire Marshall, Mark Yaden, firefighter and fire investigator, Rob Buckley, and fire insurance investigator, Joel Felder. (RP 01/12/10, 49-50, 98, 121-122). There were many combustible items, including paper and cardboard in that area. (RP 01/12/10, 99). The control knob of that burner was turned to the highest setting, nine. (RP 01/12/10, 152).

The defendants claimed the stove was not working. (RP 01/13/10, 323). However, according to forensic engineer and fire investigator, Douglas Barovsky, the burner would heat when turned on (RP 01/14/10, 400, 413).

ARGUMENT

1. THIS COURT NEED NOT ADDRESS THE MERITS OF THE DEFENDANTS' ARGUMENT BECAUSE, NOT ONLY IS IT RAISED FOR THE FIRST TIME ON APPEAL, BUT LEYSA SWEANY TOOK THE OPPOSITE POSITION AT TRIAL.

At trial, Leysa Sweany stated that the mobile home was worth more than \$10,000.00. (RP 01/14/10, 474-475). The defendants did not object to the trial court's instructions, including the "to convict" instruction regarding the alternative means of committing Arson in the First Degree by a "fire damaging a dwelling" and a "fire on property valued at ten thousand dollars or more with intent to collect insurance proceeds." Now, the defendants argue that the State did not prove the fair market value of the mobile home was over \$10,000.00. (Leysa Sweany App. Brief at 4; Leah Sweany App. Brief at 2).

Under RAP 2.5(a)(3), a "manifest" error "affecting a constitutional right" may be raised for the first time on appeal. The defendants are correct that they can raise an issue about the

sufficiency of the evidence for the first time on appeal. They are correct that a defendant has a right to a unanimous verdict. However, an error is "manifest" if it is "unmistakable, evident, or indisputable" and results in actual prejudice to the defendant. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). The defendants are incorrect in assuming (they did not actually argue the point) that the alleged error was manifest.

If Leysa Sweany had argued that the value of the mobile home was under \$10,000.00, or if the defendants had objected to that prong of the "to convict" instruction, the State would have withdrawn it. Likewise, if the defendants had objected, the trial court may not have included that provision in the "to convict" instruction.

RAP 2.5 is discretionary, providing that a party may raise issues on certain situations. *State v. Ford*, 137 Wn.2d 472, 477, 484-485, 973 P.2d 452 (1999). If the doctrines of invited

error or issue preclusion do not bar the defendants' argument, the Court should use its discretion to decline hearing the merits of their argument. To testify one way at trial (the mobile home is worth more than \$10,000.00), accept the trial court's instructions, and then to argue the opposite way on appeal seems to be what RAP 2.5 is meant to address.

2. IF THE DEFENDANTS ARE ALLOWED TO RAISE THE ISSUE ON APPEAL, THE STANDARD OF REVIEW SHOULD BE THE SAME AS ANY CLAIM REGARDING THE SUFFICIENCY OF THE EVIDENCE.

Regarding alternative means of committing a crime, there must be "substantial evidence" supporting each of the alternative means presented. *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Flowers*, 30 Wn. App. 718, 722-23, 637 P.2d 1009 (1981). *Flowers* seemed to suggest that "substantial evidence" may be a lower standard than that usually used regarding sufficiency of evidence challenges. ("Examination of the evidence in this case

demonstrates not only substantial evidence of each circumstance, but that any rational trier of fact could have found each circumstance was proved beyond a reasonable doubt." *Flowers*, 30 Wn. App. at 723. [citations omitted]

Nevertheless, it would seem logical to view "substantial evidence" as being equivalent to the standard for sufficiency of the evidence: 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. *State v. Matthews*, 132 Wn. App. 936, 940, 135 P.3d 495 (2006).

3. THERE WAS SUFFICIENT EVIDENCE THAT THE MARKET VALUE OF THE MOBILE HOME WAS \$10,000.00 OR MORE.

There were actually a number of statements about the market value of the mobile home. The defendants have only referred to the assessed value of the mobile home and have ignored the following:

- Mrs. Sweany stated the mobile home's market value was over \$10,000.00. (RP 01/14/10, 473-474). Since she is the owner of the mobile home, that opinion should carry some weight. (RP 01/14/10, 446).
- The mobile home park manager believed a pre-1995 single wide mobile home could sell for up to \$12,000.00. (RP 01/13/10, 238).
- The underwriters for the insurance company must have believed that market value of the mobile home was valued at over \$10,000.00, since it was insured for well over that amount. (RP 01/13/10, 219).
- The asking price of the mobile home in 2001 was \$15,000.00. Mrs. Sweany's mother purchased it for \$10,500.00. The defendants assume that was a fair market price at that time. The sellers in 2001 perhaps needed to sell immediately, and could have held out and eventually sold the mobile home for \$15,000.00. The defendants assume that the

mobile home depreciated after Ms. Silver purchased it. These are just assumptions and are not supported by the record.

A. The defendants are misreading RCW 9A.48.020 by not including personal property in their calculation.

RCW 9A.48.020(1)(d) provides, "A person is guilty of arson in the first degree if he or she knowingly and maliciously...causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds."

The defendants ignore that the term "property" includes personal property, not just a mobile home or real estate. The defendants had in their mobile home a refrigerator, a washer and dryer, a television, a microwave oven, purses, shoes, jewelry, a bed, bookshelves and other furniture, pictures and books, and "professional" clothing. (RP 01/14/10, 428, 436, 461, 464). In

fact, the personal property was insured for \$32,500.00. (RP 01/13/10, 219).

Assume that the jury anticipated the defendants' arguments on appeal. Assume that the jurors ignored the testimony of Leysa Sweany that the mobile home's market value was over \$10,000.00. Assume that the jurors ignored testimony that a similar mobile home could sell for \$12,000.00. Assume that the jurors believed that the Benton County Assessor's valuation of the mobile home was precisely accurate. The jury could have reasonably concluded that the personal property and the assessed value of the mobile home added together had a market value over \$10,000.00.

B. The defendants are making unsupported assumptions regarding the assessed value of the property.

The defendants assume that the assessed value of the mobile home is precisely accurate. Again, that is just an assumption which the jury did not have to accept. The fair market value

could be over or under the assessed value. (RP 01/13/10, 330).

Nevertheless, even accepting the defendants' interpretation of the statute, the jury had sufficient evidence to determine that the mobile home had a market value of \$10,000.00 or more.

4. IN ANY EVENT, EVEN IGNORING THE FACTS SHOWING THE MOBILE HOME, EITHER STANDING ALONE OR ADDING PERSONAL PROPERTY THEREIN, HAD A FAIR MARKET VALUE OF OVER \$10,000.00, THE DEFENDANTS ARE MISINTERPRETING THE STATUTE. IN THE CONTEXT USED IN RCW 9A.48.020, "VALUE" IS THE AMOUNT PROPERTY IS INSURED FOR, NOT "FAIR MARKET VALUE."

Mr. Potter to George Bailey in It's a

Wonderful Life:

Look at you. You used to be so cocky. You were going to go out and conquer the world. You once called me "a warped, frustrated, old man!" What are you but a warped, frustrated, young man? A miserable little clerk crawling in here on your hands and knees and begging for help. No securities, no stocks, no bonds. Nothin' but a miserable little \$500 equity in a little life insurance policy. You're worth more dead than alive.

Capra, Frank, It's a Wonderful Life, Liberty Films (1946).

"Q: How much does the *Mona Lisa* cost?

A: The *Mona Lisa* was insured in 1962 for \$100 million approximately \$645 million adjusted for inflation." www.kgbanswers.com.

Whether it is Mr. Potter telling George Bailey his life is worth nothing more than insurance proceeds, or a website using "cost", "value," and "amount of insurance" interchangeably, people often equate the value of a life (in the case of George Bailey), a limb (in the case of Betty Grable), or an art piece (such as the *Mona Lisa*) with the amount it is insured for. The defendants argue that the amount of insurance has no bearing on its "value."

Specifically, the defendants argue that when the legislature used the word "value" in RCW 9A.48.020(1)(d), it really meant "fair market value," and that the fair market value must be determined without referring to the insured amount. As discussed below, the legislature could have used the term "fair market value" if it so

intended, the common understanding of "value" should apply, and any other interpretation is not consistent with the intent of the statute and will result in a strained result.

A. The statute refers to the "value" of property, not the "fair market value."

Again, RCW 9A.48.020(1)(d) reads:

"A person is guilty of arson in the first degree if he or she knowingly and maliciously...causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds."

"Value" and "fair market value" have different meanings and have not been used interchangeably by the legislature. Note that RCW 9A.48.020 does not include a definition of "value." Nor does RCW 9A.48.010-Definitions include a definition of "value" for the purpose of the chapter. In contrast, RCW 9A.48.100 defines "value" for the purpose of the malicious

mischievous statutes RCW 9A.48.070 to 9A.48.090. It is also in contrast to RCW 9A.56 "Theft and Robbery," which does have a provision defining the word "value." (See RCW 9A.56.010(18)). "Value," pursuant to RCW 9A.56.010(18)(a), refers to market value. If the legislature intended that "value" under RCW 9A.48.020 meant "market value," it would have so provided.

So, the word "value" in RCW 9A.48.020 should be given its usual and ordinary meaning since it is not defined by statute. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

B. The usual and ordinary meaning of the word "value" can mean the material worth of property, rather than the fair market value.

"Value" is defined in the American Heritage Dictionary of the English Language as "1. an amount considered to be a suitable equivalent for something else; a fair price or return for goods or services. 2. Monetary or material worth." American Heritage Dictionary, 1414. [Emphasis

added] The "monetary or material worth" of the mobile home and personal property therein was the amount for which it was insured. Obviously, the defendants hoped to receive well over \$10,000.00 as a result of the fire at their mobile home. The monetary worth of the mobile home to Mrs. Sweany was \$65,000.00, the amount for which it is insured.

C. The defendants' interpretation of RCW 9A.48.020(1)(d) in the context of the purpose of that statute would result in an unlikely, absurd, or strained result.

A common rule in statutory interpretation is to avoid a result which is "unlikely, absurd, or strained." *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005). Here, the defendants' interpretation of RCW 9A.48.020 does result in an unlikely or absurd result.

Obviously, the legislature wanted a harsher penalty for someone who sets fire to his automobile with the intent of defrauding an insurance company than someone who sets fire to

an automobile to see it burn. The only way to profit from arson is for the owner to over-insure their property, and hope the insurance company pays out. The value of the property in this situation is not the fair market value.

The phrase, "property valued at ten thousand dollars or more with intent to collect insurance proceeds" must be read together. "Property valued at ten thousand dollars or more" refers to the "intent to collect insurance proceeds." If the insurance proceeds are less than \$10,000.00, an individual has not committed the crime of Arson in the First Degree. The obvious intent of RCW 9A.48.020(1)(d) is to harshly penalize a person who attempts to defraud an insurance company of \$10,000.00 or more. If a person has under-insured property, he cannot defraud an insurance company by causing a fire. So, the legislature did not intend "property valued at ten thousand dollars or more" to mean

"property whose fair market value is ten thousand dollars or more".

Think of the 72nd home run hit by Barry Bonds in 2001. The fan catching the ball believes he has just won the lottery: Mr. Bonds has surely hit his last home run of the year, and it is the baseball which has set the record for most homeruns in a season. The fan believes the baseball must be worth at least \$1,000,000.00. The fan rushes to insure the baseball for that amount. Alas, Mr. Bonds hits one more home run that season, meaning that home run baseball number 73 is now the most valuable ball in history. Number 72 now is just another home run, albeit one hit by the great Barry Bonds.

Unfortunately, as the years pass, Mr. Bonds becomes widely suspected of the use of performance-enhancing drugs, and is eventually charged with perjury. His records are denounced as the product of cheating. During his final season, fans jeer him relentlessly; even the

value of homerun ball number 73 has plummeted. Homerun ball number 72 is now not only just a used baseball, it is associated with the taint of Barry Bonds. Our once-lucky fan, now holds a baseball that no one wants to buy.

Our now not-so-lucky fan looks for some way to get a material benefit from the baseball. He remembers the \$1,000,000.00 insurance policy. He sets fire to the baseball, once holding such promise, to collect the insurance proceeds. Our fan has now committed Arson in the First Degree under RCW 9A.48.020(1)(d). Although the market value on the baseball was nil, to the fan, the material value was still \$1,000,000.00, the value of the insurance policy.

The defendants' argument would have the strained result that our fan, who tried to defraud an insurance company of \$1,000,000.00 would not be guilty, because the baseball's fair market value was under \$10,000.00. That is a result contrary to the plain language of the

statute, contrary to the common understanding of the word "value" as meaning "monetary worth" and contrary to the legislative intent.

Conversely, if a fan under-insures the baseball, he gets no benefit from causing a fire; the defendants would say the fan could be guilty of Arson in the Second Degree. Specifically, let's say the baseball could actually be sold for \$10,000.00. The fan has it insured for only \$500.00. The fan would lose \$9,500.00 by setting it on fire. Yet, the defendants would argue that since the baseball had a fair market value of \$10,000.00, the fan is guilty of Arson in the First Degree, even though for the fan's purposes, the monetary value of the baseball was only \$500.00.

CONCLUSION

This Court need not rule on whether the defendants' interpretation of the statute is correct. The defendants did not raise the issue with the trial court, and in fact, took the

opposite position. Further, even if the Court accepts the defendants' argument that "value" should mean "fair market value," the jury had clear evidence that the market value of the mobile home and its contents were over \$10,000.00. Finally, the only way the statute makes sense is to view the word "value" as meaning the monetary worth of an insurance policy. By its nature, arson under RCW 9A.48.020 (1)(d) is committed when a person over-insures property, sets fire to it, and tries to convince an insurance company to pay out over \$10,000.00 in proceeds.

The convictions should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of
October 2010.

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