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July 23, 2015
Court of Appeals
Division I
State of Washington

NO. 72452-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CESAR RAMOS-AVILA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE RICHARD F. McDERMOTT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A jury instruction on an inferior-degree offense must be given only if evidence supports a reasonable inference that the defendant committed *only* the inferior offense to the exclusion of the charged offense. The defendant was charged with first-degree arson for setting a fire in a “dwelling.” At trial, the evidence showed the defendant lit a fire that burned the front door of a family’s apartment home and spread underneath, damaging the interior, and also damaged the interior of another family’s apartment. Did the trial court properly exercise its discretion by finding no factual basis to infer that the defendant committed only second-degree arson by damaging only a “building?”

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Cesar Ramos-Avila was charged with Arson in the First Degree under RCW 9A.48.020(1)(b). The State alleged that he knowingly and maliciously caused a fire or explosion that damaged a multiple-dwelling building located at 3021 S. 219th Street in King County, Washington on May 18, 2014. CP 1. After a trial consisting of two days of testimony, the jury found Ramos-Avila

guilty. 5RP 6.¹ The court sentenced Ramos-Avila to 27 months of confinement followed by 18 months of community custody. 6RP 9-10; CP 42. Ramos-Avila timely appealed.

2. SUBSTANTIVE FACTS

On May 18, 2014, Desiree Sanchez and her two young children lived in the Wintergreen Apartments, Unit B-12, in Des Moines, King County, Washington, with her father, Pablo Ramirez, and four other family members. 3RP 50-51. The building is a two-story complex, with each apartment accessed by unsecured central interior stairways, and the upper units have exterior balconies. Ex. 3-5.

That morning, Sanchez was watching a movie with her children, a toddler and an infant, when she saw sparks and smoke coming under the front entry door of the apartment. 3RP 52-53. Sanchez ran to wake her father, who went to the closed door and saw smoke and fire coming inside. 3RP 67. Ramirez opened the door and found fire and smoke blocking their escape. 3RP 67. Sanchez saw "flames on the door, and then there was flames on the carpet." 3RP 54.

¹ The State has numbered the verbatim reports of proceedings as follows: 1RP (August 11, 2014); 2RP (August 12, 2014); 3RP (August 14, 2014); 4RP (August 18, 2014); 5RP (August 19, 2014); 6RP (September 9, 2014).

She and her father scooped up the small children and retreated to the balcony. 3RP 54-55. Smoke filled the apartment. 3RP 55. Residents of other units also fled to their balconies, and some leaped off. 3RP 68. Firefighters hoisted a ladder to rescue the children. 3RP 67.

Moments before the fire, sisters Maria and Maricela De La Cruz, who lived in apartment B-4 below, saw Ramos-Avila, who appeared drunk, walk past their front window and go upstairs with a gas can. 3RP 13-17, 35-37. The defendant ran out, gas can still in hand, and then Maricela De La Cruz saw a blaze at the door to the upstairs apartment. 3RP 37.

Pablo Ramirez testified that the day before the fire he was in a fistfight with the defendant in a store parking lot, and discovered afterward that his wallet with ID cards showing his home address had been left behind. 3RP 70-72.

King County Sheriff's Fire Investigator Charles Andrews testified that the fire had warped the front door, allowing flame and smoke into the apartment. 4RP 41-42. Had the fire not been extinguished in time, Andrews said, the whole apartment would have burned because "the fire was already lapping under the door and around the door to get into the apartment," and had nearly

reached a large amount of combustible material in the home. 4RP 61. Photographs showed fire and smoke damage both inside and outside the Ramirez home, Unit B-12, and also smoke damage inside the unit across the stairwell, B-11, where another family lived. Ex. 11-14, 16-21; CP 84-85; 4RP 39-46.

Janice Wu, a forensic scientist for the Washington State Patrol Crime Lab, testified that fire debris from the doorway, a burned doormat, carpet under a doormat, and the defendant's shoes all had traces of gasoline on them. 3RP 116; 4RP 51.

In his defense, Ramos-Avila testified that he did not start the fire, had no idea where the apartment building was, never went there, and had no gasoline that day. 4RP 82-83.

After resting his case, Ramos-Avila requested jury instructions for lesser offenses of Arson in the Second Degree and Reckless Burning in the First Degree. 4RP 95; CP 72-75. He argued that the testimony showed "that it all occurred outside of the living areas of any of the units," so the jury "could ultimately decide that this was not part of quote/unquote, the dwelling but, in fact, part of a building." 4RP 97. Further, he argued, the jury could infer that "there was no intent to cause a fire to the insides of the dwelling." 4RP 98.

The State objected. 4RP 96. The prosecutor mentioned State v. Hobart, which had very similar facts. 34 Wn. App. 187, 659 P.2d 557 (1983). However, "what is more persuasive," the prosecutor said, is that "there is just nothing in the record to indicate the defendant was in anything other than a dwelling." 4RP 96-97. "There is just not one ounce of evidence of an inference that would meet that this occurred in a building other than a dwelling." 4RP 97.

The court agreed:

We have pictures showing the amount of damage inside one of the apartment units. I don't believe that there is a set of facts that a jury could legitimately conclude that arson in the second degree was committed and not arson in the first degree because ... I just don't see any facts where a jury could legitimately conclude that. ... I'm afraid that by giving a lesser included instruction in this particular instance, we are going to confuse the jury, because I don't see that there have been facts presented where they could conclude that a lesser included crime, indeed, was committed. So I think it is all or nothing.

4RP 99-100.

In closing argument, Ramos-Avila's attorney did not discuss the definition of "dwelling" vis-à-vis "building," or argue that the dwelling element was not proven. Instead, he argued exclusively that the State had not proven that Ramos-Avila set the fire. 4RP 113-19.

C. ARGUMENT

1. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION TO DENY THE INFERIOR-DEGREE INSTRUCTION AS A MATTER OF FACT.

Ramos-Avila contends that the trial court should have instructed the jury on an inferior-degree offense of second-degree arson because there was evidence that the defendant set fire to only a “building,” not a “dwelling.” To the contrary, the evidence at trial was overwhelming that Ramos-Avila’s fire not only burned a family’s front door but spread inside their home, and also damaged the inside of a neighboring apartment. The trial court was well within its discretion to find no factual basis to give an instruction on second-degree arson.²

a. An Inferior-Degree Offense Instruction Must Meet A Factual Threshold.

Washington Const. art. I, § 22 preserves a defendant’s “right to be informed of the charges against him and to be tried only for offenses charged.” State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). However, by statute, a defendant charged with an offense consisting of different degrees can be found not guilty of the charged offense but guilty of an inferior-degree offense.

² The State is not relying on State v. Hobart, 34 Wn. App. 187, 659 P.2d 557 (1983), and does not argue that second-degree arson is not legally an inferior-degree offense to first-degree arson.

RCW 10.61.003. For inferior-degree offenses, a jury instruction is properly given when:

(1) the statutes for both the charged offense and the proposed inferior-degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150

(2000). The first two prongs are questions of law – whether the inferior-degree offense is legally a lesser offense. The third prong is a question of fact. Id. (focusing on the third prong as the factual component).

The inferior-degree-offense instruction is commonly confused and conflated with a separate right to an instruction on a lesser-included offense, where the offense is not a lesser degree of the charged offense, but is “necessarily included within that with which he or she is charged.” RCW 10.61.006. See Fernandez-Medina, 141 Wn.2d at 454 (“Indeed, many courts have failed to note the distinction.”). Regardless, the “test for determining if a party is entitled to an instruction on an inferior-degree offense differs from the test for entitlement to an instruction on a lesser

included offense *only with respect to the legal component of the test.*” Id. at 455 (emphasis added)³.

When an instruction on a lesser offense is denied based on a factual determination, the decision is reviewed for abuse of discretion. State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). Thus, the trial court’s decision will stand unless it is “manifestly unreasonable or ‘rests on facts unsupported in the record or was reached by applying the wrong legal standard.’” State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is “manifestly unreasonable” if the court adopts a view that no reasonable person would take and arrives at a decision outside the range of acceptable choices. Rohrich, 149 Wn.2d at 654. Erroneous failure to instruct the jury on a lesser offense necessitates reversal. Condon, 182 Wn.2d at 316.

The factual prong of the test for inferior-degree offenses exists to “ensure that there is evidence to support the giving of the

³ The test for instruction on a lesser-included offense is known as the Workman test. See State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (citing State v. Workman, 90 Wn.2d 541, 545, 947 P.2d 700 (1997)). The test asks (1) whether the lesser-included offense consists solely of elements that are necessary to conviction of the greater, charged offense (the legal prong) and (2) whether the evidence presented “supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense” (the factual prong). Id. (emphasis in original).

requested instruction.” Fernandez-Medina, 141 Wn.2d at 455-56. The test “includes a requirement that there be a factual showing more particularized than that required for other jury instructions.” Id. The evidence “must raise an inference that *only* the lesser included/inferior-degree offense was committed to the exclusion of the charged offense.” Id. (emphasis in original). “More specifically, a requested jury instruction on a lesser included or inferior-degree offense should be administered ‘[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.’” Id. (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)(citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)).

The supporting evidence must be viewed in the light most favorable to the moving party. Id. However, “[i]t is not enough that the jury might simply disbelieve the State’s evidence. Instead, some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.” State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)(holding, in an assault-with-weapon case, that an instruction on unlawful display of a firearm should not be given where the defendant claimed he didn’t display a gun), disapproved

of on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

As Ramos-Avila was charged here, a defendant is guilty of first-degree arson if the fire damages a dwelling. RCW 9A.48.020(1)(b). A defendant is guilty of second-degree arson if the fire damages a building. RCW 9A.48.030(1). A dwelling means "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7). A building, "in addition to its ordinary meaning, includes any dwelling ... or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods." RCW 9A.04.110(5). First-degree arson supersedes second-degree arson even though "dwelling" is included in the definition of "building." State v. Lunstrom, 19 Wn. App. 597, 576 P.2d 453 (1978). Damages, "in addition to its ordinary meaning, includes any charring, scorching, burning or breaking ... and shall include any diminution in the value of any property as a consequence of an act." RCW 9A.48.010(1)(b).

b. The Trial Court Properly Found No Facts To Support An Instruction On Second-Degree Arson.

Ramos-Avila asserts that the evidence “demonstrated conclusively that Ramos-Avila damaged a portion of a building, and the jury could have reasonably concluded that persons do not ordinarily ‘lodge’ in the stairwell of a building.” AOB at 4. He misstates the evidence. But even if he didn’t, his argument fails.

Actually, the evidence was conclusive that the fire damaged both the outside of the front door and the interior living quarters of the targeted home. Ex. 11-14, 16-21; CP 84-85; 4RP 39-46. As many as eight people resided in that apartment, including small children. 3RP 50-51. Additionally, the apartment home across the hall also suffered extensive smoke damage. 4RP 41-43. No reasonable jury could conclude that only second-degree arson was committed to the exclusion of first-degree arson because the insides of two homes were damaged, not just a stairwell.

But even taking Ramos-Avila’s characterization of the evidence as true, his logic does not hold up. His argument would mean that first-degree arson is never committed unless a fire damages an entire dwelling, or at least the precise part where the residents “lodge.” That neither comports with the law nor makes

common sense. The statute proscribes setting a fire that “damages” – not “destroys” -- a dwelling, and a dwelling is defined as the whole building if it is ordinarily used for lodging, not merely the part used to lodge. RCW 9A.04.110(7). In fact, “Washington courts have consistently held as a matter of law that when a building clearly is used for lodging, an unoccupied portion of the building is included in the definition of dwelling.” State v. McPherson, 186 Wn. App. 114, 118, 344 P.3d 1283 (2015)(citing residential burglary cases, which use the same definition of dwelling in RCW 9A.04.110(7)). See also State v. Neal, 161 Wn. App. 111, 113-14, 249 P.3d 211 (2011)(a tool room in an apartment building is a “dwelling” because it was a portion of a building used as lodging); State v. Moran, 181 Wn. App. 316, 321-23, 324 P.3d 808, review denied, 337 P.3d 327 (2014)(the area under the foundation of a house is a “dwelling” even though the area was not accessible from the inside living quarters); State v. Murbach, 68 Wn. App. 509, 513, 843 P.2d 551 (1993)(attached garage is a dwelling).

That makes sense in the context of arson, too: If the stairway and front door of a freestanding single-family home were set ablaze, common sense would say that a dwelling was damaged. The fact that Desiree Sanchez, her father and their large family

lived in an apartment does not make their front door any less a part of their dwelling than had they lived in a mansion -- especially when the fire did, in fact, reach inside and damage the interior.

Additionally, Ramos-Avila faults the trial court for using the lesser-included-offense test instead of the inferior-degree-offense test in excluding the instruction. That is of no importance because the factual thresholds are identical. Fernandez-Medina, 141 Wn.2d at 455. The court repeatedly stated categorically -- and correctly -- that there was absolutely no "set of facts that a jury could legitimately conclude that arson in the second degree was committed and not arson in the first degree." 4RP 99. That was a proper application of the law, and it was well-grounded in the facts.

Lastly, Ramos-Avila's sole theory of the case was that he was not there and did not do it, not that a dwelling was not damaged. In fact, he did not make a single argument to the jury that a mere building was damaged and not a dwelling. The lack of an instruction on second-degree arson did not preclude such an argument; Ramos-Avila could have pressed for an outright acquittal. But he was silent on that issue. That is important

because a lesser-offense instruction must support the moving party's theory. See Fowler, 114 Wn.2d at 67. While Fowler was about a different crime, the situation there is quite comparable: In an assault-with-a-weapon trial, the defendant testified that he did not have a gun, or if he did, he did not draw it. Id. at 61. So he was not entitled to an instruction on Unlawful Display of a Weapon because he was claiming he didn't commit that crime either. Id. at 67. Similarly, Ramos-Avila was not entitled to a second-degree arson instruction because he denied committing any arson at all.

The trial court properly exercised its discretion by refusing a second-degree arson instruction because there was not a single fact to support an inference that only a building, but not a dwelling, had been damaged. If Ramos-Avila's gasoline-fueled blaze damaged any part of the Wintergreen Apartments that morning, it damaged a dwelling. Yet it extensively damaged the inside of people's homes. The trial court's denial of the jury instruction as a matter of fact should not be disturbed on appeal.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Ramos-Avila's conviction and sentence.

DATED this 23rd day of July, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Suzanne Elliott, containing a copy of the BRIEF OF RESPONDENT in State v. Cesar Ramos-Avila, Cause No. 72452-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of July, 2015

W Brame

Name:

Done in Seattle, Washington