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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY *kw*  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

WAYNE ANTHONY MURPHY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John Hickman

No. 07-1-04577-7

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**BRIEF OF RESPONDENT**

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A. INTRODUCTION

Appellant, defendant Wayne Anthony Murphy, challenges his conviction for arson in the first degree on the basis that one of the alternatives the jury considered was not supported by sufficient evidence.<sup>1</sup> The State alleged that the defendant maliciously set a fire to a wood frame four unit apartment complex in the middle of the night. RP 11, p. 696. At the time the apartment was occupied by at least four individuals, two of them young children.<sup>2</sup> RP 10, p. 545. The fire, set in a highly flammable juniper tree, raced up the outside of the building, melting portions of the asphalt roof tiles and damaging the sheathing underneath. RP 11, p. 704. Smoke and heat from the flames entered the apartment where the children were sleeping, causing damage to the interior curtains/blinds. RP 10, p. 647.

Using narrow definitions of “fire” and “building, and citing to only a portion of the available evidence, the defendant contends that substantial evidence does not exist to support alternative 2(b), that the fire “was in a building in which there was at the time another human being who was not a participant in the crime. This argument should be rejected. Applying

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<sup>1</sup> The defendant apparently does not challenge his misdemeanor conviction for harassment as there are no assignments of error or argument pertaining to this second charge.

<sup>2</sup> Citations to the verbatim report of proceedings will be by volume and page number.

the correct legal standard to the full facts of the case, and drawing all inferences in favor of the State, substantial evidence supports both alternatives.<sup>3</sup> For these reasons, the State asks this Court to affirm the conviction.

B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Viewing the evidence in the light most favorable to the State, does sufficient evidence establish that the fire was “in a building . . . in which there was at the time a human being who was not a participant in the crime(s)?”

C. STATEMENT OF THE CASE.

1. Procedure

The defendant, Wayne Anthony Murphy, (hereafter “defendant.”) was arraigned on charges of arson in the first degree and felony harassment on September 4, 2007 in Pierce County Cause Number 07-1-04577-7. The original information alleged the defendant committed arson in the first degree by starting a fire in a building in which there were human beings unrelated to the crime. CP 1-2. The information was later

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<sup>3</sup> As to the first alternative, the allegation that the fire damaged a dwelling, no challenge has or can be made.

amended to allege additionally that the defendant started a fire which damaged a dwelling. CP 19-20.

Early in the proceedings, defendant alleged that Deputy Prosecuting Attorney Bertha Baranko Fitzer tampered with a potential alibi witness, Clainea Williams. CP 5-8. To insure that the defendant's due process rights were protected, Ms. Fitzer asked the court to hold a full evidentiary hearing on the defendant's claim. To further protect the defendant's fundamental right to a fair trial, Ms. Fitzer asked a different deputy prosecuting attorney, Ms. April McComb, to handle that hearing. Ms. Fitzer had no contact with the witness prior to the hearing and left the room during the witness's testimony. RP 4, 205-206. At this hearing, the witness, Althea Williams, testified that she had had no direct contact with Ms. Fitzer. She stated that the only conversations she had with the State were through a receptionist in the prosecutor's office and through contact with the investigating detective. RP 4, pp. 208; 211-213; 215-217. The witness also testified that the defendant called her and asked her to lie for him to the judge and the prosecutor. RP 4, 214. The defendant wanted her to tell the court that he had been at her house. *Id.*

Ms. Williams' testimony was corroborated by Ms. Fitzer who testified that she did not call the witness, had never met her, and did not intimidate her. RP 4, p. 243-244. At the conclusion of the testimony, the trial court found that there had been no contact between Ms. Fitzer and the

witness. After summarizing the evidence presented, the court's conclusions regarding this issue were unequivocal:

Therefore, I do not find that there is any basis whatsoever to dismiss this on the basis of Ms. Fitzer exercising any misconduct or undue influence on any person connected to this trial, whether it's Ms. Williams or any other witness.

As far as any governmental agency attempting to influence the testimony of any person, based on the testimony of Ms. Williams as well as Mr. Wimmer, I do not find that there was any, again, indication of misconduct or attempt to influence the testimony of this particular witness and, therefore, will dismiss this motion.

RP 4, 263-264.

Following jury selection and the testimony of several witnesses, the State informed the court and defense counsel that there had been a probable violation of RCW 9.73.090(1)(b). RP 6, p. 480, 489. That section provides that statements taken by police from those in custody must, when taped, contain the advisement of rights on the tape itself. As the jury had already heard the tape in question, and based on authority cited to it by the State, the trial court ordered a mistrial. RP 6, 490-91.

The subsequent trial concluded with guilty verdicts on both the arson and harassment counts. CP 88-89.

## 2. Trial Testimony

This case started with a dispute between the defendant and Ms. Clainea Williams. Beginning on August 9, 2007 and continuing through

to August 14, 2007, the defendant made various demands for money he believed Clainea Williams owed to him. During this time, the defendant left 22 voicemails<sup>4</sup> on Ms. William's cell phone. RP 11, p. 779. Ms. Williams was staying with her sister and/or her boyfriend. RP 11, p. 790. The phone calls gradually escalated. On August 11, 2007, at 3:38 p.m., the defendant called and left a message stating that he was going to be on the hill that night and demanding his money. He stated that if he didn't get his money, "I'm going to act real stupid. . ." Ex. 2.

At 12:52, the defendant left a message stating that he was watching the apartment of the boyfriend, John Wormack. Ex. 2. Later that night, the defendant threw a rock at Wormack's window. RP 11, pp. 783-784. This incident was reported to the police. RP 11, p. 792.

At 2:06 a.m. on August 12, 2007, the defendant left a message stating that he had been "Fire Marshall Bill" and threatening "I will burn that bitch up, and you'll be on top." Ex. 2.

At 2:10 a.m., the defendant left a message stating that "I will kill everything around your family, nigger, I will do you." Ex. 2.

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<sup>4</sup> The record is being supplement with exhibit numbers two and three. Exhibit two is the tape of the recorded voicemails which was admitted and published to the jury. Exhibit number three is the transcript of the tape which, though not admitted, was used as an aid for the jury as the tape was played. It is being sent for this court's use for the same purpose recognizing that the tape itself is the actual evidence.

At 2:11 on August 12, 2007, the defendant left a message stating in part, "I'm killing everyone around you. That goes for John-John, you and your bitch. I want my money. Becky already told me." Ex. 2.

Between 2:00 and 2:30 a.m., the defendant arrived at the apartment at 4035 S. Warner where Rebecca Seabert lived with her daughter, Angelica. RP 10, pp. 548-549, 642. On the night in question, Rebecca and Angelica were babysitting Rebecca's grandchildren. RP 10, p. 644. One child was asleep in Rebecca's bedroom. RP 10, p. 648. The other child had fallen asleep on the front room sofa, clearly visible from the front door. RP 10, pp. 648-49.

The defendant demanded that Rebecca tell him where Clainea was. RP 10, pp. 549-550. The defendant argued with Rebecca and then threatened to burn the building down. RP 10, p. 551. Rebecca protested that her young grandchildren were there. *Id.* The defendant replied that he didn't care. *Id.*

Within 5 to 10 minutes of the defendant leaving, Rebecca Seabert noticed the glow from the fire. RP 10, pp. 553-554. About the same time, a neighbor, seeing the fire, pounded on her door. *Id.* Rebecca and her daughter Angelica grabbed the two children and fled. RP 10, pp. 646-647. The fire, ignited in a juniper tree, raced up the side of the building, up the drain pipe (causing it to drop off the building) and through the down spout

roof access. That started burning the roof. RP 11, pp. 706; 716-719. The fire melted blinds within the apartment. RP 10, pp. 647-48.<sup>5</sup> Tacoma Fire Department Fire Investigator Lt. Mike Curley testified that based on the physical evidence, the fire was intentionally set. RP 11, p. 722.

The fire was called in at 2:49 a.m. on August 12, 2007. RP 11, p. 693. At 3:08 a.m. on August 12<sup>th</sup>, the defendant left a message telling Clainea that “There’s a lot of kids in danger right now. I tried to tell you. They lookin’ for me, but I ain’t never with you. In other words, they gonna find you and everybody else, so John John he’s the next victim. Beck, oh, she was the first one cause she opened her mouth.” Ex. 2.

Other calls were made at 3:16, 8:38, 8:39, and 8:42 on August 12. In the 8:42 call, the defendant left a message saying: “Hey check this out. I got one more thing to say to you, I want my money. If I don’t get it everybody else gonna get burned up.” Ex. 2.

The calls continued into the night of August 12. At approximately 5:30 or 6:00 a.m. on August 13, a second juniper bush was set on fire immediately outside Rebecca’s bedroom. This fire was smaller than the first one as the parties apparently discovered it earlier and were able to extinguish it. RP 10, p. 649.

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<sup>5</sup> The specific testimony relating to this issue will be discussed in the Argument section of this brief.

Later that day, the defendant left a message stating in part that “I will hunt you down.” Another call that day conveyed the message that he would “fuck you all up.” Ex. 2.

On August 16, 2007, Clainea Williams gave a statement to the University Place Police. Deputy Shook recorded her statement, and the voice mails left on her cell phone. RP 11, p. 773.

On August 22, 2007, the defendant was arrested by Deputy Salmon. RP 10, p. 615. Custody was then transferred to Deputy Curtis Seevers. RP 10, p. 616. Deputy Seevers testified that when he arrested the defendant he found two cell phones on his person. Deputy Seevers ultimately tied the cell phones to a number of the calls made by the defendant. RP 10, 616-619; 623. He also testified that the defendant made statements during questioning which corroborated the fact he was the one making the calls. RP 10, p. 630.

The defense called the defendant’s nephew Eric Webb and his niece, Cynthia Nieves, as alibi witnesses. RP 13, pp. 915-929; RP 12, pp. 849-882. These witnesses testified that on the night of the fire, their uncle was at home.

D. ARGUMENT.

1. LEGAL STANDARDS

a. Law Governing Arson

The corpus delicti of the crime of arson consists of two elements: (1) that the building in question burned; and (2) that it burned as the result of the willful and criminal act of some person. *State v. Nelson*, 17 Wn. App. 66, 69, 561 P.2d 1093(1974); *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336(1998). Opportunity and convincing proof of motive on part of the accused to burn a residence are circumstances that may establish that the building burned as a result of the willful and criminal act of some person. *State v. Pflueller*, 167 Wash. 485, 490, 9 P.2d 785 (1932).

Washington's arson statute is contained in RCW 9A.48 et.seq. arson in the first degree is defined in RCW 9A.48.020. That section provides:

A person is guilty of arson in the first degree if he or she knowingly and maliciously;

- (a) Causes a fire or explosion which is manifestly dangerous to any human life, including fire fighters; 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.

The arson statute refers to the definition of building contained in RCW 9A.04.110(5). RCW 9A.48.110(a). That section defines “building” broadly. Thus,

“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 latter portion of this definition is modified, however, by RCW 9A.48.110(a). That section provides that separately secured or occupied units are not to be treated as a separate building. Thus, the arson statute treats an apartment building as an entire structure. Consequently, fire in any part of the building is fire in a building under the express terms of the arson statute.

Here, the jury was instructed on the elements of arson in instruction number 12, the “to convict” instruction. CP 76. That instruction provided:

#### INSTRUCTION NO. 12

To convict the defendant of the crime of arson in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of August 2007, the defendant caused a fire or explosion;
  - (2) (a) That the fire or explosion damaged a dwelling
- OR

- (b) was in a building in which there was at the time another human being who was not a participant in the crime;
- (3) That the defendant acted knowingly and maliciously; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1) (3) (4) and either 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements 2(a) and 2(b) are alternatives and only one need be proved. You must unanimously agree that (2)(a) has been proved or that (2)(b) has been proved.

On other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 76). The defense did not object to this instruction nor is it challenged on appeal. Nonetheless, the defendant now challenges his conviction, arguing that there was insufficient evidence to establish the second alternative method of committing arson in the first degree.

b. Sufficiency of Evidence

A challenge to the sufficiency of the evidence starts with the basic question of whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). In analyzing this issue, the reviewing court is required to assume the truth of the State's evidence; draw all reasonable inferences from the evidence in favor of the State and

interpret it most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992); *State v. Thompson*, 73 Wn. App. 654, 662, 870 P.2d 1022 (1994); *State v. Partin*, 88 Wn. 2d 899, 906-07 (1977).

Where there exists sufficient evidence as to both alternative methods of committing a crime, the conviction will be affirmed. *State v. Ortega-Martinez*, 124 Wn.2d 702, 717, 881 P.2d 2321 (1994). As explained below, the State has met its burden under the above test.

2. APPLYING THE CORRECT LEGAL STANDARD, SUFFICIENT EVIDENCE EXISTS TO ESTABLISH THAT THE DEFENDANT STARTED A FIRE IN A BUILDING IN WHICH THERE WERE HUMAN BEINGS WHO WERE NOT PARTICIPANTS IN THE CRIME.

The defendant starts his argument with a limited quotation from closing argument. This comment is taken out of context. The full argument discussed the two different alternative ways of committing arson in the first degree. Contrasting the undisputed evidence on the first alternative, the State noted that there could be dispute regarding the second. The argument continued, however, with a brief citation to the evidence supporting that alternative. The full passage states:

The second part, we can quibble about whether or not the fire was actually in the building. You've heard testimony that the effects of the fire got into the building. You also saw some pictures about how it got into the roof.

RP 13, p. 942. The evidence, rather than argument, submitted on this issue, along with all inferences from the evidence, supports the verdict.

The defendant argues that there was no fire in the apartment and therefore insufficient evidence to establish the second alternative means of committing arson in the first degree. Appellant's Brief at 8. This argument requires that the court interpret the evidence in favor of the defendant and that it accept an extremely limited definition of the terms "fire" and "building."

Using the appropriate definition of building, and drawing all inferences in favor of the State, the fire in question was "in" the building because the specific arson definition of building treats the entire structure as a single entity. RCW 9A.48.010(a). The evidence at trial established that this fire burned the entire corner of the structure, ran through drainage structures and then migrated to the roof. RP 11, p. 699. Finally, the fire investigator established that the fire also got into the roof of the building. Lt. Curley testified that upon arriving at the fire scene, the fire fighters pointed out that the fire had "impacted the building to the point that it made its way actually up into the roof structure. . . ." RP 11, p. 699, lines 2-4. And that "they actually had to ladder the roof and put out the fire that was up in the roof area as well." RP 11, p. 699, lines 14-16.

On cross-examination, the defense lawyer attempted to limit this testimony to the outside of the roof. Lt. Curley testified that he did not go into the attic, but that there was damage to the sheathing which was

underneath the roofing material. RP 11, pp. 733-34. He explained that the sheathing was under the roofing material and the felt which typically covers a roof. *Id.*

This court looks at the above evidence in the light most favorable to the State, assumes that it is true, and draws all inferences from it. *Salinas*, 119 Wn.2d at 197; *Thompson*, 73 Wn. App. at 662. The logical inference from this evidence is that the fire was “in” the building. The pictures supplied to the court document the extensive damage to the building. The testimony establishes that this was not superficial damage to external structures. It was in fact, significant damage caused by a fire that worked its way into the building itself. Applying the correct standard, sufficient evidence supports the challenged alternative.

Nonetheless, without citation to legal authority or discussion of the applicable statute, the defendant argues that the State failed to prove that the fire actually got inside the Seabert’s apartment. There is no such requirement given the plain language of the statute.

Moreover, even if the law required that the State prove the fire actually entered the apartment, the State still met its burden because the term fire is not limited to the actual physical flame. It is an entire process which combines heat, fuel, oxygen and smoke which may contain toxic gases. The undisputed evidence establishes that both the heat and the smoke entered the apartment where the children slept. RP 10, p. 647.

The appropriate starting place is the expert testimony concerning the fire process. The jury heard evidence from Lt. Mike Curley that the fire process includes a number of elements and events which culminate in the actual consumption of the item being burned. Lt. Curley provided extensive testimony concerning the mechanical processes associated with fire. He testified that there is a fire tetrahedron, which is an uninhibited chain reaction. RP 10, p. 665. The gases are “part and parcel” of the fire/combustion process. RP 10, p. 670. The gases contained in the smoke emitted by a fire present significant health hazards because they contain heat and various toxic chemicals. RP 10, pp. 668-69. These byproducts of combustion vary with the type of material burning and included carbon monoxide, carbon dioxide, formaldehyde, and various acidic compounds. RP 10, pp. 669-70. The body cannot tolerate the high heat of the gases. RP 10, 669. Most of the chemicals involved are corrosives that attack the mucous membrane in the body, irritate the eyes, throat and lungs. *Id.* Carbon monoxide, which is colorless and odorless, gets into the body and limits the body’s ability to oxygenate the blood. RP 10, pp. 669-70. Finally, gases associated with fire are a significant component when there are fire injuries. RP 10, p. 670. This fact is of particular importance because the fire in this case was started while two young children, one with serious lung issues, were asleep in the building. RP 10, pp. 546; 549.

First, the testimony of Angelica Seabert established that the heat and smoke associated with the fire entered the Seabert apartment. She testified:

The back left corner of the apartments were on fire from the bushes down below were on fire from the bushes down below all the way to the gutters, the full corner of the apartment. And I smelled it and heard it before I saw it. And there was a whole bunch of smoke and stuff. And then it was extremely hot because it was fire, of course, but the—we had our window open because it was summer and the dining room and the—curtains kind of melted.

RP 10, p. 647, lines 7-15.

Next, contrary to the position taken appellant's brief, Rebecca Seabert's testimony also supports the conclusion the fire entered the apartment. Early in her testimony, Ms. Seabert confirmed that the fire had damaged the interior blinds. RP 10, p. 556.

The defendant, looking at only selected evidence, nonetheless asserts that "Rebecca Seabert testified that there was no fire inside her apartment. RP 10, 591. A complete analysis of the testimony on that page reveals, however, that Ms. Seabert was simply telling the defense lawyer that she did not see fire inside the apartment because she was getting her grandchild and attempting to flee the fire. She testified:

Q: When you were insides your house and you saw the glow and before you left, did you notice the fire actually enter into your apartment?

A: Did I see the fire come in? No, I was trying to get out before that happened.

Q: Right, so you got out and, to your knowledge, there was no fire inside your apartment?

A: No. But it was—I could see because the glow, the flames were high. I could see that it was like crumpling the blinds. I was trying to get out before it crumpled anything else.

Q: You think you saw some evidence of heat coming into the building but not necessarily fire?

A: Correct.

RP 10, p. 591, lines 1-14.

The above evidence, taken together and analyzed under the appropriate legal standards establishes that the fire was in a building in which there were children and that the fire actually entered the Seabert apartment. The defendant's argument to the contrary should be summarily rejected.

E. CONCLUSION.

The defendant's argument for reversal rests upon an incomplete analysis of the evidence and incorrect application of the governing legal

standard. The jury, hearing all the evidence concluded that the defendant was guilty as charged. The State asks that this conviction be affirmed.

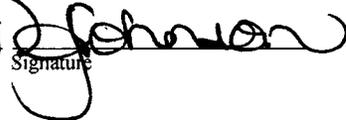
DATED: December 17, 2009.

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/17/09   
Date Signature

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