

NO. 41405-8-II  
COURT OF APPEALS, DIVISION II

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DIVISION II  
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STATE OF WASHINGTON,  
Respondent,

vs.

JOSHUA A. STACY,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Paula Casey, Judge  
Cause No. 10-1-01051-7

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AMENDED BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340  
(360) 626-0148

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, burglary in the second degree, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in failing to instruct the jury that in order to answer “yes” on the special verdict form IV it must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer.
03. The trial court erred in instructing the jury that it must be unanimous before returning verdicts on the special verdict form IV.
04. The trial court erred in permitting Stacy to be represented by counsel who provided ineffective assistance by failing to object to the court’s instruction 20 that did not require the jury to be satisfied beyond a reasonable doubt in answering “yes” on the special verdict form IV and which further instructed the jury that it must be unanimous before returning verdicts on the special verdict form IV and by failing to propose an accurate instruction and special verdict form.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not taking count I, burglary in the second degree, from the jury for lack of sufficiency of the evidence?  
[Assignment of Error No. 1].
02. Whether the trial court erred in failing to instruct the jury that in order to answer “yes” on the special verdict form IV it must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer?  
[Assignment of Error No. 2].

03. Whether the trial court erred in instructing the jury that it must be unanimous before returning verdicts on the special verdict form IV finding that the crime of arson in the second degree was a major economic offense or series of offenses, that the crime involved a destructive and foreseeable impact on persons other than the victim and that Stacy committed the crime shortly after being released from incarceration? [Assignment of Error No. 3].
04. Whether the trial court erred in permitting Stacy to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 20 that did not require the jury to be satisfied beyond a reasonable doubt in answering "yes" on the special verdict form IV and which further instructed the jury that it must be unanimous before returning verdicts on the special verdict form IV and by failing to propose an accurate instruction and special verdict form? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Joshua A. Stacy (Stacy) was charged by third amended information filed in Thurston County Superior Court on October 10, 2010, with two counts of burglary in the second degree, counts I and III, and two counts of arson in the second degree, counts II and IV, contrary to RCWs 9A.48.030 and 9A.52.030. [CP 19-20]. Regarding count IV, the information further alleged numerous aggravating factors under RCW 9.94A.535(d)(ii), (r) and/or (t): major economic or serious

offense, destructive and foreseeable impact on persons other than victim and commission shortly after release from incarceration. [CP 20].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced on October 11, the Honorable Paula Casey presiding. Neither objections nor exceptions were taken to the jury instructions.<sup>1</sup> [RP 234].

The jury returned verdicts of guilty on all but count II, including all aggravating factors for count IV, Stacy was sentenced to an exceptional sentence, and timely notice of this appeal followed. [CP 52-56, 65-77].

02. Substantive Facts

02.1 Count I: Burglary Second Degree (July 6-7, 2010)

On July 6 or 7, 2010, someone entered a construction site that was entirely encircled by a security fence [RP 21, 23], after which he or she ignited a small fire that caused damage to the exterior of a modular trailer within the site. [RP 28-30].

As of May 2010, Stacy was on global positioning supervision (GPS), which required him to wear an ankle bracelet. [RP 135-36]. Records from the GPS mapping system placed Stacy in the vicinity of the construction site around midnight on the evening of July 6 [RP 142-43].

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<sup>1</sup> All references to the Report of Proceedings are to the transcripts entitled Trial – Volumes I-II.

In a subsequent interview, Stacy admitted to being in the alleyway just outside the construction zone that evening but denied entering the fenced area. [RP 187-88, 190].

02.2 Counts III-IV: Burglary Second Degree and Arson Second Degree (July 8, 2010)

In the early morning hours of the following July 8 [RP 63], someone again entered the same construction site [RP 34-35, 63], after which he or she ignited a fire in a room within the four-story building on the site [RP 74, 94], thereby causing extensive soot and smoke damage to the entire building, later calculated to be somewhere between \$1.8 and \$2 million. [ [RP 74, 96, 100, 227].

Records from the GPS mapping system placed Stacy within the secured area of the construction on this occasion. [RP 147-48, 152-54, 173]. When interviewed, Stacy admitted this, explaining that he had merely entered the site in an attempt to look in a window in the building before leaving the scene. [RP 182-86].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD STACY'S CRIMINAL CONVICTION FOR BURGLARY IN THE SECOND DEGREE IN COUNT I.

The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Under RCW 9A.52.030, as set forth above, to convict a defendant of burglary in the second degree, the State must prove beyond a reasonable doubt that the defendant, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building.

Here, the evidence presented by the State only established Stacy’s presence in the vicinity of the construction site. Specifically, in the alleyway bordering the site. No direct evidence was presented that he entered the site on this occasion or that he initiated the fire, the charge for which he was found not guilty. [CP 53]. Under these facts, or lack thereof, insufficient

evidence was presented that Stacy committed the offense, with the result that his conviction for burglary in the second degree in count I should be reversed and dismissed with prejudice.

02. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IN ORDER TO ANSWER “YES” ON THE SPECIAL VERDICT FORM IV IT MUST UNANIMOUSLY BE BE SATISFIED BEYOND A REASONABLE DOUBT THAT “YES” IS THE CORRECT ANSWER.

Court’s instruction 20 read, in part, as follows:

In order to answer the question in the verdict form “yes” you must unanimously be satisfied that “yes” is the correct answer.

This was error. The failure of the court to state clearly the necessity for the State to prove each element of the charge by a standard of beyond a reasonable doubt is a significant constitutional failure. See State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (failing to define reasonable doubt and to instruct jurors that the prosecution must prove each element by this standard is “grievous constitutional failure”). Failing to so instruct the jury on these issues is reversible error, even if the instruction is not requested and even if no objection is made to its omission. Id. at 213-14. Accordingly, the court’s exceptional sentence, which was based on this constitutionally defective instruction, must be vacated and the matter remanded for resentencing.

03. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING VERDICTS ON THE SPECIAL VERDICT FORM IV FINDING THAT THE CRIME OF ARSON IN THE SECOND DEGREE WAS A MAJOR ECONOMIC OFFENSE OR SERIES OF OFFENSES, THAT THE CRIME INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM AND THAT STACY COMMITTED THE CRIME SHORTLY AFTER BEING RELEASED FROM INCARCERATION.

As instructed in court's instruction 20, the jury was told that it had to be unanimous to return a verdict on the special verdict form IV. [CP 49-50, 56].

Because this is a criminal case, all twelve of you must agree in order to answer each question in the special verdict form.

In order to answer the question in the verdict form "yes" you must unanimously be satisfied that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

[CP 49-50].

But this is incorrect. As explained in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), where, as here, the trial court had instructed the jury that unanimity was required to answer "no" on the special verdict, our Supreme Court vacated two school zone drug offense sentencing enhancements, holding that such an instruction is reversible error because

it requires unanimity for either finding “yes” or “no.” Id. at 147. Bashaw is directly on point, with the result that the court’s exceptional sentence based on special verdict form IV of 100 months, where the standard range was 53 to 70 months, must be vacated and the matter remanded for resentencing. [CP 67, 69].

04. STACY WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT’S INSTRUCTION 20 THAT DID NOT REQUIRE THE JURY TO BE SATISFIED BEYOND A REASONABLE DOUBT IN ANSWERING “YES” ON THE SPECIAL VERDICT FORM IV AND WHICH FURTHER INSTRUCTED THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING VERDICTS ON THE SPECIAL VERDICT FORM IV AND BY FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d

1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below.

State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issues set forth in the two preceding sections of this brief relating to the trial court's failure to instruct the jury that in order to answer "yes" on the special verdict form IV it must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer and the trial court instructing the jury that it must be unanimous before returning verdicts on the special verdict form IV, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to court's instruction 20 and the accompanying special verdict form IV for the reasons set forth in the two preceding sections.

Second, the prejudice is self-evident. Again, as set forth in the preceding two sections, had counsel properly objected and/or proposed an accurate instruction and special verdict form, there is every likelihood that the court would have upheld the objection and the jury would have been correctly instructed and would have issued a verdict on the special verdict form IV that would be based on the proper standard of beyond a reasonable doubt and not be subject to speculation, for "when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." State v. Bashaw, 169 Wn.2d at 148.

E. CONCLUSION

Based on the above, Stacy respectfully requests this court to reverse his conviction for burglary in the second degree, count I, and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 27<sup>th</sup> day of April 2011.

Thomas E. Doyle  
THOMAS E. DOYLE, WSBA 10634  
Attorney for Appellant

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne	Joshua A. Stacy #320040
Deputy Pros Atty	WSP
2000 Lakeridge Drive S.W.	1313 North 13 <sup>th</sup> Avenue
Olympia, WA 98502	Walla Walla, WA 99362

DATED this 27<sup>th</sup> day of April 2011.

Thomas E. Doyle  
Thomas E. Doyle  
Attorney for Appellant  
WSBA No. 10634