

NO. 46948-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JOSE F. ORELLANA ARITA,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

On April 22 police responded to a mobile home on fire off of Kirkpatrick Road in the Humptulips area that the fire department believed was suspicious. Verbatim Report of Proceedings at 2. The property was the site of an old cedar mill which now contained several trailer homes. VRP at 64. The burned trailer was occupied by J.J. Haskey and Sally Emery. VRP at 65. Defendant and Brandi Haley lived in one of the other trailers. *Id.* They are married. Trial Exhibit #39.

Mr. Lucky Russell owns a firearms dealership in Humptulips. VRP at 8. He has sold ammunition to Defendant and knew him as a neighbor for a couple of years. *Id.* He had an unobstructed view of the trailer that burned. VRP at 9. He heard the fire start, and saw a green van. *Id.* He knew that Gary Taylor and Edna Ferry drove that van. VRP at 11.

Mr. Michael Anderson lived behind the trailer at the time. VRP at 192. Mr. Anderson knows Defendant as Jose, Brandi's boyfriend. VRP at 192. Mr. Anderson saw Gary Taylor pouring gas in jugs about an hour before Mr. Anderson noticed that the trailer had caught fire. VRP at 193. Mr. Anderson testified that Gary Taylor was with Defendant and Brandi and two other individuals in Defendant's trailer earlier in the day. VRP at 194-195. Mr. Anderson said that, about two months before the fire,

Brandi had hinted to him that she wanted the trailer burned down, but that he couldn't do it. VRP at 204. He also said he saw J.J. [Haskey] give Defendant a pipe bomb. VRP at 206.

Deputy Jason Wecker of the Grays Harbor Sheriff's Department was called out to the fire, and returned the following day. VRP at 38. Deputy Wecker testified that the sliding glass doors appeared to have been shattered, and that the remnants of a stick were in the tracks. VRP at 50-51. He testified that the origin of the fire was in the middle of the living room, near the sliding glass doors. VRP at 59.

Officers were again called out to the property on April 28, 2014, this time for complaints of threats. VRP at 68. The call changed to a shot fired call while some deputies were en route. VRP at 106-107. J.J. Haskey said Defendant had shot at them from a quad (motorcycle.) VRP at 22. Detective Wallace and Detective Sgt. Johansson responded too because they planned on arresting Defendant and Haley and for the fire and wanted to interview them on scene. VRP at 127-128.

Deputy Cowsert spoke to Defendant. VRP at 109. Defendant denied having a gun or firing a gun. VRP at 113. Detective Johansson then arrived and spoke with Defendant. VRP at 114. Detective Johansson told Defendant that he wanted to swab Defendant's hands for gunpowder

residue, and Defendant then admitted to firing the gun, and said he was an illegal immigrant and wasn't supposed to have guns. VRP at 92-93.

Detective Wallace interviewed Defendant. VRP at 136-37.

Defendant told Detective Wallace that he and Haley were mad at the Haskeys, and so they asked Gary Taylor to burn down the trailer in exchange for a vehicle. VRP 137-138. Detective Wallace also testified that Defendant told Gary Taylor that he didn't want the house burned down, and he thought Taylor understood this. VRP at 139. Police later found a .22 rifle in the trunk of a vehicle. VRP at 81. Police they also searched Defendant's residence and found several baggies of white powder in the residence. VRP at 129. They also found a pipe bomb. VRP at 83. Detective Wallace later interviewed Defendant about the pipe bomb, and Defendant said a girl named Talia had dropped it off for "Buggo," and claimed he thought it was a "large firework." VRP at 141.

At trial Detective Wallace began to testify that Sgt. Johansson had told him that Haley had confessed, but Defendant objected to the alleged hearsay, the objection was sustained, and the jury was instructed to disregard. VRP at 128.

In closing argument the State argued that Defendant's claim he told Gary Taylor not to burn down the trail was minimization of his role.

VRP at 224-225; 232. The State also argued Defendant was minimizing with regards to the gun charge. VRP at 227. The State also argued that it was illogical for someone to have burned down the trailer for compensation if the offer of compensation had been withdrawn. VRP at 226.

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The evidence was sufficient to prove intent to commit arson. The jury could have found that Defendant's alleged retraction was minimization.**

Defendant challenges the sufficiency of the evidence of Defendant's intent to solicit Gary Taylor to burn down the trailer, claiming that Defendant's statement to police that he "changed his mind" is a defense which necessarily negates the element of intent. However, given that the target of the arson, a trailer home, was actually burned down, the jury may have believed that Defendant was attempting to minimize his role.

Standard of Review.

"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 guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074

(1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).) “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

The jury may not have believed the “recantation” because the trailer did burn down in an apparent arson.

The evidence was that Defendant told police that he and his wife agreed to ask Gary Taylor to burn down the trailer, but that Defendant changed his mind and asked Gary Taylor not to burn down the trailer. However the trailer in question had already burned down under suspicious circumstances when Defendant said this. A rational jury could have believed that Defendant’s claim that he told Gary Taylor not to burn down

the trailer was, as the State argued, minimization of his role in an attempt to mitigate his culpability.

Even if the jury did believe that Defendant told Gary Taylor not to burn down the trailer, self-serving statements do not insulate Defendant from his crime. A solicitation is complete once the offer is made, because it increases the risk the greater harm will occur. *State v. Jensen*, 164 Wn. 2d 943, 953, 195 P.3d 512, 518 (2008). As long as the evidence proves Defendant solicited another to commit arson within the time period specified, the crime is complete. The jury was instructed properly on the intent requirements of solicitation to commit arson and they convicted him. This court should uphold that conviction.

2. The jury was instructed to disregard the alleged hearsay, so there was no error.

Defendant claims that the introduction of hearsay tainted the trial and attempts to raise this evidentiary ruling to the level of constitutional error. However, the hearsay objection was sustained and the jury was instructed to disregard it. To the extent the alleged hearsay was admitted, it was not offered for the truth of the matter.

Juries are presumed to follow instructions.

“Juries are presumed to follow instructions absent evidence to the contrary.” *State v. Dye*, 178 Wn. 2d 541, 556, 309 P.3d 1192, 1200 (2013) (citing *State v. Kirkman*, 159 Wash.2d 918, 928, 155 P.3d 125 (2007).)

The jury was instructed to disregard.

Detective Wallace started to say that Sgt. Johansson told him about someone’s confession, but the testimony was objected to, and the jury immediately instructed to disregard. Defendant asserts that this alleged hearsay allowed the jury to find Defendant guilty despite Defendant’s claim that he changed his mind and told Gary Taylor not to burn down the trailer. This is speculation, and the Court should not entertain it. This court should presume that the jury followed the instruction to disregard, lacking any evidence to the contrary, and affirm the conviction.

3. Defendant’s trial counsel was not ineffective because his objection was sustained and the jury instructed to disregard.

Defendant next claims that his trial counsel was ineffective because the defense council failed to request a mistrial after his objection was sustained and the jury instructed to disregard. However, a mistrial would not necessarily have been granted, so Defendant cannot prove prejudice.

Standard of review.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel’s performance was deficient. *Strickland* at 687. Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial,

a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met, than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

Defendant has not shown that his counsel’s performance was deficient.

Defendant claims that his trial counsel’s performance was inadequate. But Defendant’s trial counsel objected, and the objection was sustained, and the jury was instructed to disregard. Defendant’s trial counsel was not deficient for making a sustained objection. It would start a bad precedent to find that an attorney who makes a successful objection is ineffective. This court should find that Defendant has not overcome the presumption that his attorney’s performance was adequate, and affirm the conviction.

Defendant cannot show prejudice from not requesting a mistrial.

Even assuming, *arguendo*, that Defendant's trial counsel's performance fell so far below the standards, Defendant fails to show prejudice. A decision to abort a criminal trial lies within the discretion of the trial court. *State v. Rich*, 63 Wn. App. 743, 748, 821 P.2d 1269, 1272 (1992); *also see State v. Hopson*, 113 Wn. 2d 273, 284, 778 P.2d 1014, 1019 (1989).) In the instant case it has not been shown that the trial court would have granted such a motion. "[T]he court must presume that the jury followed the judge's instructions to disregard the remark." *State v. Weber*, 99 Wn. 2d 158, 166, 659 P.2d 1102, 1107 (1983) (*citing State v. Johnson*, 60 Wash.2d 21, 371 P.2d 611 (1962).) Had the trial court denied such a motion there would have been no different outcome. Therefore, there is no showing of prejudice and Defendant's claim of ineffective assistance fails. This court should affirm his conviction.

4. The State did not charge Defendant under RCW 9.40.120. *Flinn* is inapposite.

Defendant next claims that *State v. Flinn* stands for the proposition that to prove a violation of RCW 70.74.022, Unlawful Possession of Explosives, the State was required to prove the knowledge requirements of an unrelated crime, RCW 9.40.120, Possession of an Incendiary Device. However, *Flinn* never references Title 70 at all, but rather concerns the statutory construction of RCW 9.40.110 and RCW 9.40.120. *See Flinn*, 119 Wn. App. 232, 241, 80 P.3d 171, 176 (2003) *aff'd*, 154 Wn. 2d 193, 110 P.3d 748 (2005).

RCW Chapter 9.40 contains no references to Title 70. Nor does RCW Chapter 70.74 reference the provisions of RCW Chapter 9.40, but rather has its own definition of “explosive” and “improvised device.” *See* RCW 70.74.010. Possession of an Incendiary Device is a separate crime in an altogether different title, and the State needed only to prove that the device was an explosive or improvised device as defined by RCW Chapter 70.74.

Here, the State proved that Defendant knew he owned the pipe bomb, because Defendant told police where it (allegedly) came from, and claimed to believe it was a “large firework.” Whether the jury believed that Defendant really thought that a metal pipe with both ends capped and

a fuse sticking out of it was a “firework” should be left to the sound discretion of the finder of fact.

Because the State proved that Defendant possessed the pipe bomb, and that he knew he possessed it, the conviction should be affirmed.

CONCLUSION

The evidence was sufficient to prove that Defendant solicited Gary Taylor to commit an arson, his self-serving claim that he retracted this desire notwithstanding. Defendant clearly attempted to minimize his role in the criminal activity he was caught engaging in, from the gun to the pipe bomb to the arson. It is unsurprising that the jury did not believe his assertions that he told Taylor not to do it.

Defendant’s trial counsel objected to alleged hearsay, and that objection was sustained and the jury instructed to disregard. Far from being ineffective, defense counsel appears to have been quite effective. Speculation that a motion for a mistrial might have affected the ultimate outcome should not overcome a presumption that defense council is competent.

Defendant’s claims regarding proof of knowledge of the destructive purpose of an incendiary device are misplaced. The crime of possession of an incendiary device is wholly separate from the regulatory

crime Defendant was convicted of, Possession of Explosive Without a License.

Defendant's assignments of error are without merit. This court should affirm his conviction.

DATED this 8th day of October, 2015.

Respectfully Submitted,

BY: /s Jason F. Walker
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GRAYS HARBOR COUNTY PROSECUTOR

October 09, 2015 - 11:17 AM

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