

FILED

SEP 30 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 28875-7-III
(consolidated under State v. Leysa Lynn Sweany, No. 28860-9)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LEAH LYNN SWEANY,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE VIC L. VANDERSCHOOR

BRIEF OF APPELLANT LEAH LYNN SWEANY

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

FILED

SEP 30 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 28875-7-III
(consolidated under State v. Leysa Lynn Sweany, No. 28860-9)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LEAH LYNN SWEANY,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE VIC L. VANDERSCHOOR

BRIEF OF APPELLANT LEAH LYNN SWEANY

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	2
	The State failed to prove the trailer was valued at \$10,000 or more.....	2
D.	CONCLUSION.....	6

AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).....	3
<u>State v. Baeza</u> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	2
<u>State v. Clark</u> , 13 Wn. App. 782, 537 P.2d 820 (1975).....	5
<u>State v. Collins</u> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	3
<u>State v. Coria</u> , 146 Wn.2d 631, 48 P.3d 980 (2002) (Sanders, J., (dissenting)).....	4
<u>State v. Flowers</u> , 30 Wn. App. 718, 637 P.2d 1009 (1981), <i>rev. denied</i> 97 Wn.2d 1024 (1982).....	3

<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	5
<u>State v. Moore</u> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	3, 6
<u>State v. Rivas</u> , 349, 984 P.2d 432 (1999), <i>rev. denied</i> , 140 Wn.2d 1013, 5 P.3d 9 (2000), <i>overruled on other</i> <i>grounds</i> , <u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	4
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	3
<u>State v. Taplin</u> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	3
<u>Jackson v. State</u> , 818 P.2d 910 (Okl.Crim.App.Ct. (1991).....	4

Statutes

U.S. Const. amend. 14.....	2
Wash. Const. art. I, § 3.....	2
Wash. Const. art. I, § 21.....	3
RCW 9A.48.020.....	3
RCW 9A.48.020(1)(b).....	4
RCW 9A.48.020(1)(d).....	4
RCW 9A.56 <i>et seq.</i>	5
RCW 9A.56.010(18)(a).....	5

A. ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining the conviction for first degree arson.

2. Leah Sweany's rights to due process and a unanimous jury were violated where one of the alternative means of committing first degree arson was not supported by substantial evidence.

Issue pertaining to assignments of error.

Where one of two charged alternatives means of committing first degree arson is not supported by substantial evidence, is reversal required for a failure of jury unanimity and violation of due process?

B. STATEMENT OF THE CASE

Appellant Leah Sweany adopts by reference¹ the statement of the case set forth in her mother's (Leysa Sweany's) Brief of Appellant, No. 28860-9, pp. 1-3. The following additional facts are pertinent.

The State similarly charged Leah with first degree arson, alleging she started the fire with the intent of collecting the insurance proceeds. CP 65-66. The jurors were instructed in pertinent part that in order to convict Leah they must find:

- (1) That on or about January 7, 2009, the defendant cause a fire or was an accomplice with another who caused the fire:

¹ RAP 10.1(g)(2).

- (2) That the fire
- (a) damaged a dwelling or
 - (b) was on property *valued at ten thousand dollars or more* and was with the intent to collect insurance proceeds; and ...

...

If you find from the evidence that elements (1), (3), (4), and any of the alternative elements (2)(a) or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

...

Instruction No. 14 at CP 105; 1/14/10² RP 29–30 (emphasis added).

The jury subsequently convicted Leah as charged. CP 115. This appeal followed. CP 126–27.

C. ARGUMENT

The State failed to prove the trailer was valued at \$10,000 or more.

As a part of the due process rights guaranteed under both the Wash. Const. art. I, § 3 and United States Constitution, Fourteenth Amendment, the State must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d

² The transcripts of the trial days are mostly contained in Volumes I, II and III, numbered sequentially, and will be referred to as “RP ___”. The second half of the last day of trial was reported by a different court reporter and will be referred to by its date as “1/14/10 RP ___”.

646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id.

Washington further requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The multiple means of committing first degree arson under RCW 9A.48.020 constitute alternative means for which there must be substantial evidence for all charged alternatives. State v. Flowers, 30 Wn. App. 718, 722–23, 637 P.2d 1009 (1981), *rev. denied*, 97 Wn.2d 1024 (1982). “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the appellate court can

determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means. State v. Rivas, 349, 351–52, 984 P.2d 432 (1999), *rev. denied*, 140 Wn.2d 1013, 5 P.3d 9 (2000), *overruled on other grounds*, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

Leah was convicted of first degree arson. The jury was instructed there were two alternative means of committing the crime: if Leah caused a fire that (1) damaged a dwelling or (2) was on property *valued at ten thousand dollars or more*. Instruction No. 14 at CP 105 (emphasis added); RCW 9A.48.020 (1)(b) and (d). Here, there was no substantial evidence that the trailer was “valued” at \$10,000 or more.

No Washington cases have dealt with the element of “value” in the context of the crime of arson. As argued by Leah’s mother in this appeal, at least one state court has determined that the appropriate method of proving this element is the “market value” of the property. Brief of Appellant, No. 28860-9, p. 7 (citing Jackson v. State, 818 P.2d 910, 911 (Okl.Crim.App.Ct. (1991))). Arson is generally considered a property crime. *See e.g.*, State v. Coria, 146 Wn.2d 631, 647–48, 48 P.3d 980 (2002) (Sanders, J., (dissenting)). Thus, a “market value” method of

valuation is consistent with the definition of “value” used for other property crimes such as theft and robbery under RCW 9A.56 *et seq.*:

“Value” means the market value³ of the property or services at the time and in the approximate area of the criminal act.

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

Here, the evidence established that in 2001, the trailer’s market value was \$10,500 based upon Ms. Silver’s purchase for that price. RP 374. By 2009, the trailer’s value had depreciated to an assessed value of only \$8,350. RP 330. Given the state of the interior of the trailer at the time of the fire as testified to by several witnesses⁴, the value of the trailer was substantially closer to the \$8,350 assessed value, and most certainly less than the \$10,000 element the State was charged with proving.

The State argued that the “insured value” of the trailer—either \$65,000 or \$45,000—established the requisite element of “valued at ten thousand dollars or more.” 1/14/10 RP 34–35. However, this argument is circular and illogical, where the State also contended that the trailer was heavily over insured. 1/14/10 RP 40, 75–76, 82. Speculation about the

³ Market value is the “price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.” *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995) (*quoting State v. Clark*, 13 Wn. App. 782, 787, 537 P.2d 820 (1975)). Market value is based not on the value to any particular person, but rather on an objective standard. *Kleist*, 126 Wn.2d at 438, 895 P.2d 398.

⁴ RP 111–13, 120–21, 475–76.

value is not substantial evidence. Moore, 7 Wn. App. 1. The statute requires proof of actual value, and the State failed to prove this element.

Here, the jury was instructed as to two alternative means of committing the crime and the State argued both means during closing argument. Although the jury was instructed on unanimity in the “to convict” instruction, there was no special verdict allowing the jury to specify which alternative means it found or whether it found both alternative means. Thus, this Court cannot determine that the verdict rested on only one alternative means. Since the State failed to prove the trailer was worth \$10,000 or more, Leah’s rights to due process and a unanimous verdict were violated and her conviction must be reversed.

D. CONCLUSION

For the reasons stated, the conviction must be reversed and dismissed.

Respectfully submitted September 30, 2010.


Susan Marie Gasch
Attorney for Appellant