

ORIGINAL

FILED

NOV 12 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 290531-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER MICHAEL LUND, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00267-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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ISSUES

Regarding Assignments of Error 1 and 2:

1. IS THE TRIAL COURT'S RULING ON A MOTION TO DISMISS PRESERVED FOR APPEAL?
2. WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT?
 - A. What is the standard on review regarding a challenge to the sufficiency of the evidence?
 - B. Does the Arson in the First Degree statute apply only where a fire creates an actual danger to a human life, other than the defendant's?
 - C. In any event, even if his life is excluded, were the defendant's actions manifestly dangerous to other human life?

Regarding Assignment of Error 3:

3. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DISMISSING JUROR NUMBER EIGHT?
 - A. What is the standard on review?
 - B. Was there an abuse of discretion where the juror stated that she had been praying for the defendant and his family, and that she was concerned that the defendant and his family knew her identity?

C. Is there any prejudice to the defendant, given that the State could have exercised a peremptory challenge against juror number eight?

STATEMENT OF THE CASE

Someone knowingly and maliciously set fire to a vehicle on January 14, 2009, at about 2:15 a.m.

At around 2:15 a.m., residences living in the 800 block of Elm Street in Kennewick, Washington were awoken by a loud explosion. (RP 35). Stacia Miller heard an explosion and looked outside to see her neighbor's car on fire with a person on fire, wailing in the air and yelling. (RP 17-18). Jimmy Nguyen, 841 S. Elm, heard a big boom and saw a big flame ball coming from his neighbor's car. (RP 35). He saw a man who was on fire next to the car. (RP 35). The man fled when Mr. Nguyen ran outside to try to help him. (RP 36).

Consistent with Nguyen's description, police officers noted that there seemed to be a trail of burnt clothing going from the vehicle to around a

corner. (RP 68, 70). The fragments of that burnt clothing was examined by Sheri Jenkins of the Washington State Patrol Crime Laboratory, and found to have partially evaporated gasoline. (RP 142-44). She also found there was partially evaporated gasoline in the vehicle. (RP 142-44). The police also found two road flares. (RP 71). One flare was in the passenger seat with the cap off, and had been ignited. (RP 123). The other flare was intact, and positioned just outside the vehicle. (RP 71).

Captain Joe Terpenning of the Kennewick Fire Department is a certified fire inspector, and did a "cause and origin" analysis of the scene. (RP 117-18). He concluded that the fire started in the cab of the vehicle and was caused by someone dropping an accelerant, probably a flammable liquid, inside the vehicle and then holding or throwing the flame from the road flare onto the accelerant. (RP 121, 123-25). This conclusion is consistent with the witnesses' statements about

an explosion: holding a flare over gasoline would cause a sudden fire and flames. (RP 125-26).

The defendant was the person who set fire to the vehicle.

The vehicle was a 2007 Mitsubishi, titled to Gloria Broschart who lives at 835 S. Elm in Kennewick, Washington, with John Winchester. (RP 26-27). Mr. Winchester primarily drove the vehicle. (RP 47). The defendant knew Mr. Winchester and knew where he lived. (RP 29-31).

The following timeline may be important:

January 13, 2009, at 10:35 p.m.: The defendant called Mr. Winchester and asked Winchester to testify regarding a child-custody case. Winchester declined. The defendant became upset. (RP 42-43).

January 14, 2009 at 2:15 a.m.: An individual male sets fire to the Mitsubishi that Winchester drives; the vehicle is parked in front of Winchester's house. (RP 28-29). The perpetrator is severely burned in the fire. (RP 18).

January 14, 2009 at 3:15 a.m.: The defendant arrives at the Kennewick General Hospital Emergency Room for treatment of burns to his face, back of head, chest, abdomen, arms, and hands. (RP 83).

The defendant's burns are consistent with Captain Terpenning's conclusion regarding the cause of the fire. (RP 127). The defendant probably leaned into the car after pouring gasoline therein, and lit the road flare. (RP 127). His lower torso would be protected by the car and uninjured, while his upper torso would be subject to various burns. (RP 127).

No other person sought treatment for such burns in Tri-City area hospitals on the morning of January 14, 2009. (RP 135, 155-56). In fact, the only other individuals treated for burns at all were a 13-year-old who had a follow-up visit from three days earlier, a three-year-old who had a follow-up visit from two days earlier, and a

23-month-old who burned his hand on a pellet stove. (RP 135).

The defendant admitted he left his house after 2:00 a.m. on January 14, 2009 to smoke. (RP 200). The defendant claims that he was wearing a sweatshirt that he had worn two days earlier while working on a car. (RP 201). When he lit a cigarette, the sweatshirt caught on fire. (RP 203).

The problem with this story is that gas quickly evaporates according to forensic scientist Sheri Jenkins and Capt. Terpenning. (RP 127-28; 145-46). If the defendant had spilled gasoline on the sweatshirt two days before, neither Ms. Jenkins nor Capt. Terpenning would expect that sweatshirt to ignite. (RP 127-28; 146).

A further problem with the defendant's story is that the defendant could not explain where this sweatshirt was; the police did not find it in a search of his house or dumpster. (RP 168).

In fact, there was no clothing at the defendant's residence that had fire damage. (RP 169). In addition, there was no evidence whatsoever of any fire damage at the defendant's residence. (RP 168-69).

Finally, the police found a plastic jug and a funnel in a garbage bag outside the defendant's house. (RP 159). The jug had evaporated gasoline therein. (RP 145, 165). The defendant had no explanation about how gasoline would have gotten into the jug. (RP 169).

The fire was manifestly dangerous to human life, including the defendant's and those who lived in the area.

Mr. Winchester and Ms. Broschart live in a single unit residential area, and the danger to the occupants was clear. (RP 18). Ms. Miller stated that the explosion shook her house. (RP 17-18). Mr. Nguyen heard "[a] big boom like a big noise," and saw a big ball of flame coming from his neighbor's car. (RP 35). The flames were

several feet high. (RP 37). The force of the explosion blew out the back window of the car. (RP 120). The police found broken glass around a corner from the car. (RP 70-71).

Of course, the defendant suffered second and third degree burns over much of his upper torso. (RP 83). He was treated at Harborview Medical Center for about eight weeks. (RP 216).

ARGUMENT

- 1. THE DEFENDANT WAIVED ANY OBJECTION TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO DISMISS BY PRESENTING FURTHER EVIDENCE.**

The defendant first argues that, "The trial court erroneously denied [his] motion to dismiss the charge of Arson in the First Degree." (App. Brief at 1). However, the defendant presented additional evidence after the motion was denied. As stated in *State v. Thomas*, 52 Wn.2d at 256:

This court has consistently adhered to the rule that a challenge to the sufficiency of the evidence at the

close of the plaintiff's case is waived by a defendant who does not stand on his motion and proceeds to present evidence on his own behalf, after his motion to dismiss has been denied. *Hector v. Martin*, Wash., 321 P.2d 555, and cases cited therein. The rule applies equally in criminal cases. *State v. Dildine*, 41 Wash.2d 614, 250 P.2d 951; *State v. Brown*, 178 Wash. 588, 35 P.2d 99.

State v. Thomas, 52 Wn.2d 255, 256, 324 P.2d 821, (1958).

2. ASSUMING THE DEFENDANT INTENDS TO ARGUE THAT THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO CONVICT, THE STATE MAKES THE FOLLOWING POINTS:

A. The standard on review regarding sufficiency of the evidence is whether any rational jury, in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt.

See among other cases, *State v. Matthews*, 132 Wn. App. 936, 940, 135 P.3d 495 (2006), for this well established standard.

B. The defendant would have this Court rephrase RCW 9A.48.020 (1)(a) from, "Causes a fire which is manifestly dangerous to any human life" to "Causes a fire which is actually dangerous to a human life, other than the defendant's."

The State has three responses.

First, the phrase "manifestly dangerous to any human life" is unambiguous. (Emphasis added) RCW 9A.48.020(1)(a). As such, it is not subject to statutory interpretation. Clear and unambiguous statutory language is not subject to judicial construction. *State v. Anderson*, 58 Wn. App. 107, 111, 791 P.2d 547 (1990). Although the defendant relies on *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002), that Court held that "any" means "every" and "all." As stated in *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991), the word "any" is not ambiguous and courts have consistently interpreted "any" to mean "all" and "every."

Second, the legislature could have easily provided that RCW 9A.48.020(1)(a) applied to a fire which was manifestly dangerous to any human life, *other than the perpetrator* if it had intended. In fact, the legislature did exactly that in another portion of the same statute. The legislature provided in RCW 9A.48.020(1)(c): If a person "[c]auses a fire or explosion in a building in which there shall be at the time a human being who is not a participant in the crime" (Emphasis added.) If the legislature could make such a provision in one section of the Arson in the First Degree statute, it surely could in another if that was the intent.

Indeed, the legislature has provided that other crimes do not apply to participants. For example, the felony murder statute, RCW 9A.32.050 (1)(b), only applies where a person "[c]auses the death of a person other than one of the participants" Under RCW 9A.08.020(5)(a), a person cannot be both an accomplice of a crime

and a victim of it. If the legislature intended for Arson in the First Degree, under RCW 9A.48.020(1)(a) not to apply to a participant, it would have so provided.

Third, the above reasoning also applies to the phrase "manifestly dangerous" (to any human life). If the legislature intended the crime only to apply if there was "actual danger" to human life, it would have so provided. There are numerous examples of the legislature doing exactly that. For instance, Criminal Mistreatment in the First Degree, RCW 9A.42.020, requires that the defendant "[r]ecklessly ... causes great bodily harm to a child ...". Criminal Mistreatment in the Fourth Degree, RCW 9A.42.037(1)(a), is committed when a person "With criminal negligence, creates an imminent and substantial risk of bodily injury to a child ...". If the legislature intended for the arson statute to apply to actual danger, as opposed to manifest danger, it would have so provided.

C. In any event, the defendant is wrong in claiming that he is the only victim, and that no one else was in manifest danger as a result of the fire.

The case herein dealt with an uncontrolled fire in a residential area. In fact, the defendant was apparently immediately injured by the fire; he had no control over it whatsoever. The fire was probably started with gasoline as the accelerant, and a road flare as the ignition. The force of the explosion shook a neighbor's house. (RP 17-18). The back window of the targeted vehicle was blown out and glass was found around a corner from the scene. (RP 70-71; 120). Observers talked about a fireball coming from the car, and flames shooting several feet high. (RP 35). The vehicle was destroyed. (RP 26).

This fire was manifestly dangerous to the residents in the 800 block of Elm Street, Kennewick, Washington, not just the defendant.

3. THE COURT APPROPRIATELY DISMISSED JUROR NUMBER EIGHT.

The defendant's statement of facts regarding Juror number eight does not include the fact that the juror herself prayed for the defendant and his family. (App. Brief at 10-11). Note the trial court's colloquy:

THE COURT: So you yourself have been engaged in praying for issues in their family?

JUROR 8: Yes, our church as a body would do that.

THE COURT: And you participated in that?

JUROR 8: Yes, I did.

(RP 113).

The defendant also omitted the fact that the juror was concerned that the defendant and his family knew her identity:

JUROR 8: [B]ut my thoughts would be I know that he knows who I am. I know

that his family would know who I am. So that would be a slight concern, but, you know, I'd feel like I'd have to do the right thing anyway.

(RP 113-14).

Given that background, the issues are: What is the standard on review, and did the trial court properly apply that standard?

A. The standard on review is abuse of discretion.

Issues of juror dismissal can be reviewed only for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768, 123 P.3d 72 (2005). "A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Boiko*, 138 Wn. App. 256, 260, 156 P.3d 934 (2007). Dismissal of a juror is governed by RCW 2.36.110, which provides:

It shall be the duty of a judge to excuse from further jury service any

juror, who in the opinion of the judge, has manifested unfitness as a juror, by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. RCW 2.36.110. (Emphasis added.)

B. The trial court did not abuse its discretion.

The decision to dismiss the juror who has been praying for the defendant's family and is concerned that the defendant and his family know her identity should be a "no-brainer." Suppose the juror had been praying for Mr. Winchester and Ms. Broschart, and was concerned that they knew her identity. It seems obvious that such a juror would be dismissed. Far from abusing its discretion, the trial court properly dismissed the juror.

The trial court correctly followed guidelines set by previous cases. When determining whether a juror must be discharged, a judge must act as both an observer and decision maker. See *State v. Jordan*, 103 Wn. App. 221,

229, 11 P.3d 866 (2000). The trial judge has the discretion to hear and resolve the issue in a way that avoids tainting the juror, and thus avoids creating prejudice against either party. *Id.* The trial judge decided to dismiss the juror after interviewing the juror, allowing the prosecutor and defense attorney to question her, and hearing arguments. (RP 112-15).

C. The State would have used a peremptory challenge against Juror Number Eight had it known that the juror was praying for the defendant and his family.

The State only used two peremptory challenges. (CP 63). The problem concerning Juror number eight was that she did not immediately recognize the defendant, and therefore, did not report the fact that she went to church with him, knew him and his family, and had prayed for them. Upon hearing the defendant's wife's name, the juror recognized the defendant as a fellow churchgoer. (RP 112). After the brief colloquy

with Juror eight, the State moved for her dismissal. (RP 114). The State would have used one of its remaining five peremptory challenges if the information had been disclosed during voir dire.

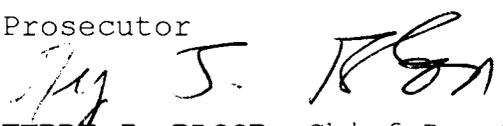
CONCLUSION

The conviction should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of
November 2010.

ANDY MILLER

Prosecutor


TERRY J. BLOOR, Chief Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 290531

vs.

DECLARATION OF SERVICE

CHRISTOPHER MICHAEL LUND,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on **November 10, 2010**.

Dennis W. Morgan
Attorney at Law
120 W. Main Avenue
Ritzville, WA 99169-1408

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

CHRISTOPHER MICHAEL LUND
AIRWAY HEIGHTS CORRECTION CENTER
P. O. BOX 2049, NB-244
AIRWAY HEIGHTS, WA 99001

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

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

EXECUTED at Kennewick, Washington, on **November 10, 2010**.



 PAMELA BRADSHAW