

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 30, 2011, 2:29 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 86270-2
Court of Appeals No. 28875-7-III
(consolidated under 28860-9-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

LEAH LYNN SWEANY,
Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER LEAH LYNN SWEANY

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

ORIGINAL

TABLE OF CONTENTS

A. ISSUES PRESENTED.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....4

 1. Legislative history supports the conclusion that objective market value of property is the intended standard under RCW 9A.48.020(1)(d).....4

 a. The property referred to in RCW 9A.48.020(1)(d), “causes a fire or explosion *on property*”, is real or personal property that is capable of being occupied.....4

 b. The legislative history shows the crime of first degree arson was designed primarily to protect people, not property.....7

 c. Contrary to the Court of Appeals’ decision, the statutory scheme is not served by imposing criminal liability based on the amount of insurance proceeds an arsonist hopes to collect.....9

 d. The statutory purpose is served by imposing criminal liability based on fair market value of the property being destroyed.....11

 e. The legislative scheme of insurance fraud otherwise provides criminal penalty for destruction of insured property under circumstances that do not amount to first degree arson.....12

2. Ms. Leah Sweany is entitled to reversal of her conviction.....13

3. Pursuant to RAP 10.1(g), Ms. Leah Sweany adopts and incorporates by reference the arguments of Petitioner Leysa Sweany.....14

D. CONCLUSION.....15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brown v. State, Dept. of Social and Health Services</u> , 145 Wn. App. 177, 185 P.3d 1210 (2008).....	4–5
<u>Condit v. Lewis Refrigeration Co.</u> , 101 Wn.2d 106, 676 P.2d 466 (1984).....	6
<u>Cox v. Helenius</u> , 103 Wash.2d 383, 693 P.2d 683 (1985).....	4
<u>In re Pers. Restraint of Brady</u> , 154 Wn. App. 189, 224 P.3d 842 (2010).....	10
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	4
<u>State v. Bainard</u> , 148 Wn. App. 93, 9 P.2d 460 (2009).....	7, 8, 9
<u>State v. Clark</u> , 13 Wn. App. 782, 537 P.2d 820 (1975).....	11
<u>State v. Coria</u> , 146 Wn.2d 631, 48 P.3d 980 (2002) (Sanders, J., (dissenting)).....	11
<u>State v. Cromwell</u> , 157 Wn.2d 529, 140 P.3d 593 (2006).....	4
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	11
<u>State v. Nicholson</u> , 119 Wn. App. 855, 84 P.3d 877 (2003).....	13
<u>State v. Rivas</u> , 97 Wn. App. 349, 984 P.2d 432 (1999).....	13
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	13, 14
<u>State v. Sweany</u> , 162 Wn. App. 223, 256 P.3d 1230 (2011).....	3, 9, 10
<u>State v. Tejada</u> , 93 Wn. App. 907, 971 P.2d 79 (1999).....	10
<u>Tingey v. Haisch</u> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	4
<u>Udall v. T.D. Escrow Servs., Inc.</u> , 159 Wn.2d 903, 154 P.3d 882 (2007)...	4

<u>Whatcom County v. City of Bellingham</u> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	10
---	----

Statutes

Laws of 1995, ch. 285, § 37.....	12
Former RCW 9.91.090.....	12
RCW 9A.48.020.....	6
RCW 9A.48.020(1).....	1, 5
RCW 9A.48.020(1)a).....	6
RCW 9A.48.020(1)b).....	6
RCW 9A.48.020(1)c).....	7
RCW 9A.48.020(1)(d).....	passim
RCW 9A.56 <i>et seq</i>	11
RCW 9A.56.010(18)(a).....	11
RCW 48.30.220.....	12

Court Rules

RAP 10.1(g).....	14
------------------	----

Miscellaneous Resources

11A WAPRAC WPIC 80.02.....	10
----------------------------	----

A. ISSUES PRESENTED

1. Under RCW 9A.48.020(1), a person is guilty of arson if she “knowingly and maliciously ... (d) causes a fire ... on property valued at ten thousand dollars or more with intent to collect insurance proceeds.” Does the term “valued at” mean the amount of insurance coverage on the property or should it stand for market value?

2. 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

Juanita Silvers, petitioner Leah Sweany's grandmother, purchased a 1982 Fleetwood mobile home in 2001 for \$10,500. RP 373-74. Ms. Silvers lived in the trailer until 2008 when she signed it over to Leah's mother, Ms. Leysa Sweany. RP 375.

From 2001 until January 7, 2009, Leah, her brother and their mother lived in the trailer in the Santiago Estates in Kennewick. RP 446. The trailer was insured for \$45,000. RP 450.

The mother was served with an eviction notice on December 9, 2008. RP 234. She verbally agreed to vacate on December 31, 2008, but was still living in the space in January 2009. On January 7, 2009,

firefighters were called to a fire at the trailer. RP 14. The fire was quickly extinguished and limited to the kitchen range and island. RP 46-54.

The State charged Leah and her mother with first degree arson, alleging they, acting alone or as an accomplice, started the fire with the intent of collecting the insurance proceeds. CP 4-5, 65-66. At trial, the State presented evidence that trailers built before 1995, such as this trailer, sold for anywhere between \$6000 and \$12,000. RP 238. The interior of the trailer was described as "dismal" with graffiti on the walls and the paneling on one wall hanging loose. RP 113, 121, 475. The trailer's assessed value in 2009 was \$8350. RP 330.

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;
- (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; 1/14/10¹ RP 29–30 (emphasis added).

In closing argument, the prosecutor told the jury:

We have to show the defendants caused, that is the key phrase, caused a fire either acting alone or acting as accomplices. We have to show that the fire was to a dwelling, and there's a legal definition for that word dwelling, but it's pretty obvious it's where a person lives, or it was a dwelling or it was made for purposes of collecting on insurance on property valued, insurance value more than \$10,000, and we have to show that this was done knowingly and maliciously.

So, really there's only one key question here. The only real issue is whether the defendant's knowingly caused the fire. It was a dwelling. There's no question about that. The property was insured for more than \$10,000. We can argue about 65. I'm gonna obviously. They've got documents showing it was \$45,000 the mobile home was insured for. Okay. It was insured for more than that.

The jury subsequently convicted Leah as charged. CP 115.

On appeal, Leah contended that the State failed to prove beyond a reasonable doubt the essential element that the mobile home had a fair market value greater than \$10,000. The Court of Appeals rejected the argument, concluding that “valued at” meant the amount of insurance coverage carried on the trailer. State v. Sweany, 162 Wn. App. 223, 231–33, 256 P.3d 1230 (2011). The conviction was affirmed. Id. at 234.

¹ 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 ___”.

C. ARGUMENT

1. Legislative history supports the conclusion that objective market value of property is the intended standard under RCW 9A.48.020(1)(d).

a. The property referred to in RCW 9A.48.020(1)(d), “causes a fire or explosion on property”, is real or personal property that is capable of being occupied. A court's objective in construing a statute is to determine and give effect to the legislature's intent and purpose. State v. Cromwell, 157 Wn.2d 529, 534, 140 P.3d 593 (2006). “ ‘[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.’ ” Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 909, 154 P.3d 882 (2007) (alteration in original) (internal quotation marks omitted) (quoting Tingey v. Haisch, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007)). If a term is not statutorily defined, the term is given its ordinary or common law meaning. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). A court must, when possible, “give effect to every word, clause and sentence of a statute.” Cox v. Helenius, 103 Wash.2d 383, 387, 693 P.2d 683 (1985). Legislative intent is determined primarily from the statutory language, viewed “in the context of the overall legislative scheme.” Brown v. State, Dept. of Social

and Health Services 145 Wn. App. 177, 182, 185 P.3d 1210 (2008)

(citation omitted).

A person is guilty of first degree arson is she “knowingly and maliciously”:

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

RCW 9A.48.020(1). At issue here is subsection (d), whether petitioners— with intent to collect insurance proceeds— caused a fire “on property valued at ten thousand dollars”. As part of its argument on appeal, the State asserts without citation to authority that since the statute does not limit “property” to real property, the insurance value of all personal property contained in the trailer should be included in the \$10,000 calculation. Respondent’s Supplemental Brief, pp. 6–9. The statute instead contemplates that the requisite “property” for purposes of first degree arson is limited to property that is capable of being occupied, whether real or personal.

“Property” is not defined under RCW 9A.48.020 and there does not appear to be any case authority construing its scope. Under the maxim of “*ejusdem generis*,” however, “general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms.” Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 111, 676 P.2d 466 (1984). Thus, the language “on property” should be restricted to property of a similar nature to the items specifically listed in RCW 9A.48.020. The items listed are real property or structures where people or firefighters may be found², a dwelling³ and a building⁴. An automobile, a sailboat, and even a single-wide trailer, such as is involved here, are types of personal property that fit within the statute’s protection of people who are or may be occupying real or personal property that may be the target of arson.

Contrary to the State’s position, the first degree arson statute does not purport to protect items of personal property such as “[a] refrigerator, washer, dryer, television, microwave oven, purses, shoes, jewelry, bed, bookshelves, other furniture, pictures, books and ‘professional clothing’”. Respondent’s Supplemental Brief, p. 9. Common sense and grammar

² RCW 9A.48.020(1)a).

³ RCW 9A.48.020(1)b).

dictate that causing a fire “on” property refers to the general location of the fire, rather than to a specific item of property. Although it is conceivable that the legislature intended to prohibit the setting of a fire on top of a bookshelf or on top of a microwave oven, in that event it would more precisely have specified that the prohibited act was causing fire “to” such personal property. As discussed below, RCW 9A.48.020(1)(d) was intended to prohibit causing fires on property (real or personal) where human lives were at risk.

b. The legislative history shows the crime of first degree arson was designed primarily to protect people, not property. The court in State v. Bainard, 148 Wn. App. 93, 9 P.2d 460 (2009), recounted the following legislative history of the first degree arson statute.

At common law, the crime of arson was viewed primarily as a crime against the person, and its primary purpose was to protect the inhabitants of a dwelling from injury or death by fire. 3 Wayne R. LaFave, *Substantive Criminal Law*, § 21.3, at 239 (2d ed.2003); see McClaine v. Territory, 1 Wash. 345, 348–49, 25 P. 453 (1890) (‘At the common law there was no question of value.... It was the safety of the inhabitants of the structure that the law sought to protect.’); 5 Am.Jur.2d *Arson and Related Offenses* § 1, at 839 (2007). Legislative enactment in many states broadened the concept of arson to include damage by fire or explosion to many structures other than dwelling houses, and to other kinds of property. 3 LaFave, *supra*, at 240–42. These developments are reflected in the development of Washington arson law.

⁴ RCW 9A.48.020(1)c).

Until 1909, arson was defined by statute as the act of setting fire to any of a number of different kinds of property including but not limited to dwellings and business and agricultural structures. Laws of 1895, ch. 87, § 1; Laws of 1886, p. 77, § 1. In 1909, the legislature rewrote the arson statutes, creating two degrees of arson. First degree arson had two alternatives: (1) the willful burning ‘in the night-time the dwelling house of another, or any building in which there shall be at the time a human being’ or (2) setting ‘any fire manifestly dangerous to any human life.’ Laws of 1909, ch. 249, § 320. Second degree arson was defined to include the burning of various types of structures and property not directly related to human habitation or occupancy. Laws of 1909, ch. 249, § 321. The 1909 statutes have remained the law of Washington up to the present, with only minor changes. See RCW 9A.48.020, .030.

The legislature codified common law arson as first degree arson, leaving intact the concerns for the danger to human life. State v. Spino, 61 Wn.2d 246, 248, 377 P.2d 868 (1963). ‘Most statutes provide that the crime is either first-degree or aggravated arson any time there is a risk to a human life because of malicious and willful burning, with the risk being measured by potential, not actual, harm to persons.’ 5 Am.Jur.2d, *supra*, § 5, at 847 (footnote omitted).

Bainard, 148 Wn. App. at 108–09.

The potential risk to human life was also a key factor in adding fires set with intent to defraud an insurer to the prohibited conduct under first degree arson. As noted by the Bainard court, “In 1981, the legislature added a fourth way of committing first degree arson, namely causing “a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.” Laws of 1981, ch. 203, § 2. This amendment also involved an element of human danger. The amendment

was made contemporaneous with changes to the Model Penal Code, which included a similar “intent to defraud” provision “ ‘ *in view of the great danger of bodily injury* from the extensive fires often planned and executed by professionals.’ ” 3 LaFave, *supra*, § 21.3(f), at 253 (emphasis added) (quoting MODEL PENAL CODE § 220.1, cmt. at 25 (1980)).” Bainard, 148 Wn. App. at 109.

Thus, the legislative history of RCW 9A.48.020(1)(d) shows that the purpose of the statute is to prohibit insurance-motivated fires on property (real or personal) where human lives may be at risk.

c. Contrary to the Court of Appeals’ decision, the statutory scheme is not served by imposing criminal liability based on the amount of insurance proceeds an arsonist hopes to collect. Division III determined that the phrase “valued at” means the insured value:

The plain and ordinary meaning of ‘valued at’ is of a value that is not inherent or objective but which is, or has been assigned. In the context of insurance-motivated arson, where criminal liability attaches if fire is caused on ‘property valued at ten thousand dollars or more with intent to collect insurance,’ the logical assigned value is the insured value: the amount that the arsonist-insured presumably hopes to collect.

State v. Sweany, 162 Wn. App. 223, 231, 256 P.3d 1230 (2011). Without discussion, the Court posits that:

[T]he purpose of the statutory scheme is better served by imposing criminal liability based on the amount of insurance proceeds that

the arsonist hopes to collect than on the actual value of the property; in other words, by imposing criminal liability on the owner who sets fire to a \$9,000 mobile home in hopes of collecting on a \$45,000 claim rather than on the unlikely owner who sets fire to a \$45,000 mobile home in hopes of collecting on a policy insuring the home for \$9,000.

Id. at 232.

Statutes must be construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Courts should interpret statutes in a way that avoids a strained or unrealistic interpretation. In re Pers. Restraint of Brady, 154 Wn. App. 189, 193, 224 P.3d 842 (2010) (citing State v. Tejada, 93 Wn. App. 907, 911, 971 P.2d 79 (1999)). The statute criminalizes “[c]aus[ing] a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.” RCW 9A.48.020(1)(d). In relevant part, the State must prove the essential elements that the fire “was on property valued at ten thousand dollars or more” and “was [set] with the intent to collect insurance proceeds.” 11A WAPRAC WPIC 80.02.

By focusing on insured value, Division III narrows the scope of the act that is criminalized by RCW 9A.48.020(1)(d). The purpose of the first degree arson statute is to punish people who set fires or cause explosions in places where innocent people are likely to be at risk of harm. Whether

it be an owner who sets fire to a \$9,000 mobile home in hopes of collecting on a \$45,000 claim or the owner who sets fire to a \$45,000 mobile home in hopes of collecting on a policy insuring the home for \$9,000, the statute intends to punish both—as arsonists who deliberately set property on fire in order to cash in on insurance proceeds.

d. The statutory purpose is served by imposing criminal liability based on fair market value of the property being destroyed. The legislature has chosen a figure of ten thousand dollars as the minimum value for prosecution of first degree arson under RCW 9A.48.020(1)(d). This is not unlike the theft statutes, in which the degrees of crime are based on value. 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 would be 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 value⁵ of the property or services at the time and in the approximate area of the criminal act.

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

⁵ 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.

Using market value offers an easily ascertainable valuation that provides an objective standard for use in the decision to prosecute a crime under RCW 9A.48.020(1)(d) and evaluation of the sufficiency of proof upon a conviction. Interpreting “valued at” to mean market value further serves the clear intent of the Legislature to punish as a Class A felony *any* insurance-motivated fire on property valued at a minimum of \$10,000, where human lives may be at risk.

e. The legislative scheme of insurance fraud otherwise provides criminal penalty for destruction of insured property under circumstances that do not amount to first degree arson. Former RCW 9.91.090, which related to fraudulent destruction of insured property, was repealed by Laws of 1995, ch. 285, § 37. Now, a person who burns or destroys any insured property – real or personal – with intent to defraud an insurer is subject to prosecution under Title 48, Insurance, Chapter 48.30, Unfair Practices and Fraud.

Any person, who, with intent to defraud or prejudice the insurer thereof, burns or in any manner injures, destroys, secretes, abandons, or disposes of any property which is insured at the time against loss or damage by fire, theft, embezzlement, or any other casualty, whether the same be the property of or in the possession of such person or any other person, under circumstances not making the offense arson in the first degree, is guilty of a class C felony.

RCW 48.30.220, Destruction, injury, secretion, etc., of property.

Unlike the arson statutes, this provision extends expansive protection to “any property” and prohibits a broad spectrum of misconduct. Thus, the State is not without a remedy should this Court determine that RCW 9A.48.020(1)(d) prohibits consideration of insurance coverage held on either the trailer or its contents, and instead requires the \$10,000 calculation be made using the fair market value of the trailer.

2. Ms. Leah Sweany is entitled to reversal of her conviction.

If one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict must have been based on one alternative that was supported by substantial evidence. State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), *disapproved on other grounds*, State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007). Absent a constitutionally valid special verdict, the Court must presume that the verdict could have rested on either of the alternatives, State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003), and the error requires reversal. Rivas, 97 Wn. App. at 353.

Here, the jury was instructed as to two alternative means of committing the crime and the State argued both means during closing argument. The State proved that there was a fire and that it was set for the

purpose of obtaining insurance proceeds, but did not prove the market value of the trailer was \$10,000 or greater. In closing, the State argued *only* that the \$10,000 value was proven because the trailer was insured for \$45,000 or \$65,000. 1/14/10 RP 34, 40, 75–76, 82. 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 evidence is insufficient to support a verdict on each of the alternative means submitted to the jury, the conviction must be reversed. Rivas, 97 Wn. App. at 351–52.

3. Pursuant to RAP 10.1(g), Ms. Leah Sweany adopts and incorporates by reference the arguments of Petitioner Leysa Sweany.

RAP 10.1(g) provides that where cases are consolidated for review, a party may adopt by reference any part of the brief of another. Pursuant to this rule, Ms. Leah Sweany adopts and incorporates all supplemental arguments of Petitioner Leysa Sweany.

D. CONCLUSION

For all these reasons, Ms. Leah Sweany's conviction must be reversed and dismissed.

Respectfully submitted on December 30, 2011.

s/Susan Marie Gasch, WSBA
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 30, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Leah Lynn Sweany
8021 West Agate
Pasco WA 99301

E-mail: prosecuting@co.benton.wa.us
Terry Jay Bloor/Andrew Kelvin Miller
Benton County Pros Office
7122 West Okanogan Place
Kennewick WA 99336-2359

E-mail: tom@washapp.org
Thomas Michael Kummerow
Washington Appellate Project
1511 – 3rd Avenue, Suite 701
Seattle WA 98101-3635

s/Susan Marie Gasch, WSBA #16485