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No. 95396-1

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shelly Arndt,

Petitioner/Appellant.

Kitsap County Superior Court

Cause No. 14-1-00428-0

The Honorable Judge Leila Mills

Petitioner's Supplemental Brief

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INTRODUCTION AND SUMMARY OF ARGUMENT

The fact that made this case so hard to defend also gave rise to the defense theory of the case. Shelly Arndt had set a fire before, and that led the fire investigator to conduct a quick and incomplete fire investigation. The trial was unfair because the defense was not permitted to show the jury the weaknesses in the state's investigation or the factual basis for their challenge to its conclusions.

The trial court violated Ms. Arndt's right to present a defense. Under the appropriate standard of review for this constitutional violation, de novo review, the case must be reversed. Further, convictions for both arson and premeditated murder committed in the course of arson violate double jeopardy.

STATEMENT OF THE CASE¹

Shelly Arndt was charged with arson, murder, and multiple assault counts. CP 472-473. Her theory of defense was to challenge the state's fire investigation, showing problems and shortcuts taken that undermined the conclusion that she set the fire on purpose to kill her boyfriend Darcy Veeder Jr. CP 352-358, 490; RP 3402-3407, 3650-3667, 3800-3802, 4147-4149, 4155, 4381-4402.

¹ Trial started on September 28, 2015 and concluded on November 18, 2015. With one exception, the transcripts of the trial dates were sequentially numbered and will be cited as RP. The transcript includes duplicate numbers in the range 3562-3599. These numbers were first used for the hearing that occurred on November 11, 2015. Transcript pages in that range from that date will be cited RP (11/10/15). These same numbers were used again on November 12; pages from that date will be cited RP without further specification. Citations to pretrial and post-trial hearings will also include the date.

Fire Marshal David Lynam investigated the fire. He drew conclusions about the point of origin and ignition sequence and decided that the fire was not accidental, but that it had been intentionally set.² RP 1724, 1876-1877, 2749, 2841-2852, 2887-2892, 2992, 3042, 3692, 4047. As he started his investigation, Lynam knew that more than two years earlier, Ms. Arndt had set two fires. RP 1776, 1829-1830, 2369, 2962, 3254, 3270-3271; CP 148, 151-152. Lynam opined that, in the house's basement, an open flame held to a beanbag chair next to a couch started the fire. RP 2842, 2851, 2887-2893, 2906-2908, 2915-2923, 3013-3014, 3016-3017, 3156-3157, 3165, 3183-3184, 3195.

Reaching this conclusion early in the process, Lynam and his team performed only a cursory investigation of critical areas in the basement. RP 2993, 3032. One area that got little attention was the very location where the state's investigator opined the fire had started. When Lynam's team investigated, they missed a melted bucket remnant adhered to the basement floor near the couch.³ RP 3666-3686; CP 448-449; Ex. 345, 346, 347. The bucket could not be moved by hand. A shovel was required to pry it loose from the cement floor. RP 3667-3678. The underside of the bucket was white, undamaged by fire. RP 3668, 3678. The bucket also created a protected area on the cement floor. RP 3678; CP 448.

² Fire investigators use the term "incendiary" to describe fires that result from arson. RP 1541, 1890-1892.

³ The melted bucket remnant had also been overlooked by Ed Iskra, an insurance investigator who conducted his own partial investigation of the fire. Iskra testified that the melted remnant was not present when he went to the scene, even though it appeared in photos he'd taken before Mann went to the house. RP 3677, 4223; CP 448.

The defense needed these facts and their import set before the jury. The melted bucket's presence showed the inadequacy of the fire marshal's investigation; it also disproved Lynam's hypothesized ignition sequence. Lynam theorized that a person could have started the fire by moving a beanbag chair to the point of origin and lighting it with a lighter.⁴ RP 2840-2842, 3013-3017. Lynam told the jury about experiments he believed supported his beanbag ignition sequence theory. RP 2386-2402, 2420, 2512-2514, 2557, 2842-2852, 2887-2922, 3142, 3165, 3183-3184, 3195-3196, 4251. In closing arguments, the prosecution relied on Lynam's beanbag theory as proof of premeditation.⁵ RP 4333-4334, 4403-4404.

But the melted bucket's presence established that a beanbag chair in that location could not have been the first-ignited fuel. RP 3667-3682; CP 448-449. This is so because the bucket was made of a material with lower melting and boiling points than polystyrene, the fill material for the beanbag chairs. RP 2513, 3667-3682, 3960, 4032-4034, 4046; CP 448-449. Had fire destroyed a beanbag chair next to the bucket, the bucket would have been entirely consumed without leaving any remnant. RP 3673; CP 448-449.

Besides Lynam's proposed point of origin, another location that received only minimal attention was the tiled area under vents connecting the basement to the floor above. RP 957, 1386, 2814, 3860, 3959-3960;

⁴ The State introduced evidence that there were beanbag chairs in the area. RP 967, 980, 1063, 1084, 1110, 2381, 2723, 2831. Three beanbag chairs had been piled on a foosball table some distance from the hypothesized point of origin prior to the fire. RP 2381, 2723, 2831.

⁵ This was so even though Lynam had backed away from his beanbag theory during his rebuttal testimony. RP 4248.

CP 447. In the upstairs living room, a wood and presto-log fire had been burning in a fireplace insert. RP 957, 1386.

Lynam knew this area was significant, because embers from the fireplace insert may have drifted down through the vent and accidentally caused a fire.⁶ RP 2815, 2863. He conducted tests aimed at determining if embers from a presto-log could have ignited material such as paper. RP 1928-1939.

However, Lynam did not excavate debris in the area immediately below the fireplace insert. RP 957, 1386, 2814, 3860, 3959-3960; CP 447. After he'd completed his investigation and ruled out the fireplace insert as a possible cause, additional evidence was discovered in the area below the vents. RP 3959-3960; CP 447.

This evidence included the remains of another melted plastic container stuck to the basement floor, as well as "protected areas" that indicated the presence of combustible material. RP 3959-3960, 447. The defense team hoped to use this overlooked evidence to highlight the inadequacy of Lynam's investigation of the scene. The evidence also undermined Lynam's ember test, which he performed without knowing if sparks from the fireplace insert would have fallen on highly flammable material.

A third area glossed over by Lynam was a severely burned foosball table, where three beanbag chairs had been placed prior to the fire. RP

⁶ The door of the insert may have been open during the fire. In addition, some testimony indicated that Veeder, who had a blood alcohol content of .26, had attempted to stoke the fire. RP 1054, 1206-1207, 1419, 1582, 1780, 1782, 1902, 2095, 2356, 2498, 2520, 2558, 2774, 2814, 2985, 3294, 3511, 3923-3924.

2831-2832, 3036, 3040-3042, 3057-3059, 3084-3088, 3095, 3114-3115, 3162, 3813, 3945, 4041, 4252. On the foosball table were the remains of an electrical device, which the fire marshal's team apparently overlooked. CP 448. The device was a possible ignition source for the fire. CP 448.

The defense retained an experienced fire investigator named Dale Mann to review Lynam's work.⁷ Mann was a former state patrol crime lab supervisor and certified arson investigator. RP 3403, 3573, 3576, 3580, 3717, 4050; CP 446. The prosecution agreed that he qualified as an expert. RP 3407.

Mann went to the scene twice after it had been cleared by authorities. RP 3528, RP 1856, 2481, 3617, 3667-3682, 3762; CP 447. He found material that had been overlooked by the fire marshal's team.⁸ The evidence Mann discovered included the melted bucket remnant stuck to the floor at Lynam's proposed point of origin, the melted plastic remnant and protected areas below the ceiling vent, and the electrical device on the burnt foosball table. RP 3667-3686, 3860, 3959-360, 4022-4023; CP 447-448; Ex. 345-347.

⁷ Although Mann conducted what is known as a "technical review," he resisted the label and referred to his work as a hybrid between a technical review and a peer review. RP 4094, 4137. Technical reviews may be susceptible to bias; peer reviews are characterized by independency and objectivity. See National Fire Protection Association 921: *Guide for Fire and Explosion Investigations* (2011) (NFPA 921) Section 4.6.2-4.6.3 (available at: <http://www.nfpa.org/Assets/files/AboutTheCodes/921/Ch%204%20methodology.pdf> (accessed 5/1/19)).

⁸ The evidence found by Mann had also been missed by Iskra, the insurance investigator who testified on behalf of the prosecution. RP 1856, 2481.

Mann tested debris from the scene and found polystyrene residue on the foosball table but not near the couch.⁹ RP (11/10/15) 3565, 3574, 3576; RP 3652, 3679; CP 448. This undermined Lynam's beanbag hypothesis: it showed that beanbag fill material was on the foosball table but not at Lynam's point of origin. It also contradicted Lynam's testimony that testing for polystyrene residue would have been useless. RP 3059, 3179-3180, 3196.

Mann also reviewed all available police reports and other documentation relating to the case. RP 3761-3764. Fire investigators routinely rely on such material in forming their opinions. RP 3749-3751. Mann concluded that the cause of the fire could not be determined. RP 3537-3538, 3664-3665; CP 450. He also believed that the fire marshal's office failed to conduct a proper investigation. RP 3402-3407, 4147-4149, 4155, 4158-4159; CP 450.

In Mann's opinion, the available evidence did not support Lynam's proposed point of origin, ignition sequence, or conclusion that the fire was the result of arson. RP 3537-3538, 3664-3665, 3674, 3680, 3682, 4048; CP 450. His review of Lynam's work suggested that the fire marshal had allowed his objectivity to be compromised by his knowledge of Ms. Arndt's history, resulting in a truncated investigation. RP 3771, 3774-3775, 3779, 3788-3789, 3809-3817, 3836-3843, 3855-3862, 3884-3888,

⁹ Mann also prepared a demonstration aimed at showing jurors how burning liquids pool and create protected areas. RP 3965-4005.

3919-3920, 3945, 3952-3953, 3959-3960, 4047-4048, 4112, 4127-4129, 4147-4149, 4152-4155, 4157-4159; CP 447.

Another key problem Mann found with Lynam's conclusion related to "flashover." Mann believed that flashover occurred during this fire. RP 3893-3894; CP 449. Fire investigators use burn patterns to determine origin, and flashover affects burn patterns. RP 1508, 1516, 1560, 1582, 1596, 1613-1614, 1626, 1652, 1741, 1790, 1881-1882, 2290, 2468, 2470, 2698, 2804, 2826, 3023, 3099, 3701, 3706, 3830, 3891-3894, 3944; CP 449. If flashover does occur, the investigator may find evidence of multiple points of origin. RP 3814, 3891; CP 450. Because an accurate determination of origin is a precondition to a valid finding of cause,¹⁰ it is essential to determine whether flashover occurred. RP 1626, 1628, 1741, 3023, 3703, 3706, 3814, 3891, 4262. An investigator's failure to identify flashover undermines confidence in the investigator's ultimate conclusions, including the classification of a fire as arson. CP 450.

But the trial court excluded Mann's opinion that the fire should be classified as undetermined (rather than incendiary). RP 3537-3538, 3664-3665; CP 450.

The court did not allow Mann to testify that the melted bucket remnant he'd found near Lynam's proposed point of origin was stuck to the floor, that he'd pried it up with a shovel, that its underside was white and undamaged, and that it had created a protected area on the floor. RP 3667-3686, 4022-4023; CP 448-119; Ex. 345-347.

¹⁰ RP 1724, 1876-1877, 3042, 3692.

The court did not allow Mann's opinion that the area around the basement hearth had not been properly examined. RP 3860, 3950, 3959-3960; CP 447. The court refused to allow Mann to explain the significance of the the second melted plastic remnant he'd discovered adhered to that part of the floor. RP 3959-3960. Mann was also barred from explaining the significance of the other protected areas he'd found in that location. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894; CP 447.

The court did not allow Mann's lab test results showing the presence of polystyrene around the foosball table and the absence of polystyrene at the hypothesized point of origin. RP (11/10/15) 3565, 3574, 3576; RP 3652, 3679; CP 448.

The court did not allow Mann's opinion that the room went to "flashover," an event with the potential to skew the investigation. RP 1626, 1882, 2468, 3023, 3706, 3891, 3893-3894; CP 449.

The court did not allow Mann's conclusions drawn from reports written by police, firefighters, and the coroner's office. RP 3745, 3760. The court also refused to allow jurors to view photographs showing how burning liquids pool and create protected areas during a fire. RP 3965-4005; Ex. 465-474. Finally, the court prevented Mann from critiquing Lyman's conclusion that smoke would have been immediately visible in the living room had an accidental fire started in the basement directly below the fireplace insert. RP 2383-2385, 2482, 2552, 2868-2869, 3129-3133, 3895-3903.

By contrast, the court placed no limitations on the three fire investigators who testified for the prosecution. These included Lynam himself, an expert named Ken Rice, who had been retained by the State to evaluate Lynam's conclusions, and Ed Iskra, the insurance investigator who conducted a partial investigation into the fire's cause.¹¹ RP 1856, 1862, 2481.

Like Mann, Rice reviewed all available materials and conducted tests to evaluate Lynam's hypotheses. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481, 2988. Unlike Mann, Rice did not visit the scene. RP 2447. Neither Rice nor Iskra (who did visit the scene) conducted a complete origin and cause investigation. RP 1856, 2481. Despite this, the court allowed Rice and Iskra to provide their opinions to the jury, while excluding much of Mann's testimony. RP (11/10/15) 3565, 3574, 3576; RP 1626, 1882, 2383-2385, 2468, 2482, 2552, 2868-2869, 3023, 3129-3133, 3537-3538, 3650-3652, 3661, 3664-3686, 3706, 3740-3741, 3745, 3760, 3800-3803, 3860, 3891, 3893-3903, 3950, 3959-3960, 3965-4005, 4022-4023; CP 447-450.

The jury convicted Ms. Arndt of first-degree arson and premeditated murder committed during the course of arson.¹² CP 430-433. She moved for a new trial, arguing that the trial court had violated her

¹¹ Iskra initially classified the fire as undetermined. After Lynam prepared a supplemental report, Iskra changed his conclusion. RP 68, 1633, 1785-1788, 1796, 1824, 1838-1839, 1841.

¹² Ms. Arndt was also convicted of six counts of second-degree assault, relating to the other occupants of the house. CP 430-432. A charge of felony murder was vacated by the Court of Appeals.

constitutional right to present a defense. CP 442-451. The court denied the motion, and Ms. Arndt appealed. CP 484, 611-624.

Although the Court of Appeals affirmed, one judge dissented “because the trial court erroneously excluded crucial, highly probative testimony.” Opinion, p. 52. The Supreme Court accepted review of Ms. Arndt’s petition.

ARGUMENT

I. THE JUDGE PREVENTED MS. ARNDT FROM PRESENTING HER DEFENSE BY REFUSING TO ALLOW JURORS TO HEAR MANN’S OBSERVATIONS AND OPINIONS.

Dale Mann went to investigate the scene of the fire. He found important evidence that had been overlooked by the fire marshal’s team. This included melted plastic containers stuck to the floor in two key locations, as well as evidence of combustible material under the ceiling vent, a potential point of origin. Mann also found a possible ignition source at the foosball table, another potential point of origin. He found polystyrene at the foosball table, but not around the couch, where Lynam believed the fire had started.

However, the trial court barred Mann from telling jurors about much of what he found at the scene. The court also prohibited Mann from explaining why he believed Lynam’s investigation was inadequate. The court also refused to allow Mann to share the results of tests on debris he recovered from the scene. The evidence would have severely undermined the prosecution’s case.

The evidence was relevant and admissible.¹³ By improperly excluding critical evidence, the trial judge violated Ms. Arndt's right to present her defense to the jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Multiple key facets of Lynam's insufficient investigation were not explained to the jury.

Lynam's inadequate investigation of his point of origin. A fire cannot be classified as arson without first determining where the fire originated. RP 1724, 1876-1877, 3042, 3692. Mann found a melted bucket remnant at Lynam's proposed point of origin. RP 3666-3686; CP 448-449; Ex. 345, 346, 347. The remnant appeared in photos taken before Mann arrived at the scene; however, Lynam, Iskra, and the other investigators overlooked it. RP 3677; CP 448.

Mann pried the remnant up, found the underside to be white and undamaged, and discovered that it had created a protected area on the cement floor. RP 3667-3678; CP 448. The court barred Mann from sharing this information with the jury, and excluded photographs documenting his discovery. RP 3666-3686, 4029; Ex. 345-347.

The bucket's presence showed that Lynam did not thoroughly investigate his own proposed point of origin. RP 1724, 1876-1877, 3042, 3692. The evidence was relevant and should have been admitted. The site

¹³ A complete discussion of the relevance and admissibility of Mann's evidence is set forth in Judge Maxa's dissent. Opinion, pp. 38-52 (Maxa, ACJ, dissenting); *see also* Petition, pp. 11-27.

where Mann found the bucket was critical to Lynam's conclusion that the fire was arson.

Mann's discovery of the bucket also disproved the State's beanbag theory which the prosecutor relied on as proof of premeditation. RP 4333-4334, 4403-4404. Had fire destroyed a beanbag chair next to the bucket, the bucket would have been entirely consumed without leaving any remnant.¹⁴ RP 3673; CP 448-449.

The beanbag hypothesis was further undermined by Mann's testing of debris from the scene. Mann found polystyrene at the foosball table, but no polystyrene at Lynam's proposed point of origin. RP (11/10/15) 3565, 3574, 3576; RP 3652, 3679; CP 448. This suggested that beanbag chairs were on the foosball table when the fire started, not by the couch, as Lynam believed. The court excluded this result. RP 3652.

Mann's observations, test results, and opinions were relevant and admissible.¹⁵ The proffered testimony had some tendency to show that Lynam's conclusions were incorrect. ER 401-402. Mann's observations were based on personal knowledge, and his opinions would have been helpful to the jury.¹⁶ ER 602; ER 702. The trial court should have allowed jurors to hear Mann's critique and the facts supporting it. Exclusion of this

¹⁴ This is so, Mann explained, because the bucket was made of a material with lower melting and boiling points than polystyrene, the fill material for the beanbag chairs. RP 2513, 3667-3682, 3960, 4032-4034, 4046; CP 448-449.

¹⁵ Even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010); ER 401. See also Opinion, p. 52 (Maxa, ACJ., dissenting).

¹⁶ Under ER 702, expert testimony is admissible if helpful to the trier of fact, with "helpfulness" construed "broadly." *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

evidence prevented Ms. Arndt from presenting her defense to the jury. *Jones*, 168 Wn.2d at 719-721.

Lynam's inadequate investigation of other areas. Mann examined two other areas of interest in the basement, finding in both evidence that Lynam's team had overlooked. What he discovered undermined Lynam's theory regarding the fire's origin.

The first area was below the ceiling vent. There, Mann discovered a second plastic remnant stuck to the basement floor. RP 3959-3960, CP 447. He also found protected areas, indicating the presence of other combustibles. CP 447.

Lynam had recognized the importance of this area—he conducted ember tests in his effort to rule out the upstairs fireplace insert as the cause of the fire. RP 1929, 1934-1936, 2383, 2505, 2813, 2817, 2860, 2872-2874, 2881. But he did not excavate the debris below the vents. RP 957, 1386, 2814, 3860, 3959-3960; CP 447. Instead, he and Rice assumed that the tile area below the vents had not had any highly-flammable material on it before the fire started. RP 1934-1936, 2383, 2813, 2817, 2881.

This meant that Lynam missed the second plastic remnant and did not realize there had been combustibles beneath the vent. This called into question the results of his ember tests – he should not have ruled out a spark from above without knowing what that spark might land on.¹⁷

¹⁷ The ember test suffered from another flaw as well. The upstairs fire was made of both wood and presto logs; however, Lynam tested only embers from a presto-log. RP 1929; 2505, 2872-2874, 2860. Presto-logs do not produce sparks. RP 1583, 3160.

The court did not allow Mann to make more than a passing reference to his discovery of the second plastic remnant. The court also prevented him from talking about evidence of other combustible material he found below the vent. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447.

Mann's observations and opinions regarding the area below the upstairs fireplace insert were relevant and admissible. ER 401-402, 602, 702-703. His testimony would have exposed Lynam's failures. Absent a thorough examination, Lynam should not have ruled out the upstairs fireplace insert as the cause of an accidental fire. RP 1929, 1934-1936, 2383, 2505, 2813, 2817, 2860, 2872-2874, 2881.

The second area missed by Lynam, Mann also examined the severely burned foosball table. RP 2831-2832, 3036, 3040-3042, 3057-3059, 3084-3088, 3095, 3114-3115, 3162, 3813, 3945, 4041, 4252. Mann discovered an electrical device. CP 448. This was a potential ignition source, given its proximity to the highly flammable beanbag chairs. CP 448.

Mann tested debris from the table. His tests revealed the presence of polystyrene, confirming that beanbag chairs had been on the foosball table. RP (11/10/15) 3565, 3574, 3576; RP 3652; CP 448. Lynam did not excavate the foosball table and performed no polystyrene testing on any material from the basement. He told the jury that such tests would have been useless. RP 3059, 3179-3180, 3196.

The court prevented Mann from discussing his test results. RP 3652. Jurors were left with the false impression—from Lynam’s testimony—that testing for polystyrene would have been useless. RP 3059, 3179-3180, 3196. In fact, Mann’s tests undermined Lynam’s beanbag hypothesis,¹⁸ while supporting the idea that the fire might have started at the foosball table.

Like his testimony about the area below the vent, Mann’s testimony regarding the foosball table was relevant and admissible. ER 401-402. His observations were within his personal knowledge, and his opinions would have been helpful to the jury. ER 602, 702-703. The court’s decision prevented Ms. Arndt from showing jurors the holes in the State’s case. *Jones*, 168 Wn.2d at 719-721.

Mann’s opinion that flashover occurred. A “flashover” event can make it difficult to determine a fire’s origin and cause. RP 1508, 1626, 1741, 1882, 2468, 2470, 3023, 3706, 3814, 3891, 3893-3894, 3944; CP 449. Flashover occurs when a room is heated until “pretty much everything in the room instantly ignites.” RP 1503. When flashover occurs, an investigator must conduct a thorough search, and may discover evidence of multiple points of origin. RP 3814, 3891; CP 450.

Mann believed flashover occurred in this case. RP 3893-3894; CP 449-450. The trial judge excluded Mann’s opinion on flashover, but allowed Lynam, Iskra, and Rice to provide their opinions on the subject. RP 1652, 1737-1738, 1768-1769, 1925, 3030-3031, 3893-3894, 4234.

¹⁸ Which the State relied on as evidence of premeditation. RP 4333-4334, 4403-4404.

Mann's expert opinion on flashover was relevant and admissible. ER 401, 702. It would have helped the jury evaluate Lynam's conclusion that the fire was intentionally set. By excluding the evidence, the trial judge prevented Ms. Arndt from defending herself. *Jones*, 168 Wn.2d at 719-721.

Mann's review of police reports. Like the other experts who testified, Mann reviewed police reports and other documents relating to the fire. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481, 2988, 3761-3764. Fire experts routinely rely on such reports. RP 3749-3751.

Mann's review of these reports led him to conclude that Lynam had reached his opinion based on incomplete evidence. He found that Lynam had overlooked discrepancies in the reports. He also found that Lynam had decided the fire was arson before reviewing all available information. RP 3402-3407, 4147-4149, 4155, 4158-4159; CP 450.

The court prohibited Mann from mentioning that he'd reviewed these materials. RP 3740-3741, 3745, 3760. The court also excluded any opinions drawn from his review of these materials. RP 3740-3741, 3745, 3760. No such restriction was imposed on any of the other experts.

The court had no basis for excluding this evidence. Fire investigators routinely rely on police reports and other documentation. RP 3749-3751. Lynam, Rice, and Iskra all reviewed the materials, and testified that they had done so. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481, 2988. Mann's review of the materials showed that his investigation was at least as thorough as those undertaken by the State's experts.

The materials also helped establish problems with Lynam's investigation. Lynam should have followed up on discrepancies revealed in the reports and should not have decided the fire was arson before reviewing all the available materials. Mann's critique regarding Lynam's subpar investigation was more than minimally relevant. *Salas*, 168 Wn.2d at 669. It had some tendency to undermine Lynam's conclusions, which provided the foundation for the prosecution's case, and thus were "of consequence to the determination of the action." ER 401.

Mann's critique would also have been helpful to the jury under ER 702. Jurors should have been allowed to hear his opinion regarding Lynam's inadequate review of the written materials. Without Mann's opinion, jurors had no way of evaluating the validity of Lynam's conclusions. The evidence should not have been kept from the jury. By excluding the evidence, the trial court prevented Ms. Arndt from presenting her theory to the jury.

The excluded evidence was central to Ms. Arndt's defense. It would have alerted jurors to serious problems with Lynam's conclusion that the fire resulted from arson. Because of this, the State cannot show that the error was harmless beyond a reasonable doubt. *See State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). (Standard of review addressed in next section.)

Since the excluded evidence went to the heart of the defense theory, the court's error cannot be described as trivial, formal, or merely academic. *See City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496

(2000). Absent the error, a reasonable jury could have reached a different result. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The entire defense was a challenge to the validity of Lynam's conclusions. The fire marshal prematurely decided that the fire was arson, missed critical pieces of evidence (which were later discovered by Mann), and reached conclusions that were unsupported by the available information. Ms. Arndt's convictions must be reversed. *Jones*, 168 Wn.2d at 719-721; *Franklin*, 180 Wn.2d at 382.

II. THE SUPREME COURT MUST REVIEW MS. ARNDT'S SIXTH AMENDMENT RIGHT-TO-PRESENT-A-DEFENSE CLAIM *DE NOVO*.

By excluding evidence that was relevant and admissible, the trial court violated Ms. Arndt's constitutional right to present her defense to the jury. U.S. Const. Amend. VI, XIV; art. I, §§3, 22; *Jones*, 168 Wn.2d at 720. The Supreme Court should review this error *de novo*. *Id.*, at 719.

Constitutional issues are reviewed *de novo*, even where an abuse-of-discretion standard would apply in the absence of a constitutional claim. *Id.*; see also *State v. Buckman*, 190 Wn.2d 51, 57-58, 409 P.3d 193 (2018); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). The *de novo* standard ensures that the exercise of constitutional rights does not become a matter of trial court discretion.

The need for *de novo* review is especially acute where the excluded evidence is central to the accused person's defense. *Jones*, 168 Wn.2d at 719-721; see also *State v. Ward*, No. 77044-6-I, Slip Op. at *2

(Wash. Ct. App. Apr. 8, 2019). This is best illustrated by the court’s decision in *Jones*.

In *Jones*, the trial court prohibited a rape defendant from testifying that he had consensual sex with the complainant during “a nine-hour alcohol- and cocaine-fueled sex party.” *Jones*, 168 Wn.2d at 717. Without this testimony, the defendant was unable to provide “any context about how the consent happened or the actual events.” *Id.*, at 721.

The *Jones* court pointed out the importance of the evidence: “[I]t is evidence of extremely high probative value; it is Jones’s entire defense.” *Id.*, at 721. By excluding the evidence, the trial court “effectively barred Jones from presenting his defense.” *Id.*

Although *Jones* involved the admissibility of evidence,¹⁹ the Supreme Court did not defer to the trial court’s exercise of discretion: “Since Jones argues that his Sixth Amendment right to present a defense has been violated, we review his claim de novo.” *Id.*, at 719.

Cases appearing to apply a different standard of review are easily harmonized with *Jones*. Such cases do not involve the exclusion of evidence that establishes a defense or provides context to the defense theory. *See, e.g., State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010); *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017). Where the excluded evidence

¹⁹ Ordinarily, evidentiary rulings are reviewed for an abuse of discretion. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018).

establishes the defense or provides necessary context (as in *Jones*), review is *de novo*. *Jones*, 168 Wn.2d at 719-721.

For example, in *Aguirre*, also involving the rape shield statute, the trial judge barred cross-examination showing that the complainant was seeing another man while also having a relationship with the defendant.²⁰ *Aguirre*, 168 Wn.2d at 357. Unlike the evidence at issue in *Jones*, the proposed cross-examination would not have established a defense or even provided context supporting a defense theory. The Supreme Court reviewed the claim for an abuse of discretion and affirmed. *Id.*, at 363.

In *Clark*, the defendant disavowed any intent to plead diminished capacity. *Clark*, 187 Wn.2d at 649. He sought to introduce expert testimony on the subject but claimed that it “was not actually diminished capacity evidence.” *Id.*, at 651. Unlike the excluded evidence in *Jones*, the expert testimony in *Clark* would not have established or provided context to any defense, since the defendant was not claiming diminished capacity. The Supreme Court reviewed the issue for an abuse of discretion and affirmed the trial court’s ruling.²¹ *Id.*

Here, Mann’s observations and his opinions established Ms. Arndt’s defense. Mann found critical evidence overlooked by the fire

²⁰ Although the court restricted cross-examination, the defendant was permitted to testify that he believed she’d been seeing someone else. *Aguirre*, 168 Wn.2d at 363.

²¹ Furthermore, the respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See Clark*, Respondent’s Supplemental Brief, p. 16 (available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 4/29/19)); Petitioner’s Supplemental Brief (available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (accessed 4/29/19)).

marshal. Mann’s observations and the opinions he drew from all the available information undermined Lynam’s testimony that the fire was arson. By excluding the evidence, the trial court “effectively barred [Ms. Arndt] from presenting [her] defense.” *Jones*, 168 Wn.2d at 721.

When the trial court excludes evidence that would establish a defense or provide necessary context to the defense theory, the trial court decision must be reviewed *de novo*. *Jones*, 168 Wn.2d at 719-721; *see also Ward*, No. 77044-6-I, Slip Op. at *2.

Because the excluded evidence established a defense and provided critical context for the Ms. Arndt’s theory of the case, the Supreme Court must review the error *de novo*, as it did in *Jones*.²² Ms. Arndt’s convictions must be reversed, and the case remanded with instructions to admit the evidence.

III. THE CONVICTIONS FOR ARSON AND AGGRAVATED FIRST-DEGREE MURDER (BASED ON ARSON) VIOLATED MS. ARNDT’S DOUBLE JEOPARDY RIGHTS.

Ms. Arndt’s convictions for arson and premeditated murder committed during the course of arson violated double jeopardy because they stemmed from a single offense. The constitution prohibits multiple convictions for a single offense. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9.

²² Reversal is required even under an abuse-of-discretion standard. The trial court’s decision was manifestly unreasonable, based on untenable grounds, and resulted from application of the wrong legal standard. *See Gilmore*, 190 Wn.2d at 494 (explaining the abuse-of-discretion standard).

To resolve double jeopardy questions, courts first determine if there is an express statutory provision permitting multiple convictions. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). In Washington, no statute expressly permits convictions for aggravated premeditated murder and other crimes arising from the same transaction. RCW 9A.32.030; RCW 10.95.030. Because there is no express provision, the issue here turns on application of the “same evidence” test and the “merger” doctrine. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

Same evidence test. Under the “same evidence” test, double jeopardy is violated if the evidence necessary to prove one offense is sufficient to prove the other. *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291, 303 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The inquiry focuses on the evidence the State produced at trial rather than on the abstract legal elements.²³ *Orange*, 152 Wn.2d at 818-820. Here, the facts introduced to prove aggravated murder also proved the arson charge.

To prove the aggravated murder charge, the State was obligated to show that Ms. Arndt committed premeditated murder “in the course of” first-degree arson. CP 352-353, 416, 430; RCW 9A.32.030; RCW 10.95.020(11)(e). The arson aggravator is an element of the offense for double jeopardy purposes.²⁴ *State v. Allen*, 192 Wn.2d 526, 544, 431 P.3d

²³ The Court of Appeals failed to recognize this. Opinion, pp. 35-36. The court erroneously rejected Ms. Arndt’s argument because a hypothetical defendant could be convicted of aggravated murder even absent a completed arson. Opinion, pp. 35-36. This is the approach rejected by the Supreme Court. *Orange*, 152 Wn.2d at 818-820.

²⁴ The Court of Appeals believed otherwise. *See* Opinion, p. 32-36. It did not have the benefit of the *Allen* decision.

117 (2018); *Orange*, 152 Wn.2d at 816. The State relied on evidence that Ms. Arndt killed Veeder by intentionally (and with premeditation) setting the fire which damaged the house.

This evidence was also sufficient to prove first-degree arson. As charged, that offense required proof that Ms. Arndt knowingly and maliciously caused a fire which damaged a dwelling. CP 400; *see* RCW 9A.48.020(1)(b). To prove arson, the prosecution relied on the same evidence used to prove the aggravated murder– that Ms. Arndt set the fire that damaged the house.

Because the same evidence supported both charges, the trial court should have vacated Ms. Arndt’s arson conviction. *State v. Womac*, 160 Wn.2d 643, 658-660, 160 P.3d 40 (2007). By entering both convictions, the court violated Ms. Arndt’s double jeopardy rights. *Id.* The conviction for first-degree arson must be vacated, and the case remanded for a new sentencing hearing.²⁵ *Id.*

Merger doctrine. The merger doctrine applies “when the degree of one offense is raised by conduct separately criminalized by the legislature.” *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). In such cases, courts presume that “the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.*

As with the same evidence test, courts “look at how the offenses were charged and proved, and do not look at the crimes in the abstract.”

²⁵ If Count I is not reversed, Ms. Arndt’s overall sentence will not change. However, the 144-month sentence on Count III will be stricken, and her offender score and standard ranges for Counts IV-IX will be reduced. CP 473-475.

State v. Whittaker, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016). Here, the premeditated murder charge was elevated to an aggravated offense because it was committed “in the course of” first-degree arson. CP 352-353, 416, 430; RCW 10.95.020(11)(e).

The arson, as charged and proved, elevated the premeditated murder charge to an aggravated offense. Accordingly, the arson conviction merged with the aggravated murder conviction. *Freeman*, 153 Wn.2d at 772-73. The conviction for arson must be vacated. *Womac*, 160 Wn.2d at 658-660.

Independent purpose or effect. Convictions that “formally appear to be the same crime” may not be punished separately unless each crime has an independent purpose or effect. *Freeman*, 153 Wn.2d at 778. Courts focus on “the facts of the individual case” rather than “abstract legislative intent.” *Id.*, at 779.

The two crimes here do not each have an independent purpose or effect. Both the arson and the aggravating circumstance involved setting a fire that damaged a dwelling. Ms. Arndt did not set a fire to achieve two independent purposes. Instead, the jury determined that she set the fire to kill Veeder.

Nor did each crime have an effect independent of the other. The aggravating circumstance and the arson both involved damage to the dwelling. The jury found that Ms. Arndt committed aggravated murder by causing Veeder’s death “in the course of” setting a fire that damaged a dwelling. CP 400, 416, 430; *see* RCW 9A.32.030; RCW 10.95.020(11)(e);

RCW 9A.48.020(1)(b). The jury found that she committed first-degree arson by setting a fire that damaged a dwelling. CP 400, 416, 430; *see* RCW 9A.48.020(1)(b).

The “independent purpose or effect” rule does not allow both convictions to stand. *Id.* Ms. Arndt’s convictions for arson and premeditated murder committed in the course of arson violate double jeopardy. *Id.*, at 772-773. The arson conviction must be vacated, and the case remanded for resentencing. *Womac*, 160 Wn.2d at 658-660.

CONCLUSION

Shelly Arndt had a chance at acquittal if she could persuade jurors to question the fire marshal’s conclusions. Her entire defense rested on Mann’s investigation. Mann was qualified to critique Lynam’s work. He visited the scene, examined evidence overlooked by all the other investigators, reviewed police reports and other documentation, and conducted his own test of debris collected from critical areas at the scene.

Based on his review, Mann believed that the cause of the fire could not be determined from the available evidence. He should have been allowed to show jurors what he learned from visiting the scene, from testing the debris he collected, and from reviewing the reports and other documentation. By excluding a large amount of evidence that was relevant and admissible, the trial court prevented Ms. Arndt from presenting her defense to the jury.

The excluded material was “evidence of extremely high probative value; it [was her] entire defense.” *Jones*, 168 Wn.2d at 721. By excluding the evidence, the trial court “effectively barred [Ms. Arndt] from presenting [her] defense.” *Id.* Because the evidence was central to Ms. Arndt’s theory of defense, it is especially critical that the court review the constitutional violation *de novo*. *Id.*, at 719.

Ms. Arndt’s convictions must be reversed. The case must be remanded to the trial court with instructions to allow her to introduce the evidence so that the jury can consider her defense. *Id.*

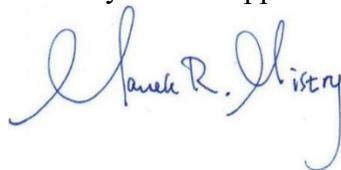
In addition, the entry of convictions for arson and premeditated murder committed in the course of arson violated double jeopardy. The two convictions were based on the same evidence, and the facts underlying the arson elevated the murder charge to an aggravated offense. If the convictions aren’t reversed, the arson conviction must be vacated, and the case remanded for a new sentencing hearing.

Respectfully submitted on May 3, 2019.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief to:

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I filed the Supplemental Brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 3, 2019.



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