

NO. 75072-1-I

No. 96017-8

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,

Respondent,

v.

DAVID ZACHERY MORGAN,

Appellant.

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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I. COUNTER ASSIGNMENT OF ERROR

The trial court erred in holding that the seizure of the defendant's clothes failed to satisfy the requirements of the "plain view" doctrine. 1 RP 180-81.

II. ISSUES

(1) The trial court granted the defendant's motion for mistrial because of the prosecutor's failure to provide discovery concerning an expert witness's opinion. Under Double Jeopardy principles, does this action preclude the defendant from being re-tried?

(2) The trial court determined that notwithstanding the prior discovery violation, the defendant could be given a fair trial. Did the court abuse its discretion in denying the defendant's motion to dismiss under CrR 8.3(b) or 4.7(h)(7)(i)?

(3) Police observed the defendant's clothing on a shelf in a hospital room, where the defendant himself and other people had access to it. Any delay in collecting that evidence presented a likelihood that trace evidence could be contaminated or volatile chemicals lost by evaporation. Was seizure of this clothing justified by exigent circumstances?

(4) Was seizure of the clothing justified under the "plain view" doctrine, where police were entitled to be in the hospital

room, and it was immediately apparent that the clothing constituted evidence? (Issue relating to counter-assignment of error)

(5) The defendant was questioned by two police officers in a hospital room. The officers did not restrain the defendant, place him under arrest, or isolate him from hospital personnel. Was the defendant in "custody" so as to require Miranda warnings?

(6) When a crime can be committed by multiple means, and there is substantial evidence of each of the means, must the jury unanimously agree on which means was proved?

(7) The jury was correctly instructed on the elements of first degree arson, on the burden of proof, and on the presumption of innocence. Was the court required to give an additional instruction that fires are presumed to result from accidental or natural causes, absent any substantial evidence to support such an instruction?

III. STATEMENT OF THE CASE

A. THE FIRE.

The defendant, David Morgan, married Brenda Welch in December 2006. Their daughter K. was born in July, 2007. They were divorced in May, 2014. In the divorce, Mr. Morgan obtained

their marital home in Lynnwood. 11 RP 2444-48.¹ Ms. Welch was granted half of the defendant's pension that had accrued during their marriage. 13 RP 2591. If she died, that money would revert to the defendant. 13 RP 2594. The defendant was also required to pay \$1000 a month in child support. During a period that he was unemployed, he and Ms. Welch agreed to reduce this temporarily to \$200. When he became employed again, he was to resume the \$1000 monthly payments plus \$500 a month towards the back payments. If Ms. Welch died, these payments would terminate. 13 RP 2599-2600.

K. lived with Ms. Welch but spent three weekends a month with the defendant. He would pick her up from school Friday afternoon. Ms. Welch would pick K. up from the defendant at 7 p.m. on Sunday. 11 RP 2451-52.

On Friday, November 14, 2014, the defendant spent the night with K. at the home of his mother, Patricia Mayfield. Ms. Mayfield testified that he had a sinus infection and was suffering from back pain. He left in "the wee hours" Saturday morning,

¹The report of proceedings covering the trials consists of 15 numbered volumes with consecutively numbered pages. There are an additional two volumes with separately-numbered pages, covering proceedings on March 28 and 29. These two volumes fit chronologically between Volume 11 and Volume 12.

leaving K. with Ms. Mayfield. He returned later that day and took K. to do "chores." He and K. again spent Saturday night at his mother's house. 14 RP 2664-67. He left again at around 3:00 a.m. Sunday morning, saying that he was going to a physical therapy appointment. He again left K. with Ms. Mayfield. He did not return. 14 RP 2678-79.

At around 6:25 p.m. on Sunday, November 16, Ms. Welch left her home in Lake Stevens to pick up K. from the defendant. 8 RP 1585, 1587-88. At around 7 p.m., a neighbor observed that the house was on fire. 8 RP 1599. Firefighters arrived within minutes. The first firefighter on the scene was Lt. John Puetz of the Lynnwood Fire Department.² When he arrived, he found the defendant on the ground in the driveway. Lt. Puetz asked if there was anyone else in the house. After being asked multiple times, the defendant mumbled "garage." 10 RP 1970-73. He had a garage door opener in his hand, which he handed to Lt. Puetz. Lt. Puetz tried to open the door, but the opener seemed to be malfunctioning. 10 RP 1975-76.

Lt. Puetz told a firefighter to check the garage. The firefighter found that the door was blocked by a bin. 9 RP 1641. Just inside

the door, he found Ms. Welch on her back in a pool of blood. He pulled her out and turned her over to paramedics. 9 RP 1644-48. She had agonal respirations, meaning that she was close to death. She was burned from her chest up, with smaller burns on her thigh. A strong odor of gasoline was coming from her. After initial treatment at the scene, she was transported to Harborview Hospital. 8 RP 1546-52.

Ms. Welch had three parallel lacerations on her head. 3/29 RP 170-71. The pattern resembled a gardening tool that was found by the front door of the defendant's home. She had a skull fracture. The fracture had lacerated a small artery. Without medical treatment, the resulting blood clot would have certainly killed her. Damage to the bones in her ear resulted in a permanent loss of hearing in that ear. Nerve damage also resulted in permanent loss of her sense of smell. 3/29 RP 171-77, 138. She did not remember how she got hurt. 13 RP 2439.

At the scene of the fire, one of the firefighters observed the defendant lying on the ground. "He was lying on his stomach on the ground, and then he'd pop up and look around. And then I looked at

² Prior to trial, the Department re-designated its Lieutenants as Captains. 10 RP 1967.

him; we made eye contact, and he'd go back down to the ground.”
13 RP 2481.

The defendant was subsequently examined by paramedics. He had no soot in his nose or mouth and no burns. 11 RP 2030-31. He had blood on his hands and clothing, but no lacerations. He had a superficial wound on his forehead and singed hair. 11 RP 2033-34. The singeing resembled what a paramedic had seen on people who had accidentally ignited a flammable liquid – for example, when lighting a barbecue. The fire will “whoof” and singe the person’s hair. 11 RP 2035-36. The defendant followed commands, but he did not respond to some questions. One of the paramedics testified that he appeared to be purposefully acting. 10 RP 1908. After being treated at the scene, the defendant was taken to Swedish Edmonds Hospital. 11 RP 2040; 3/28 RP 55.

Meanwhile, the firefighters had been informed (mistakenly) that there was a child in the house. Lt. John Turner entered the burning house to look for anyone inside. In the room that he entered, there was initially no fire and little smoke. When he went around a wood burning stove, “there was a gigantic ball of fire coming at me.” 9 RP 1675-77. Lt. Turner believed that this rapid ignition resulted from the fire hitting an accelerant. 9 RP 1681-84.

One of the firefighters testified about her attempts to extinguish the fire later in the evening. When she put out the flame at the bottom, "it would come back and circle around and come back to my backside." This was reminiscent of what she had seen in car fires. If there is a source of gasoline, it will keep re-igniting the fire. 13 RP 2487-88.

B. QUESTIONING OF DEFENDANT AND SEIZURE OF CLOTHING.

Lynnwood Police began an investigation of the fire. Officer Christopher Breault was sent to Swedish Edmonds to obtain information from the defendant and provide medical updates on his status. 1 RP 115. Another officer was similarly sent to Harborview to ascertain Ms. Welch's status and collect evidence. 1 RP 94. At the hospital, Officer Breault had a conversation with the defendant. 1 RP 116.

At around 10:40 p.m., Det. Sgt. Rodney Cohnheim and Det. Brian Joregensen arrived to question the defendant. 1 RP 75. Because the hospital room was small, Officer Breault went out to the hallway. 1 RP 118. At one point, the defendant wanted to urinate, and a nurse came in to assist him. The detectives left the room to give them privacy. After the nurse was done, they came

back in and resumed the conversation. 1 RP 66-70, 94-105. The second part of the conversation was "a little more confrontational" than the first part. 1 RP 108.

The defendant told the detectives that he had come home from work and fallen asleep upstairs. He was awakened by being struck on the head. He heard a voice, which he thought might have been Ms. Welch's. 9 RP 1764. He went downstairs through thick smoke and found the house on fire, with Ms. Welch against a back wall. She was on fire, so he ripped off her burning sweater and tried to pat out the flames. 9 RP 1764-65.

While the detectives were talking to the defendant, Officer Breault noticed that the defendant's clothes were in plastic bags sitting on a counter in the hospital room. He was concerned that the clothing could become cross-contaminated. Also, gasoline or other chemicals on the clothing could dissipate rapidly. He and another officer therefore removed the clothing from the plastic bags. They placed each individual item in a bag that were designed to preserve evidence. 1 RP 154-59.

C. SUBSEQUENT INVESTIGATION.

Examination of the defendant's clothing showed blood spatter on his jeans and the left sleeve of his shirt. 3/29 RP 80, 84-

85. Spatter results when force is applied to a source of liquid blood. 3/29 RP 79. The pattern is very different from those that result from blood spurting or from blood transfer. 3/29 RP 81.

The defendant's car was parked in the driveway of his house. It was searched pursuant to a warrant. The back seat was piled with stuff to the level of the windowsill. The trunk was also "crammed full of stuff." 12 RP 2383-84. Items in the backseat included men and girl's clothing, blankets, stuffed animals, 16 disposable cameras, and three rolls of film. Items in the trunk included 18 DVDs of family videos, family photos, tax returns, clothing, and the defendant's prescription drugs. 12 RP 2388-89. The items in the trunk included K's baby blanket, baby shoes, and baby toys. 13 RP 2450-51.

D. EXPERT TESTIMONY AND MISTRIAL.

Snohomish County Deputy Fire Marshall Edwin Hardesty conducted an investigation to determine the cause of the fire. He was assisted by Fire Investigator Mikael Makela. Marshall Hardesty submitted a report characterizing the report of the fire as "undetermined." The report stated, however, that he "could not rule out that this was an incendiary fire." He could rule out all other possible causes. 11 RP 2140.

At a first trial, Marshall Hardesty testified that from the nature of the fire, he concluded that some type of fuel or accelerant had been added to the room to sustain the fire. 4 RP 758. Based on the condition of Ms. Welch and the gasoline on her clothing, "one could conclude that a fire was intentionally set." He could eliminate all accidental causes in the room of fire origin. He could not rule out an intentionally set fire. 4 RP 764-65. He classified the cause of the fire as "undetermined." 4 RP 762.

In cross-examination, defense counsel questioned Marshall Hardesty about NFPA 921, a manual published by the National Association of Fire Investigators. That document rejects a procedure called "negative corpus," in which the investigator uses a process of elimination to conclude that a fire was intentionally set. Marshall Hardesty denied that he had used this procedure. 4 RP 782-84.

The State later called Investigator Makela as a witness. He testified that he agreed with Marshall Hardesty's conclusions. 5 RP 914. The prosecutor questioned him about NFPA 921. He testified that portions of that manual supported his conclusion. At the end of this questioning, the prosecutor asked whether he had an opinion

as to whether the fire was intentionally set. He said that it was. 5 RP 941-51.

The defense then moved for a mistrial. They said that, in discovery, the prosecutor had not disclosed Investigator Makela's opinion that the fire was intentionally set. The prosecutor had provided Marshall Hardesty's report, which characterized the cause as undetermined. 5 RP 953-56, 959, 962-63. The court concluded that the failure to disclose Investigator Makela's opinion was a violation of the court's discovery order and the defendant's rights. The court therefore declared a mistrial. 5 RP 963-64.

After the jury was discharged, the defendant moved for dismissal. 1 CP 155-76. Although the court adhered to its view that there was a discovery violation, it did not believe that the prosecutor was trying to "put one over" on the defense. The defendant could still receive a fair trial. Under the circumstances, dismissal would not serve the ends of justice. The court therefore denied the motion to dismiss. The court reserved the right to impose sanctions against the prosecutor personally at the conclusion of the case. 5 RP 996-1002. At sentencing, however, the court concluded that "the behavior complained about was not

an intentional act by” the prosecutor. It therefore decided not to impose any additional sanctions. 15 RP 2864.

A second trial was promptly convened. At the second trial, Marshall Hardesty testified to the conclusions in his report. 11 RP 2140. Investigator Makela testified that he agreed with Marshall Hardesty. 3/29 RP 132. He testified that he could eliminate all natural and accidental causes. He could not eliminate an intentionally set fire. 3/29 RP 134-35.

IV. ARGUMENT

A. THE TRIAL COURT’S DECISION TO GRANT THE DEFENDANT’S MOTION FOR A MISTRIAL DID NOT REQUIRE DISMISSAL OF THE CHARGES.

1. Absent A Finding That The Prosecutor Intended To Goad The Defense Into Seeking A Mistrial, There Is No Basis For Dismissal On Double Jeopardy Grounds.

The defendant argues that following the initial mistrial, Double Jeopardy principles precluded re-trial. The mistrial was granted on the defendant’s motion. 5 RP 962-63. Ordinarily, Double Jeopardy principles do not preclude re-trial following a mistrial on the defendant’s request. State v. Robinson, 146 Wn. App. 471, 478–79, 191 P.3d 906, 910 (2008). “Even when judicial or prosecutorial error prejudices a defendant’s prospects of securing an acquittal, he may nonetheless desire to go to the first jury and,

perhaps, end the dispute then and there with an acquittal." United States v. Dinitz, 424 U.S. 600, 608, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). It makes no difference that the defendant was faced with a choice between unpalatable alternatives:

[T]raditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error

Id. at 609 (citations omitted).

The defendant cites State v. Rich, 63 Wn. App. 743, 821 P.2d 1269 (1992). There, however, "[t]he mistrial was not consented to and was granted over [the defendant's] objection." Id. at 747. Rich was thus not a case in which the defendant's motion for mistrial was deemed not to be "consent" because it was a "Hobson's choice." Rather, it was a case in which the court granted a mistrial over the defendant's objection. The analysis of Rich has no bearing on the present case.

Federal cases recognize one narrow exception to the rule that Double Jeopardy principles do not bar re-trial following a

mistrial granted on the defendant's request. If the prosecutor *intended* to goad the defense into seeking a mistrial, re-trial is precluded. Oregon v. Kennedy, 456 U.S. 667, 676, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Whether such intent existed is a factual finding to be made by the trial court. Id. at 675.

Bad faith actions by a prosecutor are *not* sufficient to invoke this exception. Id. at 674-75.

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, ... does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.

Id. at 675-76 (citations omitted).

Washington cases have recognized the possibility of adopting a slightly broader rule: re-trial may be barred if the prosecutor "knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." State v. Hopson, 113 Wn.2d 273, 280, 778 P.2d 1014 (1989),

quoting State v. Kennedy, 295 Ore. 260, 276, 666 P.2d 1316 (1983).³ Washington courts have not yet decided whether such a rule applies under the Washington constitution. Hopson, 113 Wn.2d at 277-78; State v. Lewis, 78 Wn. App. 739, 746, 898 P.2d 874 (1995). Absent an argument that addresses the Gunwall factors, this court will interpret the Washington constitution coextensively with its federal counterpart. State v. Lee, 135 Wn.2d 369, 387, 957 P.2d 741, (1998); see State v. Gunwall, 106 Wn.2d 545, 720 P.2d 808 (1986). Since there is no Gunwall briefing in the present case, this court should apply the Federal standard.

Ultimately, however, it makes no difference in this case which rule is applied. The difference between the two standards is narrow. Both require a “rare and compelling” set of facts to require dismissal. Hopson, 113 Wn.2d at 283. Both require a factual finding by the trial court that the prosecutor either intended a mistrial or was indifferent to that possibility. Lewis, 78 Wn. App. at 744-45.

No such finding was made in the present case. To the contrary, the court found that the conduct giving rise to the mistrial was not an intentional act by the prosecutor. 5 RP 2864. Absent a

³ On remand from the U.S. Supreme Court, the Oregon Supreme Court adopted this rule under the Oregon Constitution.

finding that the prosecutor intended to goad the defense into seeking a mistrial, there is no basis to dismiss under the Federal Double Jeopardy standard. Even if Washington courts adopted the broader Oregon standard, that would still require a finding that the prosecutor was indifferent to the possibility of a mistrial. Since there was no such finding, there is no basis for dismissal on Double Jeopardy grounds.

2. The Trial Court Properly Exercised Its Discretion In Ruling That Because The Defendant Could Receive A Fair Trial, The Dismissal Of Charges Would Not Serve The Ends Of Justice.

The defendant also claims that he was entitled to dismissal under CrR 8.3(b). That rule allows a court to dismiss a prosecution “due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.”

Two things must be shown before a court can order dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. Second, a defendant must show prejudice affecting the defendant’s right to a fair trial. A trial court’s decision to dismiss charges is reviewable under the manifest abuse of discretion standard.

State v. Puapuaga, 164 Wn.2d 515, 520–21 ¶ 8, 192 P.3d 360 (2008) (footnote and citation omitted). “[D]ismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only

as a last resort.” State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

The trial court found that the prosecutor had elicited an opinion from an expert witness that had not been disclosed in discovery. 5 RP 957-58, 1000-01. The State agrees that this constitutes “governmental misconduct,” which satisfies the first requirement under CrR 8.3(b). This leaves, however, the second requirement. Under CrR 8.3(b), dismissal is “appropriate only if the defendant’s right to a fair trial has been prejudiced in a manner which could not be remedied by a new trial.” State v. Laureano, 101 Wn.2d 745, 762-63, 682 P.2d 889 (1994).

There is no showing here that the defendant suffered prejudice that could not be remedied by a new trial. Before trial recommenced, the defense was fully aware of the witness’s opinion. 5 RP 951. The State, however, agreed not to elicit the previously-undisclosed opinion. 5 RP 990. As a result, the defendant was *better off* than if the opinion had been disclosed in a timely manner. The court specifically found that the defendant could be given a fair trial. 5 RP 1001. Absent any showing that the defendant could not receive a fair trial, the court properly exercised its discretion in denying dismissal.

The defendant claims that he was prejudiced because the mistrial "forced him to waive his speedy trial rights." Brief of Appellant at 17. In one case, the Supreme Court did hold that trial delay can justify dismissal under CrR 8.3(b). State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997). Since that decision, however, CrR 3.3(h) was amended to say: "No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." Under the amended rule, CrR 8.3 cannot be used to justify a dismissal for time-for-trial reasons when CrR 3.3 has not been violated. State v. Kone, 165 Wn. App. 420, 435-37 ¶¶ 42-46, 266 P.3d 916 (2011).

In any event, the defendant's claim is untrue. As the result of an earlier agreed trial continuance, the last allowable date for trial was Monday, March 21. CP ____ (Agreed Trial Continuance filed 9/18/15); see CrR 3.3(b)(5), CrR 8.1 (incorporating CR 6(a)). When the court granted the mistrial, it set re-trial for March 18. CP ____ (Order Re-Setting Trial Date filed 3/10/16). The re-trial in fact began with preliminary motions on March 21. 6 RP 1029; see State v. Carson, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). Even disregarding the mistrial, the re-trial began within the time allowed by CrR 3.3.

The defendant claims two additional areas of prejudice. He asserts that he was prejudiced by the loss of the jury that had previously been selected. There is, however, no showing that the first jury was any fairer than the second one. If the loss of a jury is enough to mandate dismissal, a mistrial could *never* be granted based on prosecutorial error, since a mistrial would always lead to dismissal. As the United States Supreme Court has pointed out, such a rule would make judges more reluctant to grant mistrial motions, thereby harming defendants. Kennedy, 456 U.S. at 676-77.

The defendant also asserts that he was subject to prejudicial pretrial publicity. The court, however, did not believe that pretrial publicity was prejudicial to the defendant. 5 RP 1001. The defendant has pointed to nothing in the record contradicting this finding.

The defendant seeks to rely on CrR 4.7(h)(7)(i). That rule gives the trial court authority to impose several sanctions for discovery violations, including dismissal. Under that rule as well, dismissal is an extraordinary remedy. It is available only when the defendant can show actual prejudice from the prosecutor's actions. The mere possibility of prejudice is insufficient. State v. Krenik, 156

Wn. App. 314, 320 ¶ 15, 231 P.3d 252 (2010). Since the discovery violation did not prevent the defendant from receiving a fair trial, the trial court properly exercised its discretion in refusing to impose a sanction of dismissal.

The defendant claims that as a result of the trial court's rulings, "the State faced no consequences from its actions." Brief of Appellant at 17. This is absurd. The first trial was aborted after four days of trial. 2 RP 280 – 5 RP 968. During that time, a jury was selected and 13 witnesses testified. Having to repeat this process entailed great expense and waste of time. Since the defendant was indigent, the State paid increased costs for his defense as well. The trial court properly ruled that this was an adequate sanction for the discovery violation. 5 RP 1001; 15 RP 2864.

As already mentioned, the trial court's ruling is reviewed for manifest abuse of discretion. "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." Michielli, 132 Wn.2d at 240. The court determined that dismissing serious criminal charges in this case would not support the ends of justice. 5 RP 1002. The defendant has failed to point out anything unreasonable about this decision, or anything untenable about the court's

grounds or reasons. As a result, he has failed to establish that the court's decision not to dismiss the charges was an abuse of discretion.

B. THE DEFENDANT'S CLOTHING WAS LAWFULLY SEIZED.

1. The Danger Of Loss Or Contamination Of Evidence Provided An Exigent Circumstance Justifying Immediate Seizure.

The trial court held that the seizure of the defendant's clothing was justified by exigent circumstances. 1 RP 181-82, 196-97. This ruling was correct.

The exigent circumstances exception to the warrant requirement applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence. This court has identified five circumstances from federal cases that *could* be termed "exigent" circumstances. They include (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. However, merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. A court must look to the totality of the circumstances in determining whether exigent circumstances exist.

State v. Tibbles, 169 Wn.2d 364, 370 ¶ 9, 236 P.3d 885 (2010) (court's emphasis, footnote and citations omitted). Two other relevant factors are the gravity or violent nature of the offense and

whether entry can be made peaceably. Id. n. 3, quoting State v. Smith, 165 Wn.2d 511, 518 ¶ 16, 199 P.3d 386 (2009).

The defendant's argument focuses on the possibility that volatile chemicals on the clothing could dissipate. This was, however, not the *only* way in which evidence could be lost or destroyed. The officer testified that there was danger that items of evidence can be cross-contaminated. There was also danger that trace evidence could be deposited from some other source. 1 RP 154-55.

The clothing in this case was on a counter in the hospital room that the defendant was being treated in. 1 RP 154. Numerous hospital personnel had access to it. The defendant himself also had access. By the time the clothing was seized, the defendant had been told that the police suspected him of assaulting Ms. Welch and setting the fire. 1 RP 109. There was thus great danger that the evidence could be tampered with, deliberately or inadvertently, by either the defendant or another person. Since this could happen at any moment, the length of time necessary to obtain a warrant was of little relevance. Reinforcing the exigency are two of the factors mentioned in Smith: serious and violent crimes were involved, and the seizure was accomplished peaceably.

Under comparable circumstances, this court has upheld warrantless entry into a home – a greater invasion of privacy than occurred here. State v. Welker, 37 Wn. App. 628, 683 P.2d 1110 (1984). There, police entered the home of a rape suspect around 45 minutes after the crime occurred. The court pointed out that trace evidence is often found in rape cases. The defendant was aware that police were closing in on him. Given additional time, he could have destroyed some of the incriminating evidence. Under these circumstances, the potential loss of evidence provided an exigent circumstance justifying the entry. Id. at 634-35.

Similarly in the present case, there was immediate danger that either trace or chemical evidence could be contaminated, lost, or destroyed. That danger provided an exigent circumstance justifying seizure of the defendant's clothing.

2. Alternatively, The “Plain View” Doctrine Allows Police Who Are Lawfully Present To Seize Items That Can Be Immediately Recognized As Evidence.

If this court determines that the seizure of the clothing was not justified by exigent circumstances, it should consider whether the evidence was properly seized under the “plain view” doctrine. A trial court's ruling can be affirmed on any legal basis supported by

the record. State v. Vanderpool, 145 Wn. App. 81, 85 ¶ 12, 184 P.3d 1282 (2008).

A plain view search is legal when the police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity.

State v. Hatchie, 161 Wn.2d 390, 395 ¶ 11, 166 P.3d 698 (2007).

Here, the defendant conceded that the officers had a lawful reason to be in the hospital room. 1 CP 306-07. The defendant's clothing was sitting in plastic bags on a counter in the back of the room. 1 RP 154-55. At the time the clothes were seized, police knew the following: Ms. Welch had suffered burns as a result of a fire. She had also suffered serious lacerations and a skull fracture. Her clothes smelled of gasoline. The defendant had described pulling a burning sweater off of her. 1 CP 314-15; 1 RP 72-73, 81. Based on this information, it was immediately apparent to the officers that the defendant's clothing would contain evidence that would cast light on the perpetrator of the arson and assault. Consequently, they could lawfully seize the evidence without a warrant or exigent circumstances.

The trial court believed that the "plain view" doctrine did not apply because the seizure was not inadvertent. The court therefore

declined to suppress evidence of a knife found on a counter in the same room, because the officers had not expected to find it. The clothing, however, could not be seized, because the officers knew that it was in the room. 1 RP 180-81.

This reasoning was erroneous. To begin with, it is doubtful that “inadvertence” is a separate requirement for a valid “plain view” seizure. Some Washington cases have listed this as a requirement. E.g., State v. Kull, 155 Wn.2d 80, 85 ¶ 8, 118 P.3d 207 (2005). The United States Supreme Court has, however, rejected any such requirement. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); see State v. Hudson, 124 Wn.2d 107, 114 n. 1, 874 P.2d 160 (1994). Since Horton, some Washington cases have set out a two-part test for “plain view” seizure, which does not include an “inadvertence” requirement. Hatchie, 161 Wn.2d at 395 ¶ 11; State v. O’Neill, 148 Wn.2d 564, 583, 62 P.2d 489 (2003); see State v. Bunn, 197 Wn. App. 1004, 2016 WL 7109125 (2016) (unpublished) (summarizing cases).⁴

Even if the “inadvertence” requirement still exists, the trial court misconstrued that requirement.

⁴Because this decision is unpublished, it has no precedential value. This court may give it such persuasive value as the court deems appropriate. GR 14.1(a).

Discovery is inadvertent if the officer discovered the evidence while in a position that does not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position. The requirement that a discovery be inadvertent does not mean that an officer must act with a completely neutral, benign attitude when investigating suspicious activity.

State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991) (citation omitted).

The trial court accepted that when the clothes were seized, the officers were in a place that did not intrude on any expectation of privacy. The court also accepted that, without any further examination of the clothes, it was apparent that they constituted evidence. 1 RP 196-97. This being so, the requirement of "inadvertence" was satisfied. Police can properly seize evidence from a place where they have lawful access, even if they know that the evidence is there. Under the "plain view" doctrine, the clothing was properly seized.

C. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE DEFENDANT WAS NOT IN "CUSTODY" WHEN HE WAS QUESTIONED BY POLICE OFFICERS.

1. The Court's Factual Findings Are Supported By Substantial Evidence.

The defendant claims that he was interrogated in violation of the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.

1602, 16 L.Ed.2d 694 (1966). He has assigned error to three of the factual findings entered by the trial court following the CrR 3.5 hearing. Such findings will be upheld if they are supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Under this standard, each of the challenged findings should be upheld.

a. Finding no. 11: "The room where the defendant was located was not secured and not under guard."

The defendant claims that he was "under guard" because an officer was stationed outside his door. Brief of Appellant at 38-39. Officer Breault testified that he had been sent to the hospital to give his sergeant "updates on what was going on" with the defendant. When the detectives arrived to talk to the defendant, he left the room and stood outside in the hallway, to give them some privacy. 1 RP 118-19. There is no evidence that Officer Breault was guarding the defendant during the questioning. Nor is there any evidence that the defendant was even aware of his presence.

b. Finding no. 12: “Though the defendant was connected to medical equipment, he was not handcuffed or restrained during the time any law enforcement had contact with him.”

Both detectives testified that they did nothing to restrict the defendant’s movement. 1 RP 69, 98. The defendant was hooked up to some monitoring equipment. 1 RP 66, 97-98. During the second part of the questioning, he was wearing an oxygen mask. He pulled it to one side to speak to the detectives. 1 RP 69, 104. One of the detectives testified that the defendant could have gotten up and walked around, if he wanted to 1 RP 111. The record thus supports the trial court’s finding.

In any event, as discussed below, any “restraint” that might arise from the presence of medical equipment would not equate to “custody” for Miranda purposes. State v. Clappes, 117 Wis.2d 277, 285, 344 N.W.2d 141 (1984). That type of “custody” requires a curtailment of a suspect’s freedom of action “to a degree associated with formal arrest.” State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004). The use of medical equipment by medical personnel is not comparable to formal arrest.

c. Finding no. 20: “During this contact [by Det. Sgt. Cohnheim and Det. Jorgensen], the defendant was not in handcuffs, not restrained, and was not under arrest.”

The defendant’s argument does not specifically address this finding. Brief of Appellant at 35-39. “Assignments of error unsupported by argument are deemed waived.” State v. Braun, 82 Wn.2d 157, 170, 509 P.2d 742 (1973). In any event, the finding is supported by the record. Both detectives testified that the defendant was not in handcuffs, was not restrained, and was not under arrest. 1 RP 68-69, 97-98, 101.

2. The Questioning Of A Person By Two Officers In A Hospital Room Does Not Equate To “Custody.”

Once the facts have been determined, this court will determine as a matter of law whether the defendant was in “custody.” State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). “An objective test is used to determine whether a defendant was in custody—whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with formal arrest.” Lorenz, 152 Wn.2d at 36-37. “The defendant must show some objective facts indicating his or her freedom of movement was restricted.” State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172 (1992).

The majority view is that questioning in hospitals is not custodial when the suspect is not under formal arrest. Clappes, 117 Wis.2d at 286; see State v. Thomas, 843 So.2d 834, 839 (Ala. Cr. App. 2002); Cummings v. State, 27 Md. App. 361, 369-70, 341 A.2d 294 (1975); 3 Ringel, Searches & Seizures, Arrests and Confessions § 27:6 at 27-47 (2nd ed. 2016). Any “restraint” resulting from medical procedures is irrelevant. “[I]t is restraint as created by the authorities that provides the Miranda coercive atmosphere.” Clappes, 117 Wis.2d at 285. The Washington Supreme Court has agreed that no “custody” exists when a suspect is questioned by police in a hospital room, if he has not been placed under arrest or otherwise restrained by police. State v. Kelter, 71 Wn.2d 52, 54-55, 426 P.2d 500 (1967).

The defendant cites two cases involving the questioning of a suspect in his or her home: State v. Rosas-Miranda, 176 Wn. App. 773, 309 P.3d 728 (2013); and United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008). These cases reflect the special characteristics of the home:

If a reasonable person is interrogated inside his own home and is told he is “free to leave,” where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To

be "free" to leave is a hollow right if the one place the suspect cannot go is his own home.

Craighead, 539 F.2d at 1083. The same analysis would not apply to other places that lack the special constitutional status of the home.

In the context of interrogations within the home, the two cases considered four factors:

(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

Rosas-Miranda, 176 Wn. App. at 783 ¶ 22; Craighead, 539 F.2d at 1084.

The significance of the first factor is explained in Craighead:

When a large number of law enforcement personnel enter a suspect's home, they may fill the home such that there are no police-free rooms or spaces to which the suspect may retreat should he wish to terminate the interrogation. Similarly, when the number of law enforcement personnel far outnumber the suspect, the suspect may reasonably believe that, should he attempt to leave, he will be stopped by one of the many officers he will encounter on the way out. The suspect may also believe that the large number of officers was brought for the purpose of preventing his departure. In addition, if the suspect sees the officers unholstering their weapons within his home, the suspect may reasonably believe that his home is no longer safe from the threat of police force.

Craighead, 539 F.3d at 1084-85.

In Craighead, there were eight officers present. All were armed, and some unholstered their firearms in the suspect's presence. These circumstances would cause a reasonable person to believe that his home was dominated by law enforcement agents. Id. at 1085.

In Rosas-Miranda, there were likewise eight officers. Only three, however, initially approached the door, and only one questioned the suspect. Although the officers may have been armed, none of them unholstered their firearms in the suspect's presence. These factors indicated that the suspect was *not* in custody. Rosas-Miranda, 176 Wn. App. at 784 ¶ 25.

In the present case, there were two officers participating in the questioning. A third officer was present earlier, but he left when the questioning began. 1 RP 118. Two officers is not an unusual or coercive number – police officers often work with partners. They did not greatly outnumber the suspect or fill all the spaces within the hospital.

Nor is the presence of weapons unusual or coercive. In the United States, police officers are almost always armed when performing official duties. Uniformed officers almost always wear their weapons openly. They do this whether they are encountering

suspects, witnesses, or bystanders. The mere presence of a weapon does not signal to any reasonable person that he is in police custody. It is different if the officer unholsters his weapon or otherwise displays it in a threatening manner – but that did not occur in this case. The first Craighead factor indicates that the defendant here was not in custody.

The second factor is whether the suspect was restrained by physical force or threats. The trial court found that he was not restrained. 1 CP 13, finding no. 12. As was already pointed out, any “restraint” that did not result from police action is irrelevant for Miranda purposes. Clappes, 117 Wis.2d at 285.

The third factor is whether the suspect was isolated from others. He was not. While the officers were questioning the defendant, they allowed medical staff access to him. 1 RP 67, 96. In the middle of their questioning, police left the room so that a nurse could tend to him. 1 CP 13, finding no. 22.

The fourth factor is whether the suspect was told that he was free to leave or terminate the interview. He was not. This one factor supports a finding of custody. It is not, however, sufficient to establish custody. In one case, for example, the parent of a sick child was questioned by police in a “family quiet room” at a hospital.

He was not physically restrained. He was apparently not told that he could leave, but he was also not told that he could *not* leave. On consideration of these factors, the court concluded that the parent was not in custody. State v. Rotko, 116 Wn. App. 230, 241, 67 P.3d 1098 (2003).

In short, the defendant in the present case was not confronted by a large number of officers, physically restrained, threatened, isolated, or told that he was required to stay or speak with the officers. Even if the Craighead factors are applicable in this context, they indicate that the defendant was not in custody. Miranda warnings were not required.

D. THERE WAS NO PROSECUTORIAL MISCONDUCT THAT WARRANTS REVERSAL.

The defendant claims that two portions of the prosecutor's rebuttal argument constituted "misconduct."⁵

Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments

⁵ Although Washington courts have often used the term "prosecutorial misconduct," the Supreme Court has recognized that the term is "a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). A number of other courts agree that "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschafft, 759 N.W.2d 414, 418 (Minn. App. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

and their prejudicial effect. To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict.

A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

1. In Responding To Defense Arguments Concerning Witness Statements At Defense Interviews, The Prosecutor Neither Shifted The Burden Of Proof Nor Impugned Defense Counsel.

The first area of "misconduct" involves a portion of the prosecutor's argument that referred to defense interviews. To understand this argument, it is necessary to put it in context. Defense counsel's closing argument attacked the credibility of several firefighters. Counsel pointed to some things that they had testified to at trial. She said that these had not been mentioned in their reports to police nor in defense interviews. As an explanation for these inconsistencies, she argued that the firefighters' testimony had been influenced by their assumption that the defendant was guilty. 14 RP 2766-71.

In rebuttal, the prosecutor argued as follows:

And the response you get from the Defense right now is, well, these firefighters, they've got some kind of interest in this whole thing. Yeah, these firefighters who didn't know anybody, but were prepared to risk

their lives to save people; who drove the – Brenda to Harborview, and after that went, boy this just doesn't add up right; we're calling in our boss; this doesn't make sense – who wrote a statement, John Puetz who wrote his statement after this incident and had eight other calls and cleaned up the truck and wrote a statement at 1:09 in the morning. And the other officer who wrote his statement at 1:36 in the morning, an eight-page transcript to answer these questions. Oh, well, they didn't at that point answer all the questions that 14 months later [defense counsel] Mr. Wackerman can think of to answer – to ask.

And if there was any reason to believe that every single known fact would be reported by these firefighters at 1:09 in the morning, after they've saved a woman's life, after they've fought other fires, after they cleaned their equipment – Why did [defense investigator] Todd Reeves tell you this morning, I interviewed 40 people; we had statements from most of these folks, reports, forensic reports? Well, there may be more questions. And in those few interviews where [defense counsel] Ms. Silbovitz was there, even when you were done, did she ask some questions? Yep. Well, Mr. Wackerman ever show up at any of those interviews? No. And that's fine. But they were never asked until –

14 RP 2801-02. At this point, defense counsel objected that the argument was "burden shifting." The court overruled the objection but reminded the jury that this was argument, not evidence. The prosecutor never finished the last sentence. 14 RP 2802-03.

The defendant claims that this argument "shifted the burden of proof." This misconstrues the argument. The prosecutor was not suggesting that the defense had some duty to elicit facts at an

interview. Rather, he was responding to a defense argument that witnesses should be disbelieved because their testimony mentioned facts that were not disclosed at defense interviews. His explanation was that the witnesses had been asked questions at trial that they were not asked at the interviews. His argument addressed evidence that was introduced and specifically argued by the defense – not evidence that was absent.

The defendant also claims that this argument “impugned the integrity of defense counsel,” citing State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014). In that case, the court condemned comments that accused defense counsel of deception or dishonesty. Id. at 433-34 ¶¶ 19-21. Other comments that were “self-centered and rude” were improper but did not warrant a new trial. Id. at 432 ¶¶ 17-19.

In the present case, the prosecutor did not impugn counsel at all. He expressly said that the failure of one counsel to attend interviews was “fine.” The defendant now asks this court to assume that the prosecutor conveyed the opposite of what he said. Brief of Appellant at 44. No such suggestion was raised in the trial court. The defendant’s objection was the argument was “burden shifting” – not that it impugned counsel. 14 RP 2802. This court should not

assume, from a cold record, that the prosecutor's argument was taken by the jury as meaning something completely different than what it said.

In any event, even if this argument could be considered an attack on counsel, it did not question his honesty. That being the case, it falls into the category of remarks that, under Lindsay, do not warrant reversal. Both counsel should refrain from incivility and personal attacks – but remarks that do not impugn counsel's integrity do not warrant reversal. Lindsay, 180 Wn.2d at 432-33 ¶¶ 18-19.

2. In Responding To Arguments Based On The Defendant's Statements To Police, The Prosecutor Could Properly Point To Evidence That Those Statements Failed To Explain.

The second alleged area of "misconduct" involved comments about the defendant's statements to police. In defense counsel's closing arguments, she placed heavy emphasis on those statements:

David did not attempt to kill his ex-wife. He did not attempt to set his house on fire. He has told this, folks, repeatedly and consistently. And the State has proved nothing to the contrary.

14 RP 2763.

Mr. Morgan has given you a version of what happened. Has anyone given you a version to

contradict this? No. Has the State offered or proved an alternative story? No.

14 RP 2764-65.

What you also have to consider is Mr. Morgan's story. And it's a story he's told three times, and he's told it consistently. He first told it to Officer Breault. He then told the story two more times in a row to ... Detectives Joregensen and Cohnheim. And ... there was testimony that those stories were essentially consistent. And here's the story that you've heard; the only story about what happened that night. That Mr. Morgan came home from work, and he wasn't feeling well. He went upstairs to watch some TV, and he ended up falling asleep. At some point later he gets knocked on the head; he hears a voice and he thinks it might be Brenda's and he's knocked again. He passes out; and when he comes to, he can smell smoke. He gets up, he goes to the stairs; and he can see smoke coming up. And he goes downstairs and looks around, and he can see that his dining room is on fire. He can see Brenda in the back, and she's on fire as well. She comes to him. He backs up; he falls backward. He helps get the sweater off of her and attempts to take – put the fire out, on her head. And then tries to get out. He leaves, thinking she is behind him. And he realizes once he gets out, that she is not. He makes attempts to get fire in the house, to do what he can; and he hears noises in the garage. And this is the time he passes out – or doesn't pass out. He falls down, and the first – first responder, Lieutenant Puetz, is on the scene and contacts Mr. Morgan.

14 RP 2783-84.

In rebuttal, the prosecutor discussed the defendant's statements:

He gave a version. The firefighters asked for my keys. Did that happen? No. Puetz – he went to the car for

the – he said – he – I – I went to the car to get the garage door opener; he said, firefighters asked me to. Did that happen? No. I was upstairs; I got hit on the head twice. Did that happen? No evidence of it.

[The prosecutor displayed a photograph of the defendant that was taken on the day of the fire.]

There you go. That's the bump. That's the injury, a little – that little abrasion from getting hit with a rafter twice and being knocked unconscious. And that's the singe. That's it, the singe you'd get the firefighters told you, from the whoof. I was unconscious. What, seven firefighters maybe eight – can't quite remember the exact number right now – any evidence that he was unconscious, that he lost consciousness? Nope. What do you – how do you figure it out, those answers match the questions; any evidence he couldn't? Well he chose not to answer a bunch of questions; but other than that, no, he was fine.

No soot. If he had been helping her take off that sweater, he would have breathed in that soot. If he had lit her on fire and ran out of that room and chased her down and hit her, there would be no soot. There would be no smoke inhalation. Thank you. And the one question that isn't answered by his theory, by his question –

[objection overruled]

The one question that you've heard does not provide for us, was this self-inflicted? Did she break the eye herself, smash that in herself, wound herself, and spray blood on the left-handed Mr. Morgan's left arm?

14 RP 2804-05.

When a defendant makes a statement to police and later testifies at trial, the prosecutor can comment on the defendant's

failure to incorporate the events related at trial into his statement to police. "This 'partial silence' at the time of the initial statement is not insolubly ambiguous, but strongly suggests a fabricated defense and the silence properly impeaches the later defense." State v. Belgarde, 110 Wn.2d 504, 511-12, 755 P.2d 174 (1988). By the same reasoning, if the defendant does not testify, a prosecutor can equally comment on inconsistencies between his partial silence and defense theories pursued at trial. State v. Scott, 58 Wn. App. 50, 55, 791 P.2d 559 (1990).

In the present case, the defendant's theory of the case was largely based on his statements to police. In effect, the defense closing argument treated those statements as his "testimony." 14 RP 2783-84. The prosecutor was entitled to reply to that defense theory. In so doing, he could comment on the failure of those statements to explain key facts. In context, the prosecutor was not commenting on the absence of evidence. Rather, he was commenting on inconsistencies between the defendant's statements and the evidence.

The defendant cites to State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). There, the prosecutor argued that "because there is no evidence to reasonably support either of those

[exculpatory] theories, the defendants are guilty as charged.” He thus explicitly argued that the defendants should be convicted because of their failure to present evidence. Id. at 214. No comparable argument was made in the present case. The prosecutor did not say that the defendant should be convicted because of lack of evidence. Instead, he argued that the defendant’s theory of the case was inconsistent with the evidence.

“As an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel.” Brown, 132 Wn.2d at 566. A “fair response” to an argument can properly include pointing out matters that the argument overlooked. For example, in one case defense counsel’s argument included reasons why the defendant might have decided not to testify. In rebuttal, the prosecutor said that defense counsel had forgotten a big reason. The Supreme Court held that this was a fair response to defense counsel’s argument. In re Cadellis, 187 Wn.2d 127, 143-44 ¶¶ 31-32, 385 P.3d 135 (2016). Similarly in the present case, the statement that the defendant’s statements failed to account for the victim’s injuries was a fair response to the defense arguments.

Even if one or both of the prosecutor’s arguments is considered improper, the defendant must still show a substantial

likelihood the misconduct affected the jury's verdict. Brown, 132 Wn.2d at 561. Any improper argument consisted, at most, of a few lines in a 32-page closing argument (16 pages of opening argument and 16 pages of rebuttal). 14 RP 2745-61, 2789-2805. The State's evidence was strong. Among many other items of evidence, the presence of gasoline on the victim's clothing indicates that the fire was intentionally set. 13 RP 2497. The presence of numerous personal items in the defendant's car (including his daughter's baby blanket, shoes, and toys) indicates that he knew about the fire in advance. 12 RP 2288-89; 13 RP 2450-51. The blood spatter on his clothing indicates that he was standing close to the victim when she was assaulted. 3/29 RP 74-86. There is no innocent explanation for this evidence. Given the strength of the evidence and the brevity of any improper comments, there is no likelihood that any prosecutorial misconduct affected the verdict.

E. THE JURY INSTRUCTIONS WERE CORRECT.

1. The Court Correctly Instructed The Jurors That They Did Not Need To Be Unanimous On The Means By Which First Degree Arson Was Committed.

The defendant raises two issues concerning the jury instructions. The first involves the "to convict" instruction for first degree arson. That instruction set out two alternative means of

committing that crime: by causing a fire that (a) damaged a dwelling or (b) was in a building in which there was a human being who was not a participant in the crime. The instruction said that the jurors did not need to be unanimous as to which alternative had been proved, as long as each juror found that at least one alternative had been proved beyond a reasonable doubt. 1 CP 81, inst. no. 16.

The defendant claims that he had a right to jury unanimity as to the means by which the crimes was committed. This argument is based on the dissenting opinion of Justice Utter in State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982). The court held to the contrary: unanimity as to means is not required, as long as there is sufficient evidence as to each means. Id. at 823. The same rule has been stated in many other cases. E.g., State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); State v. Arndt, 97 Wn.3d 374, 377, 553 P.2d 1328 (1976). Since the appellant's brief was filed, the Supreme Court again re-affirmed this rule. State v. Armstrong, 188 Wn.2d 333, 343 ¶ 18, 394 P.3d 373 (2017).

In the present case, there was ample evidence as to each means. There was evidence that the damaged house was the defendant's dwelling. 13 RP 2446-48, 2471-72. There was also evidence that, at the time of the fire, Ms. Welch was present in the

house. 9 RP 1644. Because there was sufficient evidence as to each means, the jury did not need to be unanimous as to one of those means.

2. The Instructions On The Burden Of Proof And The Presumption Of Innocence Were Adequate For The Defendant To Argue His Theory Of The Case That The Fire Was Accidental.

Finally, the defendant claims that he was entitled to the following instruction:

When a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused.

1 CP 108.

A trial court's denial of a proposed jury instruction is generally reviewed for abuse of discretion. State v. Holcomb, 180 Wn. App. 583, 586 ¶ 7, 321 P.3d 1288 (2014). "Jury instructions are sufficient if they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case." State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). The instructions in this case required the State to prove that the defendant caused a fire, and that he acted knowingly and maliciously. The instructions said that the State was required to prove these elements beyond a reasonable doubt. 1 CP 81, inst. no. 16. The instructions also said that the defendant was presumed

innocent. That presumption continued throughout the trial unless the jurors, during their deliberations, found that it had been overcome by the evidence beyond a reasonable doubt. 1 CP 68, inst. no. 3.

These instructions adequately conveyed the presumption of innocence and the burden of proof. Challenges to jury instructions must be considered in the context of the instructions as a whole. “Jury instructions, *taken in their entirety*, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” State v. Johnson, 180 Wn.2d 295, 306 ¶ 22, 325 P.3d 135 (2014) (court’s emphasis). Taken as a whole, the instructions in this case clearly conveyed that the State had the burden of overcoming the presumption of innocence. The instructions were sufficient to allow the defendant to argue his theory of the case – that the State had failed to prove that the fire was knowingly and maliciously caused by the defendant.

The defendant places his sole reliance on State v. Smith, 142 Wash. 57, 252 P. 530 (1927). That decision rested on an earlier decision: State v. Pienick, 46 Wash. 522, 90 P. 645 (1907).

The issue there was the sufficiency of evidence to prove arson.

The court analyzed this issue as follows:

Proof of the single fact that a building has been burned does not show the corpus delicti of arson, but it must also appear that it was burned by the willful act of some person criminally responsible, and not as the result of natural or accidental causes. Where a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused.

Id. at 525. Applying the then-applicable “multiple hypothesis” rule for the sufficiency of circumstantial evidence, the court held that the evidence was insufficient to prove that the fire was deliberately caused. Id. at 525-27; but see State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (rejecting distinction between circumstantial and direct evidence).

As applied in this context, the “presumption of accidental causation” was simply one aspect of the presumption of innocence. To prove arson, the State was required to prove that the fire was deliberately set. The evidence in Pienick failed to establish that fact. As a result, the evidence was insufficient, and the verdict could not stand.

In Smith, the court applied the Pienick presumption to jury instructions. Under the facts of that case, the court held that the defendant was entitled to an instruction setting out the presumption:

The theory upon which the refusal to give this instruction is sought to be upheld by counsel for the state is that, since the state offered evidence indicating the fire was of incendiary origin, the presumption falls of its own weight. But we think this argument is unsound. There is always a presumption that a fire is of accidental origin where the origin is a contested issue. In the instant case the question of whether the fire was so set was a very serious one. There were facts relied upon by the state that it believed showed that the fire was incendiary. On the other hand, the appellant insisted just as strongly that the evidence did not establish that fact. The evidence showed two previous fires in the same building, neither of which, apparently, were incendiary. The issues were thus presented to the jury on this point. Was not the appellant entitled to the presumption that the fire was of accidental origin in a case where its origin was actually disputed?

To hold otherwise is to say that the presumption can never be available to a defendant in any case where the state seeks to show what caused the fire. Manifestly, this robs the defendant of a very vital protection in a case of this character.

The state seems to argue that this presumption is proper for the court to indulge in when it determines whether there is sufficient evidence to sustain the verdict. If this be so, then we know of no reason why the jury should not be so instructed when they are to determine whether the evidence is sufficient to establish the origin of the fire.

Smith, 142 Wash. at 58.

This court has considered the applicability of Smith in two cases: State v. Kindred, 16 Wn. App. 138, 553 P.2d 121 (1976), review denied, 89 Wn.2d 1001 (1977), and State v. Picard, 90 Wn. App. 890, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998).⁶ In both cases, this court held that the instruction was unnecessary. In Kindred, the court said that the instruction should be given “if the defendant contests the issue of the cause of the fire *and* there is substantial evidence that the fire was of accidental or natural causes.” Kindred, 16 Wn. App. at 140-41 (court’s emphasis). Because there was no evidence of accidental or natural causation, the instruction was properly refused. Id.

Moreover, the test of the sufficiency of the instructions is whether when considered as a whole counsel may satisfactorily argue his theory of the case to the jury. Here, the jury was instructed (1) on the elements of the crime of arson, (2) that the State had the burden of proving these elements beyond a reasonable doubt, and (3) on the presumption of innocence. These instructions sufficiently allowed [the defendant] to argue his theory of the case to the jury and, accordingly, the trial court did not abuse its discretion in refusing the proposed instruction.

Id. at 141 (citations omitted).

In Picard, the court similarly held that an instruction on this presumption was unnecessary:

⁶ The transcript in the present case incorrectly quotes this case

In Smith, our Supreme Court held that when the instruction was timely requested and supported by substantial evidence, failure to give the instruction constituted reversible error. The Smith opinion says nothing about whether the presence of other instructions could have cured the error, and we are left to guess what other instructions were given to the jury in the Smith trial. We conclude that Smith is dubious authority for the proposition that failure to give an instruction that a fire is presumed to be accidental is reversible error where merely the instruction is timely requested and supported by substantial evidence.

Moreover, we find persuasive the State's assertion that Washington courts no longer treat circumstantial evidence as inherently suspicious, as was true in 1927. Trial courts are now required to instruct each jury that guilt must be proven beyond a reasonable doubt. We hold that the trial court's rejection of [the defendant's] instruction regarding the presumption of accident was not an abuse of discretion because the instruction was adequately covered by the remaining instructions, which established the elements of the crime of arson, that the State had the burden of proving these elements beyond a reasonable doubt, and that there is a presumption of innocence.

Picard, 90 Wn. App. at 903-04 (citations omitted).

The reasoning of Kindred and Picard apply equally to the present case. As in both cases, the jury was instructed on the elements of arson, the burden of proof, and the presumption of innocence. 1 CP 68, 81. Moreover, as in Kindred, there was no substantial evidence that the fire was of accidental or natural origin.

name as "Bouchard." 14 RP 2647-48.

To the contrary, both fire investigators testified that all accidental causes could be eliminated. 11 RP 2136-37; 3/29 RP 135. Absent any substantial evidence of an accidental fire, the other instructions were sufficient to allow the defendant to argue his theory of the case.

The defendant criticizes the holding of Kindred. He claims that Smith is not limited to cases in which there is substantial evidence of accidental causation. Contrary to this claim, Smith indicates that the question of accidental origin in that case was "a very serious one." The court pointed out that there was evidence of two previous accidental fires in the same building. Smith, 142 Wash. at 58. This court was thus correct in limiting Smith to cases where there is substantial evidence of an accidental or natural fire. Absent such evidence, the trial court did not abuse its discretion in refusing the instruction.

V. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 17, 2017.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Respondent

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14-1-02409-1
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Findings of Fact and Conclusions of Law
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Case No.: 14-1-02409-1

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO 3.5 HEARING

vs.

DAVID Z. MORGAN

Defendant.

A hearing pursuant to CrR 3.5 was conducted before the Honorable Joseph P. Wilson on February 4, 2016. The defendant was present, in custody. State was represented by Deputy Prosecuting Attorneys Paul Stern and Bob Langbehn, and the defendant was represented by Attorneys Don Wackerman and Sarah Silbovitz. Testifying on behalf of the State was Sgt. Rod Cohnheim, Detective Brian Jorgensen, Officer Christopher Breault, and Officer Reorda of the Lynnwood Police Department. The defendant did not testify.

1
2
3 **FINDINGS OF THE FACTS**
4

- 5 1) On November 16, 2014, Detectives were alerted to a residential fire located within the city of
6 Lynnwood, WA.
7 2) The first to arrive on scene was Lt. John Puetz from the Lynnwood Fire Department.
8 3) As he began to walk around the residence, Lt. Puetz was met by a male who would later be
9 identified as the defendant, David Morgan.
10 4) The defendant indicated to Lt. Puetz that there was someone in the garage and handed him a
11 garage door opener.
12 5) The defendant would later make statements to Emergency Medical Technicians during a
13 medical assessment , regarding apparent injuries he had allegedly suffered.
14 6) The defendant was then transported to Swedish Hospital for evaluation and possible treatment.
15 7) At the time, the detectives and firefighters were aware that the victim had a young daughter
16 who had not yet been located.
17 8) It was unknown whether this girl was still located within the residence or was elsewhere.
18 9) Officer Breault of the Lynnwood Police Department was advised to respond to the hospital
19 where the defendant was located. *As officer was stationed outside defendant*
room during his stay at hospital.
20 10) Officer Breault was aware that the defendant was located in an emergency room and being
21 treated for smoke inhalation.
22 11) The room where the defendant was located was not secured and not under guard.
23 12) Though the defendant was connected to medical equipment, he was not handcuffed or
24 restrained during the time any law enforcement officer had contact with him.
25 13) Based on the fact that the defendant's child had not been located, Officer Breault asked the
defendant about where she might be located.
14) The defendant stated that she was at her paternal grandmother's house.
15) The defendant then provided Officer Breault with his son's cell phone number.
16) Officer Breault also asked the defendant what had occurred that evening.
17) The defendant freely spoke with the Officer regarding his memory of that evening.
18) At the conclusion of this conversation, the defendant allowed photographs to be taken of his
person and signed a medical release form.

- 1 19) Later that evening, Sgt. Cohnheim and Detective Jorgensen arrived at the hospital room and
2 made contact with the defendant.
- 3 20) During this contact, the defendant was not in handcuffs, not restrained, and was not under
4 arrest.
- 5 21) The detectives asked the defendant what happened that evening.
- 6 22) During this contact, the defendant had to urinate so the Detectives left the room while nursing
7 staff could tend to him.
- 8 23) Afterwards, the detectives reinitiated contact with the defendant and interviewed him regarding
9 the events of that evening.
- 10 24) The defendant was requested, but declined, to give a recorded statement at that time.
- 11 25) DNA swabs were taken of the defendant.
- 12 26) On November 17, 2014, Detectives learned that the defendant would be released from the
13 hospital that evening. By then further police investigation had been completed, to include
14 having gained details about the nature, scope and extent of Brenda Morgan's injuries.
- 15 27) At that time, the defendant was placed under arrest and informed of his constitutional (Miranda)
16 rights. The defendant was properly and fully advised of those rights. The defendant did not
17 make any further statements thereafter.
- 18 28) After his booking into the Snohomish County Jail, i.e., during the time the defendant has been
19 in custody, he has made numerous phone calls to various family members.
- 20 29) The defendant was informed on each call that it was being recorded.
- 21 30) A copy of these recordings was provided to the Prosecutors Office who then provided them to
22 defense as a part of discovery.

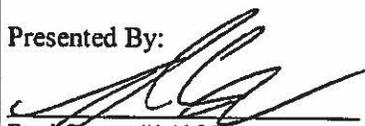
23 ~~31) These calls were not private affairs and not subject to protection under the State Constitution.~~
24 (amended)

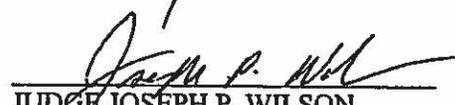
1 CONCLUSIONS OF LAW

- 2 1) Lt. Puetz was not a state agent at the time he had contact with the defendant.
- 3 2) The defendant was not in custody at the time he made statements to Lt. Puetz.
- 4 3) During any contact with Lt. Puetz, Miranda warnings were not necessary and any statements
- 5 made to Lt. Puetz or other firefighting personnel are admissible.
- 6 4) At the time Officer Breault, Sgt. Cohnheim, and Detective Jorgensen had contact with the
- 7 defendant he was not in custody.
- 8 5) Though the defendant's movement may have been restrained by medical equipment, this
- 9 restraint did not come as a result of any action on the part of law enforcement.
- 10 6) While in the hospital, the defendant was not in police custody to a degree associated with
- 11 formal arrest.
- 12 7) Miranda warnings were not required during the conversation between Officer Breault and the
- 13 defendant.
- 14 8) Miranda warnings were not required during the two interviews that took place between
- 15 Detectives Jorgensen and Cohnheim and the defendant.
- 16 9) Any statements made to law enforcement personnel are admissible at trial, subject to the Rules
- 17 of Evidence.
- 18 10) Any phone calls the defendant made while in custody were not private and therefore not subject
- 19 to protection under the State Constitution.
- 20 11) Any and all statements made by the defendant are admissible at trial., subject to the Rules of
- 21 Evidence.

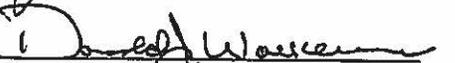
22 12) THESE CALLS WERE NOT PRIVATE AFFAIRS AND WERE SUBJECT TO
 23 PROTECTION UNDER THE STATE CONSTITUTION
 24 DONE IN OPEN COURT this 11 day of May, 2016

25 Presented By:


 Paul Stern #14199
 Deputy Prosecuting Attorney


 JUDGE JOSEPH P. WILSON

objections noted
 Copy Received and Agreed To By:

 15042
 Don Wackerman/Sarah Silbovitz
 Attorney for the Defendant

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

THE STATE OF WASHINGTON,

Respondent,

v.

MORGAN, DAVID ZACHERY,

Appellant.

No. 75072-1-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

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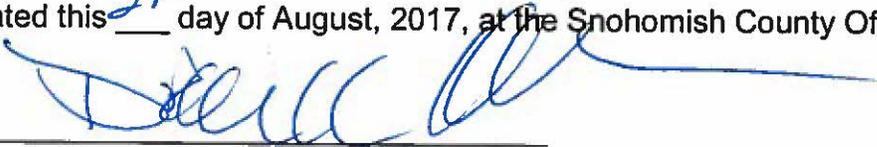
The undersigned certifies that on the 29th day of August, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT AND CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; kate@washapp.org

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

Dated this 29th day of August, 2017, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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