

64831-4

64831-4

No. 64831-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAUL LIRA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

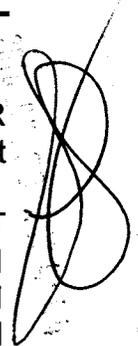


TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 5

 1. CONVICTING AND PROSECUTING MR. LIRA TWICE FOR A SINGLE ACT OF SETTING FIRE TO A BUILDING VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY 5

 a. The Double Jeopardy Clause bars two convictions for the same offense..... 5

 b. Mr. Lira was twice convicted for the same offense..... 6

 c. The proper remedy is vacation of the conviction for malicious mischief 9

 2. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF FIRST DEGREE MALICIOUS MISCHIEF 10

 a. The charging document must set forth every essential element of the crime..... 10

 b. The information omitted the essential element of the dollar value of the damage allegedly caused 12

 c. The conviction must be reversed and dismissed without prejudice to the State's ability to re-file the charge..... 13

 3. MR. LIRA WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT THE HEARING AT WHICH THE COURT AMENDED THE JUDGMENT AND SENTENCE TO REFLECT A NEW RESTITUTION AWARD 14

a. A criminal defendant has a constitutional right to be present at any resentencing proceeding where the court imposes a new sentence, including a hearing where the court amends a restitution award	16
b. The amended restitution award must be reversed and remanded for a new hearing at which Mr. Lira has a right to be present	18
4. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING 18-36 MONTHS OF COMMUNITY CUSTODY	19
E. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 9.....	5
Const. art. 1, § 22.....	10, 16
U.S. Const. amend. 5.....	5, 6
U.S. Const. amend. 14.....	10, 16
U.S. Const. amend. 6.....	10

Washington Supreme Court

<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	19
<u>In re Pers. Restraint of Davis</u> , 142 Wn.2d 165, 12 P.3d 603 (2000)	6
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	20
<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004)	6
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000)	6
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995)	7
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006)	18
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999)	18
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992)	12
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005), <u>overruled on other grounds by Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)	18

<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005)	17
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	11
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	11
<u>State v. League</u> , 167 Wn.2d 671, 223 P.3d 493 (2009)	10
<u>State v. Markle</u> , 118 Wn.2d 424, 823 P.2d 1101 (1992)	12
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987)	12
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008)... 11, 12	
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000)	11
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	11, 12, 13

Washington Court of Appeals

<u>State v. Davenport</u> , 140 Wn. App. 925, 167 P.3d 1221 (2007) 17, 19	
<u>State v. Gohl</u> , 109 Wn. App. 817, 37 P.3d 293 (2001)	6
<u>State v. Hotrum</u> , 120 Wn. App. 681, 87 P.3d 766 (2004)	17
<u>State v. Read</u> , 100 Wn. App. 776, 998 P.2d 897 (2000), <u>aff'd</u> , 147 Wn.2d 238, 53 P.3d 26 (2002).....	7, 8, 9
<u>State v. Schwab</u> , 98 Wn. App. 179, 988 P.2d 1045 (1999)	9
<u>State v. Valentine</u> , 108 Wn. App. 24, 29 P.3d 42 (2001), <u>rev.</u> <u>denied</u> , 145 Wn.2d 1022 , 41 P.3d 483 (2002)	8
<u>State v. Walker</u> , 13 Wn. App. 545, 536 P.2d 657 (1975).....	16

United States Supreme Court

<u>Ball v. United States</u> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)	6
---	---

<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932)	7
<u>Benton v. Maryland</u> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	6
<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932)	6
<u>Snyder v. Commonwealth of Massachusetts</u> , 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934)	16

Statutes

Laws 2009, ch. 375, § 20	20
Laws 2009, ch. 375, § 5	20
Laws 2009, ch. 431, § 4	13
RCW 9.94A.701(2)	19, 20
RCW 9A.48.020	8, 20
RCW 9A.48.070	8, 12, 13

Court Rules

CrR 3.4(a)	16
------------------	----

Other Authorities

<u>Roberts v. State</u> , 197 Kan. 687, 421 P.2d 48 (1966).....	17
<u>State v. Verdugo</u> , 78 N.M. 372, 431 P.2d 750 (1967)	17

A. ASSIGNMENTS OF ERROR

1. Saul Lira was convicted two times for a single act of setting fire to a building, violating his constitutional right to be free from double jeopardy.
2. The information omitted an essential element of the crime of first degree malicious mischief.
3. Mr. Lira's constitutional right to be present at the resentencing proceeding where the restitution award was amended was violated.
4. The trial court exceeded its statutory authority in imposing a term of 18-36 months community custody for first degree arson.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where two penal statutes are directed at the same evil and encompass the same criminal act that results in the same harm, this suggests the Legislature's intent not to impose separate punishments. The first degree malicious mischief and first degree arson statutes are directed at the same evil and encompass the same criminal act that results in the same harm when the defendant is charged with setting fire to a building. Where Mr. Lira was charged with setting fire to a building, do his two convictions

for first degree malicious mischief and first degree arson violate the constitutional prohibition against double jeopardy?

2. It is a constitutional requirement that a charging document in a criminal case set forth all essential elements of the crime. An essential element of first degree malicious mischief is that the accused caused damage to the property of another in an amount exceeding five thousand dollars. Was the information constitutionally deficient where it omitted this essential element?

3. A defendant has a constitutional right to be present at any resentencing proceeding where the court exercises its discretion and increases the quantum of punishment initially imposed. Was Mr. Lira's constitutional right to be present violated where he was not present at the resentencing proceeding where the court amended the initial restitution award and increased the amount of restitution owed?

4. A trial court may impose a term of community custody only as authorized by statute. Did the court exceed its statutory authority in imposing an 18-36 month term of community custody, where the statute authorized the court to impose only an 18-month term?

C. STATEMENT OF THE CASE

The State charged Mr. Lira with one count of first degree arson and one count of first degree malicious mischief, stemming from the same act of allegedly setting fire to a building.¹ CP 66.

Testimony at the jury trial established that, on the night of August 7, 2009, Mr. Lira was living in a house in Bellingham with his girlfriend Leah Vandermeulen, his cousin Anna Leavitt, his cousin Ignacio Flores, and Mr. Flores's brother "Poncho." 11/16/09RP 61-62. Poncho was not present at the house that night, but Ms. Vandermeulen's daughter and her friend were present, as were Ms. Leavitt's two daughters. 11/16/09RP 86.

At some point during the evening, Mr. Lira and Ms. Vandermeulen got into an argument upstairs. 11/16/09RP 87. Mr. Lira and Ms. Leavitt had been drinking and Mr. Lira was intoxicated. 11/17/09RP 213. Ms. Vandermeulen and Ms. Leavitt then left the house to go downtown, while Mr. Flores stayed upstairs with Mr. Lira in Ms. Vandermeulen's bedroom and tried to get him to calm down. 11/16/09RP 88. Mr. Lira began flicking a "Bic" lighter that he held in his hand. 11/16/09RP 89. Mr. Lira testified he put the lighter to the feather blanket on top of Ms. Vandermeulen's bed two

¹ The State also charged Mr. Lira with one count of felony harassment, but the jury later acquitted Mr. Lira of that charge. CP 28, 67.

times and each time Mr. Flores appeared to extinguish the fires with his hand. 11/17/09RP 204. Mr. Lira then went to the bathroom, and when he returned, Mr. Flores was not there and the fire had escalated. 11/17/09RP 204. Mr. Lira tried to put out the fire with water bottles present in the room, but it soon got out of control. 11/17/09RP 204. Mr. Flores returned and tried to help put out the fire, but to no avail. 11/17/09RP 204. Mr. Lira and Mr. Flores then left the house. Everyone else in the house had already got out safely and no one (except Mr. Lira himself) was harmed by the fire. 11/16/09RP 92.

Mr. Lira did not intend to burn down the house or to harm anyone and he testified that he had no malicious intent.

11/17/09RP 205, 209-11. He called 911 to report the fire and admitted to police and at trial that he started the fire. 11/17/09RP 116-17, 185-87, 208.

Jan Vanderveen testified that he owned the house that was set on fire, which he had rented to Ms. Leavitt. 11/17/09RP 137-38. By the time of trial, he had paid \$65,000 for repairs to the house. 11/17/09RP 140.

The jury found Mr. Lira guilty of both first degree arson and first degree malicious mischief and the court entered separate

convictions for each count. CP 15, 28. The court also ordered Mr. Lira to pay restitution in the amount of \$55,933 to Mary Vanderveen, and the restitution award became part of the judgment and sentence. CP 22.

D. ARGUMENT

1. CONVICTING AND PROSECUTING MR. LIRA TWICE FOR A SINGLE ACT OF SETTING FIRE TO A BUILDING VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY

Mr. Lira was charged and convicted of first degree arson and first degree malicious mischief based on the same act of setting fire to a house. CP 66-67 (information); CP 37, 49 (jury instructions); CP 15 (judgment and sentence). But the Legislature did not intend to impose multiple punishments for the same act of setting fire to a building. Therefore, the multiple convictions violated Mr. Lira's constitutional right to be free from double jeopardy, and the malicious mischief conviction must be vacated.

a. The Double Jeopardy Clause bars two convictions for the same offense. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution protect a criminal defendant from

multiple convictions and punishments for the same offense.² Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The fact of conviction alone, even without the imposition of sentence, constitutes punishment for purposes of a double jeopardy analysis. State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (citing Ball, 470 U.S. at 865; In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

Where a defendant is charged with violating two separate statutory provisions for a single act, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

b. Mr. Lira was twice convicted for the same offense.

In analyzing a double jeopardy issue, the question is whether the Legislature intended to punish the same conduct twice under

² The Fifth Amendment provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This clause applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Similarly, article 1, section 9 of the Washington Constitution states that "no person shall be . . . twice put in jeopardy for the same offense."

different criminal provisions. State v. Read, 100 Wn. App. 776, 792, 998 P.2d 897 (2000), aff'd, 147 Wn.2d 238, 53 P.3d 26 (2002).

Washington applies the "same evidence" test to determine legislative intent, which is derived from the federal "same elements" test set forth in Blockberger, 284 U.S. 299. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). By this test, an accused may not be convicted of offenses that are the same in fact and in law. Calle, 125 Wn.2d at 777.

There is no question that Mr. Lira's convictions are the same in fact, as they are based on the same act of setting fire to a building. See Read, 100 Wn. App. at 791 (second degree murder and first degree assault convictions same in fact where based upon same act, directed at same victim).

Moreover, the two crimes for which Mr. Lira was convicted are both statutorily defined in the same chapter of the Washington Criminal Code, entitled "Arson, Reckless Burning, and Malicious Mischief." See Chapter 9A.48, RCW. Under the alternative means charged in this case, a person is guilty of first degree arson when he knowingly and maliciously causes a fire to a building, if the fire is manifestly dangerous to human life, if the fire damages a dwelling, or if at the time of the fire a human being who was not a participant

in the crime was inside the building. RCW 9A.48.020(1)(a), (b), (c); CP 66. A person is guilty of first degree malicious mischief as charged if the person knowingly and maliciously causes physical damage to another person's property in an amount exceeding five thousand dollars. RCW 9A.48.070(1)(a); CP 66. The statutory elements differ to the extent that first degree arson requires proof that the fire was dangerous to human life, whereas first degree malicious mischief requires proof of a particular dollar amount of damage. But both crimes encompass knowing and malicious conduct that causes damage to property.

The "same evidence" test is not dispositive; two convictions may still constitute double jeopardy even though the offenses involve different legal elements, if the court finds the Legislature intended to impose only a single punishment. State v. Valentine, 108 Wn. App. 24, 28, 29 P.3d 42 (2001), rev. denied, 145 Wn.2d 1022 , 41 P.3d 483 (2002). If the two statutes are directed at the same evil and encompass the same criminal act, this suggests the Legislature's intent *not* to impose separate punishments. Id.

In Read, this Court held an assault that ends in murder is punished only once, as murder. Read, 100 Wn. App. at 791-92. The court reasoned that the assault and murder statutes are

directed at the same evil, assaultive conduct. The essential difference between them "is the grievousness of the harm caused by the conduct. When the harm is the same for both offenses, as in this case, it is inconceivable the Legislature intended the conduct to be a violation of both offenses." Read, 100 Wn. App. at 792.

Similarly, this Court has also held that two crimes defined in the homicide chapter of the criminal code constitute the same offenses for double jeopardy purposes, as both are directed at punishing the same behavior that causes the same harm. State v. Schwab, 98 Wn. App. 179, 189-90, 988 P.2d 1045 (1999) (Legislature did not intend convictions for second degree felony murder and first degree manslaughter for single homicide, since both laws proscribe killing another person). As in Schwab and Read, the Legislature could not have intended multiple punishments for first degree arson and first degree malicious mischief when, as in this case, they both involved the same conduct that resulted in the same harm.

c. The proper remedy is vacation of the conviction for malicious mischief. Where two convictions violate the prohibition against double jeopardy, the remedy is to vacate the lesser conviction and remand for resentencing on the remaining

conviction. State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009). Thus, the conviction for malicious mischief must be vacated.

2. THE INFORMATION OMITTED AN
ESSENTIAL ELEMENT OF THE CRIME OF
FIRST DEGREE MALICIOUS MISCHIEF

Alternatively, the malicious mischief conviction must be reversed, because the information omitted an essential element of the crime.

a. The charging document must set forth every essential element of the crime. It is a fundamental principle of criminal procedure, embodied in the state³ and federal⁴ constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d

³ Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

⁴ The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)).

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every material element of the charge, along with all essential supporting facts, must be set forth with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. But for post-verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Nonetheless, an information cannot be upheld, regardless of when the challenge is

raised, if it does not contain all the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

b. The information omitted the essential element of the dollar value of the damage allegedly caused. Here, the information charging the crime of first degree malicious mischief alleged

That on or about the 7th day of August, 2009, the said defendant, SAUL LIRA, then and there being in said county and state, did, knowingly and maliciously cause physical damage *in an amount exceeding one thousand Five hundred dollars (\$1,500.00)* to the property of another; in violation of RCW 9A.48.070(1)(a), which violation is a Class B felony.

CP 66 (emphasis added).

The information omitted the essential element of the dollar value of the damage allegedly caused. The first degree malicious mischief statute provides:

(1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another *in an amount exceeding five thousand dollars*

.....

RCW 9A.48.070 (emphasis added).

The statute was amended in 2009 to increase the dollar value element from one thousand five hundred dollars to five thousand dollars. See Laws 2009, ch. 431, § 4. The new statute took effect July 26, 2009, before the alleged crime in this case. Laws 2009, ch. 431, § 4. The information here reflects the dollar-value element of the old statute, not the current statute. Thus, the information omits an essential element of the crime and is constitutionally infirm.

c. The conviction must be reversed and dismissed without prejudice to the State's ability to re-file the charge. If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

3. MR. LIRA WAS DENIED HIS
CONSTITUTIONAL RIGHT TO BE PRESENT
AT THE HEARING AT WHICH THE COURT
AMENDED THE JUDGMENT AND
SENTENCE TO REFLECT A NEW
RESTITUTION AWARD

At the original sentencing proceeding, the court ordered Mr. Lira to pay restitution in the amount of \$55,933 to Mary Vanderveen, the owner of the house that he set on fire. CP 22. The restitution order became part of the original judgment and sentence, which was filed on January 14, 2010. CP 15, 22. The judgment and sentence stated, "Defendant refuses to waive any right to be present at any restitution hearing." CP 20. Mr. Lira signed his initials to this provision of the judgment and sentence. CP 20.

Subsequently, on March 9, 2010, the State filed "Motion and Affidavit for Order to Amend Payee and Restitution Amount." CP ___, Sub #45.⁵ The State requested amendment of the restitution order, as the deputy prosecutor had recently become aware that State Farm Insurance Company had paid Peter and Mary Vanderveen for the loss they incurred as a result of the fire set to their rental home. Sub #45 at 2. The State requested the court amend the original restitution award and order restitution in the

⁵ A supplemental designation of clerk's papers has been filed for this and the other documents cited in the brief that were filed after the notice of appeal.

amount of \$64,723.72 payable to State Farm, and \$500 payable to the Vanderveens, which represented the amount of money they had paid for their insurance deductible. Id.

A hearing was held on April 1, 2010. Sub #51 (minutes). But Mr. Lira was not present at the hearing, despite his earlier refusal to waive his right to be present at all future restitution hearings. Sub #51; CP 20. Moreover, Mr. Lira's original defense attorney, Lance Hendrix, was also not present—a different attorney, "Petersen," was standing in for Mr. Hendrix. Sub #51. Petersen requested a continuance, in order to allow Mr. Hendrix to be present, but the court denied the motion. Id.

That same day, the court entered an order amending the payee and restitution amount. Sub #52. The court ordered Mr. Lira to pay \$64,723.72 to State Farm and \$500 to Peter and Mary Vanderveen. Id.

The order amending the restitution award must be reversed, as Mr. Lira had a constitutional right to be present at the hearing, which was violated.

a. A criminal defendant has a constitutional right to be present at any resentencing proceeding where the court imposes a new sentence, including a hearing where the court amends a restitution award. The right to be present at sentencing derives from the federal and state constitutions and court rule. Const. art. 1, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"); U.S. Const. amend. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); CrR 3.4(a) ("The defendant shall be present . . . at the imposition of sentence").

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be affected, and evidence should not be taken in his absence." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge"). The presence of counsel at such a proceeding is insufficient to satisfy this constitutional mandate. Walker, 13 Wn. App. at 557.

The right to be present applies at any resentencing proceeding where the act to be done by the court involves the exercise of discretion or judgment. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). When the original sentence is set aside and a new sentence pronounced, the defendant has just as much right to be present as at the original sentencing proceeding. State v. Verdugo, 78 N.M. 372, 373, 431 P.2d 750 (1967); Roberts v. State, 197 Kan. 687, 689-90, 421 P.2d 48 (1966). Moreover, where an order following a hearing modifies the original terms of the judgment and sentence and increases the quantum of punishment imposed, the defendant's presence at the hearing is required. State v. Hotrum, 120 Wn. App. 681, 684, 87 P.3d 766 (2004).

A restitution award involves the exercise of court discretion. State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005).

While the restitution statute directs that restitution 'shall' be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss [incurred by the victim], either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution. Instead, RCW 9.94A.753 allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss.

Id. (citing State v. Hughes, 154 Wn.2d 118, 153, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) ("[t]he trial court has great power and discretion in issuing restitution"); State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999) (when authorized by statute, imposition of restitution is generally within the discretion of the trial court, and absent abuse of discretion will not be disturbed on appeal)).

Therefore, a defendant has a right to be present at a restitution hearing.

Violation of a criminal defendant's right to be present at a criminal proceeding is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006).

b. The amended restitution award must be reversed and remanded for a new hearing at which Mr. Lira has a right to be present. Here, the court held a resentencing hearing at which the court considered evidence presented by the State, exercised its discretion, and amended the judgment and sentence to increase the quantum of punishment imposed. Therefore, under the

authorities cited above, Mr. Lira had a right to be present at the hearing, which was violated.

Where a defendant's right to be present at resentencing is violated, the remedy is remand for a new resentencing hearing at which he may exercise his right to be present. Davenport, 140 Wn. App. at 927. That is the remedy here.

4. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING 18-36 MONTHS OF COMMUNITY CUSTODY

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, the court imposed 18-36 months of community custody for count I, first degree arson. CP 19. The court exceeded its statutory authority in doing so, as the Sentencing Reform Act (SRA) authorizes only a determinate term of 18 months community custody for first degree arson.

RCW 9.94A.701(2) provides:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

RCW 9.94A.701(2) took effect July 26, 2009. See Laws 2009, ch. 375, § 5. The law unequivocally applies to Mr. Lira's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.").

First degree arson is a "violent offense" within the meaning of RCW 9.94A.701(2). It is a class A felony that is a "violent offense" but not a "serious violent offense." RCW 9A.48.020(2); RCW 9.94A.030(44), (53)(a)(i). Therefore, the court was authorized to impose only 18 months of community custody, not 18-36 months.

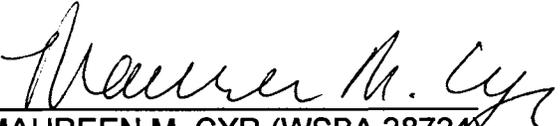
A sentence in excess of statutory authority is subject to challenge, and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (and cases cited therein). Because the court exceeded its statutory authority in imposing a 18-36 month term of community custody, the sentence must be reversed and remanded for resentencing.

E. CONCLUSION

The two convictions for first degree arson and first degree malicious mischief violated Mr. Lira's constitutional right to be free from double jeopardy. Therefore, the malicious mischief conviction must be vacated. Alternatively, because the information omitted an essential element of the crime of malicious mischief, the conviction must be reversed and the charge dismissed without prejudice to the State's ability to re-file the charge.

In addition, Mr. Lira's constitutional right to be present at the resentencing proceeding where the court amended the restitution award was violated, requiring the restitution order be reversed and remanded for resentencing. The sentence must be reversed and remanded for the additional reason that the court exceeded its statutory authority in imposing a community custody term of 18-36 months.

Respectfully submitted this 30th day of July 2010.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 64831-4-I
)	
SAUL LIRA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-------------------------------------|--|---|-------------------------------------|
| <input checked="" type="checkbox"/> | ERIC RICHEY, DPA
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98225 | <input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> | SAUL LIRA
323170
STAFFORD CREEK CC
191 CONSTANTINE WAY
ABERDEEN, WA 98520 | <input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2010.

X _____ 

2010 JUL 30 PM 4:44
COURT OF APPEALS
DIVISION ONE