IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA AL STACY, Appellant.	No. 41405-8-II UNPUBLISHED OPINION

Johanson, J. — Joshua Al Stacy appeals his sentence and jury trial convictions for two counts of second degree burglary and one count of second degree arson with aggravating sentencing factors. He argues that (1) the evidence was insufficient to support one of the second degree burglary convictions, (2) the special verdict instructions failed to instruct the jury that it must apply the reasonable doubt standard, (3) the special verdict instructions improperly instructed the jury that it must be unanimous to return a "no" answer to the special verdicts, and (4) defense counsel rendered ineffective assistance of counsel by failing to propose the correct special verdict instructions. Holding that (1) the evidence was sufficient to support the second

degree burglary conviction, (2) any error in the special verdict instruction was cured by another instruction and any potential error in the special verdict was also harmless, (3) Stacy failed to preserve the unanimity issue and any potential error was harmless, and (4) Stacy's ineffective assistance claim fails because any potential error was harmless, we affirm.

FACTS

I. Background

On the morning of July 7, 2010, employees working on the construction of the new Olympia City Hall discovered that someone had attempted to set fire to one of the portable trailers immediately adjacent to an alley. The trailer had some smoke or soot markings on two exterior walls and some of the insulation and the "plastic moisture barrier" under the trailer had burned. 1 Verbatim Report of Proceedings (VRP) at 32-33. The employees also found a scorched Coleman fuel can nearby and graffiti[1] on the outside of some of the nearby structures.

The following night, someone started a fire inside the partially constructed city hall. Although the fire extinguished itself without burning too aggressively, it filled much of the building with smoke and caused at least $1.8 million in damages. The fire investigators discovered a container of Coleman camp fuel[2] near the burned area and concluded that the fuel had been used to start the fire.[3]

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[1] The letters "DSP or DSK" were painted on the outside of a nearby structure. 1 VRP at 48.

[2] Forensic scientists later tested one of the two Coleman fuel cans and found one latent fingerprint. This fingerprint did not match Stacy's fingerprints.

[3] They also discovered some spray-painted graffiti in the building's hallway walls. This graffiti said, "Dark patriot for life," "DSP," and "fuck pigs." 1 VRP at 36-37.

During the fire investigation, Community Corrections Officer (CCO) David McHugh Thomson informed the investigators that Joshua Al Stacy, one of individuals CCO Thomson's office was supervising and who was under global positioning supervision (GPS), had been in the construction site or in the alley adjacent to the trailer when the fires occurred. Stacy had been released from Coyote Ridge Corrections Institution on May 11, 2010.

The owner of a store located near the construction site, heard about the fires and checked his security cameras for footage of any individuals in the area at the time of the fires. The store owner captured at least three still shots of individuals walking through the nearby alley around the time of the second fire and turned them over to the police. Two of the photographs were taken at 12:13 am, and one was taken at 2:18 am. These photographs showed Stacy and another person walking down the street; Stacy was wearing gloves.[4]

Officers detained Stacy on July 9. When they later searched Stacy's belongings, they found "Coleman waterproof camp matches" and a working lighter, but they did not find any cigarettes or gloves. 1 VRP at 167.

Detective Jeff Herbig interviewed Stacy. When Det. Herbig told Stacy that the photographs from the nearby business's surveillance system and the GPS tracking records put him at the construction site on the night of the two fires, Stacy responded that (1) he and another man had been in the alley on the night of the first fire, but they had not entered the fenced construction site; and (2) he had entered the construction site the night of the second fire, but he had only looked through some of the building's windows and had not entered the building.

[4] Although the jury saw these photographs, they are not part of the appellate record.

II. Procedure

The State charged Stacy with second degree burglary[5] (count I) and second degree arson[6] (count II) related to the fire underneath the trailer and with second degree burglary (count III) and second degree arson (count IV) related to the fire inside the new city hall. On count IV, the State also alleged that (1) the offense was a major economic offense, (2) "[t]he offense involved a destructive and foreseeable impact on persons other than the victim," and (3) Stacy "committed the current offense shortly after being released from incarceration." Clerk's Papers (CP) at 19-20.

The State's witnesses testified as described above. Lt. Brian Schenk from the Olympia Fire Department also testified that (1) the second fire caused the most property damage of any fire he was aware of over the previous 10 years, and (2) the average fire damage for fires that had occurred in the previous 10 years was about $142,000. Additionally, Richard Dougherty, a project manager for the city of Olympia, testified about the second fire's damages; estimating that they would exceed $2 million.[7] The fire damage delayed the opening of the new city hall by approximately two months.

CCO Thomson also testified about Stacy's GPS tracking records from the nights of the fires. The tracking system showed that Stacy was in the alley where the portable trailer was located shortly before midnight on July 6.[8] It also showed that on July 8, Stacy entered the

[5] RCW 9A.52.030(1).

[6] RCW 9A.48.030.

[7] He testified that it would be two months before the damages were final.

[8] The system has a margin of error, but that is usually just a few feet.

construction site at 12:28 am, and remained "well into the construction site" until about 2:00 am. 1 VRP at 146-50. Although there were periodic gaps in GPS contact, Thomson explained that the signal could be blocked by buildings and opined that it appeared that the signal was absent when Stacy was inside a building.

Stacy did not present any witnesses. Nor did he object to any of the trial court's jury instructions.

The trial court's jury instruction 20 provided in part:

> You will also be given a special verdict form for the crime charged in Count IV [the July 8 second degree arson charge]. . . . If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach.
>
> *Because this is a criminal case, all twelve of you must agree in order to answer each question in the special verdict form.*
>
> *In order to answer the question in the verdict form "yes" you must unanimously be satisfied that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."*
>
> Because this is a criminal case, each of you must agree for you to return a verdict. When you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP at 49-50 (emphasis added).

In addition, jury instruction 21 provided:

> To find that this crime is a major economic offense, you must find that this factor is proved *beyond a reasonable doubt*:
>
> The crime involved actual monetary loss substantially greater than typical for the crime.
>
> If you find from the evidence this factor has been *proved beyond a reasonable doubt*, then it will be your duty to answer "yes" on the special verdict form.

CP at 51 (emphasis added).

The jury found Stacy guilty of both second degree burglaries (counts I and III) and of the July 8 second degree arson (count IV). It found him not guilty on the other second degree arson charge (count II). The jury answered "yes" to all three special verdicts. CP at 56. Based on the aggravating factors, the trial court imposed an exceptional sentence of 100 months confinement[9] on count IV. Stacy appeals one of his second degree burglary convictions (count I) and the special verdicts.

ANALYSIS

I. Sufficient Evidence: Second Degree Burglary

Stacy first argues that the evidence was insufficient to establish that he committed second degree burglary on July 6 to 7 (count I). He argues that the evidence established only that he was in the alley next to the construction site; that there was no direct evidence that he actually entered the construction site; and, noting that the jury acquitted him of the related second degree arson charge, that there was no direct evidence that he started the fire under the trailer. We disagree.

We review a claim of insufficient evidence to determine whether, taking the evidence in the light most favorable to the State, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To establish that Stacy committed second degree burglary on July 6 or 7, the State had to

[9] Standard range was 53 to 70 months.

prove that he entered or remained unlawfully in a building[10] other than a vehicle or a dwelling, with intent to commit a crime against a person or property therein. RCW 9A.52.030(1). The GPS evidence established that Stacy was in the alley immediately adjacent to the trailer and, at one point, that he was far enough onto the property that it appeared that he was on top of a building that was on the construction site before the construction started. Taken in the light most favorable to the State, this evidence is sufficient to establish that Stacy entered the construction site.

Additionally, although the jury acquitted Stacy on the related arson charge, the circumstantial evidence that Stacy was present at the time of both fires, that he was carrying matches and a lighter but no cigarettes when his belongings were searched after his arrest, that he was wearing gloves on the night of this fire but the officers found no gloves after he was arrested, and that he was present on the property at the approximate time the fire started, taken in the light most favorable to the State, is sufficient to establish that Stacy entered the property and attempted to start the fire. We note that although the jury acquitted Stacy of the related second degree arson charge, it could have easily done so because the damage to the trailer was minor, consisting of some scorching and some damage to insulation and a vapor barrier. Furthermore, the jury did not have to find that Stacy committed the arson in order to find him guilty of second degree burglary, it only had to find that he entered the premises with intent to commit the arson. Accordingly, Stacy's sufficiency argument fails.

[10] Stacy does not argue that the fenced construction site was not a "building."

II. Special Verdict Instructions

A. Reasonable Doubt Omission

Stacy next argues that the trial court erred in failing to instruct the jury that it had to find each of the special verdicts beyond a reasonable doubt. He argues that this is a constitutional error that we may address despite defense counsel's failure to object to the jury instructions. Although it appears that the jury instruction failed to require the jury to find the special verdicts beyond a reasonable doubt, an additional instruction cured this error as to the major economic offense special verdict, and this error is clearly harmless beyond a reasonable doubt as to all of the special verdicts.

Part of the trial court's jury instruction 20 instructed the jury that it must answer "no" to the special verdicts if it "unanimously [had] a reasonable doubt as to" each special verdict question, but the instruction did not similarly instruct the jury that it had to find each special verdict beyond a reasonable doubt in order to answer "yes" to the special verdicts. CP at 49-50. Arguably, this could have allowed the jury to answer "yes" without applying the beyond a reasonable doubt standard. But jury instruction 21 clearly directed the jury to find the major economic offense special verdict beyond a reasonable doubt. Thus, this second instruction cured any defect related to the major economic offense special verdict.

The trial court did not, however, provide any additional instructions in relation to the two remaining special verdicts. But, given the evidence the State presented, even if we presume that this error was constitutional error, any error in failing to articulate the reasonable doubt standard was clearly harmless.

Under the constitutional harmless error standard, we will not vacate the jury's finding if it appears beyond a reasonable doubt that the alleged error did not affect the verdict. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). The undisputed evidence here showed that the fire caused at least $1.8 million in damages and that the average damage caused by fires over the preceding 10 years was $142,000. The evidence here clearly established that the crime involved an actual monetary loss substantially greater than typical for the crime, and we hold that, beyond a reasonable doubt, any error in omitting the reasonable doubt standard in jury instruction 20 was harmless as to the major economic offense special verdict.

The second aggravating factor was whether the crime "involve[d] a destructive and foreseeable impact on persons other than the victim." CP at 56. Fires are by their very nature destructive, there was uncontroverted evidence that the fire here caused considerable damage to the new building, and the jury found that Stacy set fire to city property. Although there was no testimony that such damages were foreseeable, it is common knowledge that fires set in another's building will destroy property and have a foreseeable impact on the property owner. Thus, we hold that, beyond a reasonable doubt, any error in omitting the reasonable doubt standard in jury instruction 20 was harmless as to this second special verdict.

Finally, uncontroverted evidence established that Stacy committed the second degree arson within two months of having been released from incarceration on May 11, 2010. Thus, we

hold that, beyond a reasonable doubt, any error in omitting the reasonable doubt standard in jury instruction 20 was harmless as to this third special verdict.

B. Unanimity Error

Citing *State v. Bashaw*, 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010),[11] Stacy next argues that the trial court erred in instructing the jury that it had to be unanimous to answer "no" to each of the special verdicts. Although we agree that jury instruction 20 misstated the law, because Stacy failed to object to this instruction, he failed to preserve this issue for review.

We may refuse to review a claim of error that the appellant failed to raise in the trial court unless the appellant establishes that the error is manifest and constitutional. RAP 2.5(a)(3). We recently held in *State v. Grimes*, 165 Wn. App. 172, 182, 267 P.3d 454 (2011) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011); *State v. Morgan*, 163 Wn. App. 341, 261 P.3d 167 (2011)); and *State v. Bertrand*, 165 Wn. App. 393, 402, 267 P.3d 511 (2011), that this type of special verdict instructional error is not an error of constitutional magnitude.[12] Thus, under *Grimes* and *Bertrand*, Stacy cannot show that he is entitled to review under the RAP 2.5(a)(3) exception to the preservation of error requirement, and we need not further consider this argument. We note, however, that even if Stacy had preserved this error, it would, as we discuss above, be harmless beyond a reasonable doubt.

[11] Stacy's trial started on October 11, 2010, several months after our Supreme Court issued *Bashaw* on July 1, 2010.

[12] *Grimes* and *Bertrand* filed petitions for review with our Supreme Court. *See State v. Grimes*, No. 86869-7; *State v. Bertrand*, No. 40403-6. The court has stayed these petitions for review pending its decision in *State v. Nunez*, No. 85789-0.

III. No Ineffective Assistance of Counsel

Finally, Stacy argues that defense counsel provided ineffective assistance in failing to object to the special verdict instructions. This argument also fails.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We begin with a strong presumption that counsel provided adequate and effective representation. *McFarland*, 127 Wn.2d at 335. To prevail in an ineffective assistance of counsel claim, Stacy must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have differed, undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694. If Stacy fails to establish either element, we need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

As discussed above, even under the constitutional harmless error standard, Stacy does not show that any instructional error was prejudicial. Accordingly, his ineffective assistance of counsel claim also fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Worswick, A.C.J.