# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ARTHUR E. SHAW,<br><br>Appellant. | No. 41745-6-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Johanson, A.C.J. — Arthur E. Shaw appeals his conviction for first degree arson, claiming (1) authorities performed unreasonable searches and seizures, (2) the trial court erred in admitting illegally obtained evidence, (3) his arrest for trespass was pretextual, (4) Washington's trespass statute is unconstitutionally vague, (5) officers improperly testified to Shaw's guilt, (6) defense counsel provided ineffective assistance, (7) the State offered insufficient evidence for the conviction, and (8) cumulative error. We affirm because the authorities did not infringe on Shaw's rights, the trial court did not err, his arrest was proper, Washington's trespass statute is valid, defense counsel performed reasonably, the State offered sufficient evidence for a jury to convict, and the cumulative error doctrine does not apply.

FACTS

At 7:25 a.m. on June 11, 2010, Todd Parrish heard an explosion outside his house that

shook his home. He saw Shaw's home on fire 30 feet away. James Dillinger, living one-eighth mile away, also felt the explosion from Shaw's home, describing it as a "soft concussion" followed by a "loud concussion" and "whoosh" sound normally associated with fire spreading with an accelerant's help. 1 Verbatim Report of Proceedings (VRP) at 59-60.

Ocean Shores Police and Fire Departments responded to the fire. By the time fire fighters arrived, the fire was "fully involved," engulfing the house until the home collapsed. 1 VRP at 114. The fire was so dangerous that fire fighters did not attempt to enter the home, and the flames were so extensive that they reached Parrish's home and caused over $10,000 in damage.[1]

Later that morning, Ocean Shores Police Officer Jeff Elmore observed Shaw's truck on a nearby unoccupied property. Standing outside the truck, Officer Elmore could see gas cans inside it. At around 11:30 a.m., Officer Elmore, with K-9 assistance, located Shaw on that same property in a tree behind a garage of an unoccupied private residence roughly 150 feet away from Shaw's smoldering house. Officer Elmore ordered Shaw down from the tree, advised Shaw of his rights, and placed Shaw in his patrol car. Officers arrested Shaw for trespassing onto the unoccupied private property.

Shaw agreed to speak with Officer Elmore and told him that he had driven his truck to the vacant property and parked it there because he believed it was breaking down. Then, he walked from there to his ex-girlfriend's husband's house. He stayed there for a while before walking back to the unoccupied property where he fell asleep in the tree where police located him.

[1] The flames blistered Parrish's roof, peeled paint off, warped windows, and burned an adjacent tree.

Officer Elmore observed that Shaw appeared to have been recently exposed to high temperatures, as he looked burned; the back of his hands showed red skin, and the hair on his wrists, ear lobes, eyebrows, and mustache was "singed and looked charred." 1 VRP at 113. Officer Elmore also stated, "He smelled strongly of accelerant and smoke" and "looked like he was burned." 1 VRP at 113. As Hoquiam Police Officer Don Wertanen took photos to capture Shaw's appearance, Shaw asked Officer Wertanen why he was taking photos of him. Officer Wertanen responded that he was taking photos of Shaw's singed hair, at which point Shaw denied that he was burned at all.

That same day, officers obtained a warrant to search Shaw's fire-damaged house, truck, and the clothing and personal effects he possessed upon arrival at the jail. Officers seized from Shaw's truck the vehicle registration in his name, lighters, a propane torch striker, and an ARCO receipt for $35.91 from 2:52 a.m. on the morning of the fire.[2]

On June 14, Special Agents David Johnsen and Dane Whetsel, of the Bureau of Alcohol, Tobacco, and Firearms, investigated the fire. K-9s detected accelerants, and the agents seized debris samples that they sent to the crime lab. They also seized a white fuel lamp, which Special Agent Whetsel believed to be the source of the initial combustion. After investigating, Special Agent Whetsel concluded that "[i]t's highly suggestive to me that we have . . . an ignitable liquid" that caused this "very dramatic type of event." 1 VRP at 187. The crime lab confirmed that some of the samples collected from the debris, including carpet and carpet padding, tested positive for gasoline, as did Shaw's boots.

[2] An AM/PM ARCO employee testified that she sold Shaw gasoline and a gas can.

The State charged Shaw with first degree arson.[3] At trial, witnesses revealed that Shaw had lapsed in paying his home mortgage and his electricity was off, and later that day, his house was scheduled for a foreclosure auction. Shaw's former roommate also testified that Shaw repeatedly expressed a plan to blow up his house. A jury found Shaw guilty of first degree arson. Shaw timely appeals.

## ANALYSIS

### I. Reasonable Search

Shaw first argues that authorities engaged in an unreasonable warrantless search of his home and truck, in violation of state and federal law. However, police obtained a warrant before searching Shaw's house, truck, and personal clothing. Accordingly, authorities did not perform warrantless searches.

### II. Evidence from K-9

Shaw next argues that the trial court erred in admitting evidence that a tracking K-9 led police to Shaw because the evidence lacked foundation. We disagree because Shaw failed to preserve this issue for appeal. To preserve an error for appeal, a party must make timely objections. *See State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). We generally do not consider a claim raised for the first time on appeal, unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). But, issues regarding lack of foundation of evidence do not constitute an issue of constitutional magnitude and therefore may not be raised for the first time on appeal. *State v. Newbern*, 95 Wn. App. 277, 288, 975 P.2d 1041, *review denied*, 138 Wn.2d

[3] RCW 9A.48.020(1).

1018 (1999). Here, Shaw did not object at trial to the K-9 tracking evidence. Accordingly, we decline to address this issue. *See* RAP 2.5(a).

III. Reasonable Seizure and Resulting Evidence

Shaw next argues that police seized him without probable cause. Shaw then argues that the trial court erred in admitting the photographs Officer Wertanen took of him because they were the product of that unlawful seizure. Again, Shaw failed to preserve this issue.

A. Standards of Review and Rules of Law

Generally, warrantless seizures are per se unreasonable. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). An exception to the warrant requirement exists where an officer has probable cause to arrest. *See State v. Todd*, 78 Wn.2d 362, 365, 474 P.2d 542 (1970). Specifically, under RCW 10.31.100,

> A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer.

Probable cause exists "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992). Because the facts supporting probable cause are often founded on hearsay and hastily garnered knowledge, it is sufficient if the information is reasonably trustworthy and need not be absolutely accurate. *See State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64,

93 P.3d 872 (2004). And, an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists. *Huff*, 64 Wn. App. at 646. We review de novo whether probable cause exists. *State v. Wagner-Bennett*, 148 Wn. App. 538, 541, 200 P.3d 739 (2009).

State statute outlines the elements required to find an individual guilty of committing first degree arson:

> A person is guilty of arson in the first degree if he or she knowingly and maliciously:
>
> (a) Causes a fire or explosion which is manifestly dangerous to any human life, including fire[ ]fighters; or
>
> (b) Causes a fire or explosion which damages a dwelling; or
>
> (c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or
>
> (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

RCW 9A.48.020(1).

B. Preservation for Appeal

At trial, Shaw did not challenge the validity of his seizure. A defendant does not preserve his right to challenge the admission of evidence gained in an alleged illegal search or seizure by failing to move to suppress evidence at trial. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Accordingly, we decline to address, for the first time on appeal, the validity of Shaw's seizure and the admission of his post-arrest photos. Even had Shaw preserved this issue, however, it is clear that probable cause for his arrest for trespass and/or arson existed; and, accordingly, he could not demonstrate that the post-arrest photographs were fruit of the poisonous tree and inadmissible.

C. Advised of Rights

Shaw argues that officers never advised him of his rights until they arrived at the Ocean Shores police station, an hour after police began questioning him, apparently challenging the trial court's finding of fact 2. Following a pretrial CrR 3.5 hearing, the trial court issued finding of fact 2 that Officer Elmore advised Shaw of his rights shortly after Shaw descended from the tree.

Where a party challenges a trial court's findings of fact, we limit review to determining whether substantial evidence supports the findings of fact, and whether those findings support the conclusions of law. *State v. McEnry*, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). 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. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

Here, substantial evidence can sufficiently persuade a fair-minded person of finding of fact 2, because at the pretrial hearing, Officer Elmore testified that he advised Shaw of his rights immediately after Shaw descended the tree. Officer Elmore further testified that Shaw understood and agreed to waive his rights. This evidence could persuade a fair-minded person of the truth of finding of fact 2, therefore this evidence sufficiently supports finding of fact 2. *See Halstien*, 122 Wn.2d at 129.

IV. Valid Arrest for Trespass

Shaw next argues that Washington's trespassing statute is unconstitutionally vague as applied to the facts of this case and that police unlawfully arrested him for trespassing, as pretext for an arson arrest. Both of these challenges fail.

A. Vagueness Challenge

Shaw cannot demonstrate the trespass statute's invalidity, because he rests his argument on an inapplicable statutory defense. The State never prosecuted Shaw for criminal trespass, so any statutory defense to criminal trespass was not triggered. Thus, he fails to carry his burden to demonstrate the statute's unconstitutionality in the context of his case, and his vagueness claim fails.

B. Pretextual Stop Challenge

To preserve for appeal a challenge to an alleged pretextual stop, an appellant must have specifically objected to the stop on pretext grounds at the trial court. *See State v. Jones*, 163 Wn. App. 354, 365, 266 P.3d 886 (2011) ("We do not generalize specific objections such that the existence of a pretrial motion to suppress evidence seized preserves *any* claim of error with respect to that evidence."), *review denied*, 173 Wn.2d 1009 (2012). And, where a trial court has not been asked to rule on an issue, there is no ruling and thus no error appearing on the record affecting a constitutional right allowing us to address an untimely challenge to the admissibility of the unchallenged evidence. *Jones*, 163 Wn. App. at 365. Therefore, challenging his arrest as pretextual for the first time on appeal, Shaw failed to preserve this issue for review. Therefore, we decline to address his claim.

Even had Shaw preserved this issue for appeal, his claim lacks merit because he fails to demonstrate that his stop was pretextual. Washington has long held that pretextual stops are illegal. *See e.g. State v. Michaels*, 60 Wn.2d 638, 644, 374 P.2d 989 (1962), *abrogated on other grounds by State v. Carter*, 74 Wn. App. 320, 875 P.2d 1 (1994), *aff'd*, 127 Wn.2d 836, 904

P.2d 290 (1995). But, an arrest can still be valid if supported by facts relating to a crime other than that stated by the arresting officer. *See Huff*, 64 Wn. App. at 648. Probable cause exists "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." *Huff*, 64 Wn. App. at 646. And, a police officer may then arrest, without an arrest warrant, an individual for a misdemeanor only when that individual is committing the misdemeanor in the officer's presence. *See* RCW 10.31.100.

Here, authorities found Shaw hiding in a tree located on private property owned by someone other than Shaw. Under former RCW 9A.52.080 (1979), police had probable cause to believe he had knowingly entered or remained unlawfully on this private property. Also, officers found Shaw burned, singed, charred, and smelling of gasoline and smoke just two lots away from his recently-exploded house. While officers arrested Shaw at that time for criminal trespass, they also had probable cause to arrest him for arson. Shaw fails to establish a pretextual arrest.

V. Police Testimony

Shaw next argues that two police officers impermissibly opined as to Shaw's guilt by stating that he smelled like accelerant and describing the meaning of "singed." Shaw failed to preserve this issue for appeal.

Generally, witnesses may not testify directly or by inference about their opinion of the defendant's guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Such testimony is prejudicial because it invades the exclusive province of the fact finder. *State v. Yarbrough*, 151 Wn. App. 66, 93, 210 P.3d 1029 (2009).

And opinion testimony from a law enforcement officer is especially likely to influence a jury. *See State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005). But, "testimony that is not a direct comment on the defendant's guilt . . . is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

Here, Shaw raises for the first time on appeal that Officer Elmore improperly opined as to Shaw's guilt when he testified that Shaw smelled of "accelerant" when they found him and that Officer Wertanen improperly opined as to Shaw's guilt when he described "singed" as "if you light a barbecue and it explodes in your face, with the vapors." 1 VRP at 68, 113.

Shaw failed to object to these statements at trial, so to raise this issue for the first time on appeal, he must show that these statements constituted a manifest error affecting a constitutional right. RAP 2.5(a)(3). Even assuming that these statements infringed on his constitutional rights to a fair trial, Shaw does not demonstrate that the statements actually prejudiced him. Again, other incriminating evidence abounded, officers found Shaw in a tree, appearing burned, charred, singed, and smelling of smoke and gasoline and officers seized from Shaw's truck lighters, a propane torch striker, and an ARCO receipt for $35.91 from 2:52 a.m. on the morning of the fire. Therefore, Shaw failed to show prejudice required to preserve this issue for appeal, and we decline to address it. *See* RAP 2.5(a).

Because these comments were not a direct or indirect statement as to Shaw's guilt, even had he preserved this issue, Shaw fails to demonstrate that these statements constituted error.

## VI. Ineffective Assistance

Shaw next argues that defense counsel provided ineffective assistance by failing to challenge the officers' search of Shaw's home and truck, as well as their seizure of Shaw. Defense counsel was not ineffective, though, because police obtained a valid warrant for the searches and had probable cause for the seizure.

Also, Shaw claims that defense counsel provided ineffective assistance by failing to object to opinion testimony and not requesting a missing witness instruction relating to counsel's failure to call as a witness the 911 operator who would assist in establishing the time of the fire. Shaw fails to demonstrate any resulting prejudice from defense counsel's failure to seek a missing witness instruction.

A. Standard of Review

Washington has adopted the United States Supreme Court's two-pronged *Strickland* test for questions of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The *Strickland* inquiry states:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

*State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 687). Under this standard, deficient performance falls "below an objective standard of

reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to defense counsel's decisions in the course of representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *adhered to in part on remand*, ___Wn. App.___, 278 P.3d 225 (2012).

To prevail on an ineffective assistance claim, a defendant must overcome "'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). When counsel's conduct can be characterized as legitimate trial strategy, performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

B. Analysis

First, Shaw claims that defense counsel failed to provide effective assistance because he did not challenge alleged search and seizure violations, relating to Shaw and his truck and home. Shaw asserts that counsel should have not only objected to the search and seizure but also the admission of the evidence obtained as a result. But, authorities obtained a warrant before searching Shaw's truck and home, so Shaw lacks any basis in claiming that defense counsel should have challenged "warrantless" searches. Then, as authorities did not illegally seize Shaw, any attempt to challenge the admission of evidence obtained through the seizure would be futile. Therefore, counsel's decision not to challenge the warrant-supported searches and valid seizure of Shaw is not unreasonable, and does not constitute ineffective assistance. *See Grier*, 171 Wn.2d at 33.

Second, Shaw claims that defense counsel provided ineffective assistance by not objecting to the testimony of Officers Elmore and Wertanen, when they allegedly opined to Shaw's guilt.

But, Officers Elmore and Wertanen did not opine to Shaw's guilt, and instead candidly described how Shaw smelled of accelerant when they found him, and how he appeared singed—likening his appearance to a victim of a barbecue vapor explosion. The officers did not opine that Shaw set his house on fire. Therefore, defense counsel acted reasonably and did not provide ineffective assistance by not objecting and drawing further attention to Shaw's condition. *See Grier*, 171 Wn.2d at 33.

Third, Shaw claims that defense counsel provided ineffective assistance by failing to request a missing witness instruction. Specifically, he argues that, to establish the time of the fire, defense counsel should have called as a witness the 911 operator that Parrish called when he first witnessed the flames at Shaw's home. Shaw believes that, because the State failed to establish the time of the fire, it could not prove that it created a manifest danger to the Parrish family next door. But, the fire's timing is inconsequential to proving manifest danger to human life. No evidence disputes the presence of members of the Parrish family at home when the explosion occurred, and had Parrish not quickly phoned 911, the fire's damage may have been even more severe. Thus, Shaw fails to demonstrate how defense counsel's failure to request a missing witness instruction prejudiced him. And, even if Shaw were able to prove defense counsel's performance was deficient in not requesting the instruction, he certainly cannot demonstrate prejudice. As a result, Shaw's claim fails. *See Thomas*, 109 Wn.2d at 225-26.

## VII. Sufficient Evidence

Shaw next claims that the State presented insufficient evidence to support his first degree arson conviction. We hold that sufficient evidence supports the conviction. We review

insufficient evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Yarbrough*, 151 Wn. App. at 96. A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). And, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Shaw claims that the State failed to prove (1) the time of the fire, (2) that Shaw was the arsonist, and (3) that the fire created a manifest danger to human life. First, the time of the fire is not an element of first degree arson.[4]

Second, the State offered considerable evidence that could reasonably have led a jury to find that Shaw was the arsonist. Shortly after the explosion at his own house, witnesses found Shaw's truck parked just two lots away from the blaze with empty gas cans, a lighter, and propane striker inside. Officers testified to finding Shaw in a tree, and he appeared burned, charred, and singed, and smelled of accelerant and smoke. A witness testified to selling Shaw a

[4] Washington's first degree arson statute states, "A person is guilty of arson in the first degree if he or she knowingly and maliciously: (a) Causes a fire or explosion which is manifestly dangerous to any human life, including fire[ ]fighters; or (b) Causes a fire or explosion which damages a dwelling." RCW 9A.48.020(1)(a)-(b).

gas can and gasoline on the morning of the fire. Special Agents Johnsen and Whetsel testified that, after investigating the fire, they found traces of accelerant in and around the house, concluding that the fire was the product of an accelerant ignitable liquid and that the presence of gas led to an explosion which blew out the home's walls. The crime lab confirmed that debris from the house tested positive for accelerant. Finally, Shaw's former roommate testified that Shaw told her multiple times of his plan to blow up his house. Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found that Shaw committed arson. *See Yarbrough*, 151 Wn. App. at 96.

Third, while Shaw claims that the State needed to provide sufficient evidence to demonstrate that the explosion and fire created a manifest danger to human life, it actually needed to demonstrate either the manifest danger to human life or damage to a dwelling. *See* RCW 9A.48.020(1)(a)-(b). Here, Lieutenant Brian Ritter from the Ocean Shores Fire Department testified that he had four fire fighters on the scene, but they were unable to enter the home because the fire was too dangerous. Also, Parrish testified that the explosion and fire shook his neighboring home and caused $10,000 in damage to his house. Accordingly, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the fire either posed a manifest danger to any human life, including fire fighters, or caused a fire or explosion which damaged a dwelling. *See Yarbrough*, 151 Wn. App. at 96.

## VIII. Cumulative Error

Lastly, Shaw argues that cumulative error at trial deprived him of a fair trial. His claim lacks merit because he fails to demonstrate any trial errors.

Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). Here, Shaw failed to demonstrate any trial errors, so the cumulative error doctrine does not apply. *See Weber*, 159 Wn.2d at 279.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.