

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 29, 2006 Session

STATE OF TENNESSEE v. MATTHEW LEE ROGERS

**Direct Appeal from the Criminal Court for Knox County
No. 80256 Mary Beth Leibowitz, Judge**

No. E2005-01142-CCA-R3-CD - Filed September 25, 2006

The defendant, Matthew Lee Rogers, was convicted by jury of aggravated arson. He was later sentenced to twenty years in confinement as a Range I, violent offender. The defendant now appeals, arguing: (1) the evidence is insufficient to convict him of aggravated arson; (2) the trial court erred in instructing the jury on aggravated arson and reckless burning; and (3) the trial court erred by not granting a new trial after one or more of the jurors consulted an electronic dictionary in order to ascertain the meaning of “structure” as it related to the offense of aggravated arson. After thorough consideration of the record and applicable law, we reverse the defendant’s conviction and remand for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

R. Alexander Brown, (at trial and on appeal), and Tom Slaughter, (at trial), Knoxville, Tennessee, for the appellant, Matthew Lee Rogers.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and John Halstead, Kevin Allen and Joe Lodato, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The proof at trial established that on April 23, 2004, a fire was started inside the apartment of Dennis Rollins. At trial, Rollins testified that he lived in an apartment in Town View Towers, a four-story apartment building which housed approximately 900 tenants. At the

time, his girlfriend, Norma Fish, was living with him. However, unbeknownst to Rollins, his girlfriend was also dating the defendant. Approximately two and one-half weeks before the fire, news of this relationship ignited a minor physical confrontation between the defendant and Rollins. With the defendant's passions inflamed, he told Rollins, "I ain't the one to mess with. . . She's mine. She's mine."

On April 23, 2004, around 8:30 p.m., Rollins was entertaining several friends in his apartment. After running out of drinks, Rollins and his friends left his apartment to go to the store. After heading back toward his apartment, Rollins received a call from his neighbor who told him that a smoke smell was coming from his apartment. Upon returning to his apartment, Rollins opened his door, smelled smoke and saw a big black spot on the floor; whereupon, he doused the spot with water, sprayed the spot with potpourri, and placed a floor mat over the spot. According to Rollins, when he first smelled the smoke and saw the black spot on the floor, he and his friends were afraid and thought the apartment was on fire. The next day, Rollins called the apartment's management and asked them to investigate. Two days later, an arson investigator showed Rollins a videotape. Because of a hearing problem, Rollins had a paper note on his door advising people to knock loudly. The videotape showed the defendant removing the note off Rollins' door, lighting it on fire, and sliding it under the door.

Donald Sands testified that he lived in the Town View Towers and knew both the defendant and Rollins. According to Sands, the defendant was bitter toward Rollins because he was dating Fish. The defendant told him that he was going to beat up and rob Rollins. However, Sands did not believe the defendant was serious about his threats. Two days later Sands heard about the fire in Rollins' apartment.

Charles Kitts, arson investigator with the Knoxville Fire Department, testified that he viewed a videotape in connection with a reported fire at Town View Towers. After viewing the videotape, Kitts conducted an investigation of Rollins' apartment three days after the fire was reported. During his investigation, Kitts observed light smoke damage to the inside of the door and "burn and melt in the carpet." He took pictures as part of his investigation. The pictures depicted charring damage to a patch of the carpet. Upon conducting his investigation, Kitts surmised that a piece of paper was set on fire and slid under the door thereby causing damage to the carpet. Kitts stated that the defendant was identified in the videotape as the individual who started the fire. Kitts acknowledged that he did not know whether tile or concrete underlay the carpet.

Ray Offenbacher testified that he was working as a security officer for the Town View Towers when Rollins approached and asked him to look at his carpet. Upon entering Rollins' apartment, Offenbacher noted a "significant sized burn to the carpet." However, the carpet was not smoldering or posing any threat. Offenbacher also did not observe any wet spots or water on the carpet. Because it was late Friday evening, Offenbacher told Rollins to wait until Monday then go to the management office and look at the security video. Offenbacher stated that he knew Rollins was hard of hearing and kept a sign on his door. Offenbacher noted that the sign was missing from the door when he came to Rollins' apartment. Offenbacher said he was present when Rollins watched the security video and Rollins identified the defendant as the

individual who started the fire. Offenbacher stated that he estimated 200 to 300 people could have been present in the apartment building on a Friday night.

Allison Zong testified that she worked for the Town View Towers' management company. She stated that on Monday morning after the fire, she pulled the video from the camera in the hallway outside of Rollins' apartment. She recalled that Rollins identified the defendant in the video as the person who started the fire. Zong said that the defendant started the fire without permission. Zong stated that Town View Towers consisted of two high rise buildings with 304 units. Zong stated that the apartment complex was 95 to 98 percent occupied. Zong testified that the carpet had to be replaced because the fire had burned the carpet down to the tile underneath. Zong acknowledged, however, that the carpet was not replaced until the middle of July because the damage was not severe enough to warrant immediate attention. According to Zong, the management replaced the entire carpet and vinyl wall base rather than replacing the damaged portion of the carpet.

Gary Haun testified that he worked for Broadway Carpet, which replaced the carpet in Town View Towers as necessary. According to Haun, the carpet installed in Rollins' apartment was not treated with fire retardant. Barry Rice, a private investigator, testified that he specialized in arson investigation. Rice stated that he purchased carpet similar to the type of carpet found in Rollins' apartment. Rice stated that he was unable to set the carpet on fire with a piece of paper though he conducted numerous burn tests. Rice elaborated that he attempted to replicate the burn damage on the carpet by sliding a burning piece of paper under a door and by laying the burning paper on the carpet.

The defendant testified that he went to Rollins' apartment to confront Rollins face to face like a "real man." The defendant knocked on the door but nobody answered. Believing Rollins to be inside, the defendant took the paper sign off the door, lit it, and shoved it under the door. The defendant explained that he was trying to get Rollins' attention and draw him outside. The defendant acknowledged that he knew that a lot of people lived in the apartment complex.

After hearing the evidence and arguments, the jury found the defendant guilty of aggravated arson. The defendant was subsequently sentenced to twenty years in confinement as a Range I, violent offender.

ANALYSIS

I. Sufficiency of Evidence

On appeal, the defendant first claims that the evidence is insufficient to convict him of aggravated arson. Upon review of this issue, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d

231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *Id.*

Relevant to this case, a person can be found guilty of aggravated arson when that person knowingly damages any occupied structure by means of a fire or explosion without the consent of persons who have an ownership interest in the structure. *See* Tenn. Code Ann. § 39-14-301, -302.¹ At trial, the state presented evidence that the defendant started a fire on the carpet of Rollins' apartment without permission and that other tenants were present in the apartment building at the time of the fire. In challenging the sufficiency of the evidence, the defendant does not contest the evidence proving he started a fire inside the apartment building. Instead, he submits that the proof at trial showed that he caused damage to some carpet in Rollins' apartment and not the structure of Town View Towers as charged in the indictment. Therefore, he claims that the state failed to prove that he set fire or burned *any structure* pursuant to the arson and aggravated arson statutes.

We begin our review by noting that the term "structure" is not defined by the arson statute. However, the committee comments to the arson statute denote that the current language of "damages any structure" replaced prior language, which covered "any house, or outhouse, or any building, or any other structure" *See id.* § 39-14-301. Also useful to our analysis is the dictionary definition of structure. According to Black's Law Dictionary, structure is any "construction, production, or piece of work artificially built up or composed of parts purposefully joined together." *Id.* at 1464 (8th ed. 2004). According to Webster's II New College Dictionary, structure is "something constructed, such as a building." *Id.* at 32 (3rd ed. 2005). Notably, our interpretation of the term "structure" is restricted to the natural and ordinary meaning of the language used in the statute. *See State v. Denton*, 149 S.W.3d 1, 17 (Tenn. 2004); *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). We are also mindful that our criminal code provisions should be "construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000) (quoting Tenn. Code Ann. § 39-11-104 (1997)).

While there are no Tennessee cases on point, certain out-of-state cases are helpful to our review of this issue. In *In re Jesse L.* 221 Cal. App. 3d 161 (Cal. Ct. App. 1990), the appellate court was asked to determine whether burn damage to the floors, counters, and light fixtures was

¹ Arson is committed when one knowingly damages any structure by means of a fire or explosion: (1) Without the consent of all persons who have a possessory, proprietary, or security interest therein. Tenn. Code Ann. § 39-14-301(a)(1). Aggravated arson occurs when a person commits arson when one or more persons are present inside the structure. Tenn. Code Ann. § 39-14-302(a)(1).

sufficient evidence of structural fire damage to support a conviction of arson. After analyzing portions of its civil code, the court determined that “a fixture is a thing, originally personal property, but later affixed or annexed to realty so that it is considered real property.” *Id.* at 167. The court then held that “a fixture . . . becomes part of the structure to the extent that a burning or charring or destruction by fire is all that is required to constitute a burning sufficient to support a conviction of arson” *Id.* at 168. In *People v. Lee*, 24 Cal. App. 4th 1773 (Cal. Ct. App. 1994), the court was presented with the issue of whether burn damage to wall-to-wall carpeting inside a house was sufficient to convict the defendant of arson. The court noted that personal property or chattel became a fixture when “it would become essential to the ordinary and convenient use of the property to which it was annexed.” *Id.* at 1777 (quoting *M.P. Moller, Inc. v. Wilson*, 8 Cal.2d 31, 38 (Cal. 1936)). The court further noted whether personal property had lost its character as personalty and had become a permanent and integral part of the structure was a question of fact to be determined by the jury. *Id.* at 1777-78. The court concluded that “the jury could reasonably find the carpet in this case was a fixture, i.e., originally personal property which was affixed to the real property so securely and permanently it became an integral part of the structure.” *Id.* at 1778.

We find the analysis and reasoning set forth in the aforementioned cases to be persuasive and applicable to this case.² In this case, evidence established that the defendant set fire to a piece of paper, slid it under the door, thereby causing some burn damage to the wall-to-wall carpet inside an occupied apartment building. By their verdict, the jury determined that the damage to the carpet was tantamount to damage to the structure of the apartment building. In our view, it is not unreasonable for the jury to find that the carpet in this case was a permanent and integral part of the structure. Therefore, based upon the evidence presented in this case, we conclude that a reasonable jury could find the defendant guilty of aggravated arson.

II. Jury Instructions

The defendant next contends that the trial court erred in instructing the jury on the elements of aggravated arson and reckless burning. Specifically, the defendant submits that the trial court declined to provide a definition of the term “structure” in the jury charge. The defendant also submits that the jury charge erroneously reflected that the defendant could be found guilty of reckless burning if the defendant recklessly “started a fire to the structure of another,” whereas the reckless burning statute reflects that reckless burning is committed when someone recklessly “starts a fire on the land, building, structure or personal property of another.” The defendant asserts that these errors confused the jury and resulted in an unfair trial.

In criminal cases, a defendant has a right to a correct and complete charge of the law. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). Thus, it follows that the trial court has a

² Tennessee courts have considered a “fixture” as “[a]n article in the nature of personal property which has been so annexed to the realty that it is regarded as part of the land.” *State ex rel. Comm’r v. Teasley*, 913 S.W.2d 175, 177 (Tenn. Ct. App. 1995) (citing Black’s Law Dictionary). However, only those chattels/personal property are fixtures “which are so attached to the freehold that, from the intention of the parties and the uses to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold.” *Memphis Housing Authority v. Memphis Steam Laundry-Cleaner, Inc.*, 463 S.W.2d 677, 679 (Tenn. 1971); *see, e.g., Murphy v. State*, 426 S.W.2d 509, 514 (Tenn. 1968) (determining under the facts of the case, that a mobile home was a structure since it had become a fixture attached to real estate).

duty to give a complete charge of the law applicable to the facts of a case. *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). The material elements of each offense should be described and defined in connection with that offense. *See State v. Ducker*, 27 S.W.3d 889, 899 (Tenn. 2000); *State v. Cravens*, 764 S.W.2d 754, 756 (Tenn. 1989). The failure to do so deprives the defendant of the constitutional right to a jury trial and subjects the erroneous jury instruction to harmless error analysis. *Garrison*, 40 S.W.3d at 433-34. However, not all erroneous jury instruction rises to the level of constitutional error. *See State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005); *see also State v. Lynn*, 924 S.W.2d 892, 899 (Tenn. 1996). A jury instruction must be reviewed in its entirety and read as a whole rather than in isolation. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A jury instruction is considered “prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

The record reflects that prior to charging the jury, the trial court determined that it would let the jury use its common sense to determine whether the damage to the carpeting was damage to the structure. The trial court subsequently charged the jury. Below are the relevant portions of the trial court’s charge to the jury:

The defendant . . . is charged in the indictment with the crime of aggravated arson. . . . For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements. That the defendant, by means of fire or explosion, damaged a structure, to wit: Town View Towers Apartments in Knoxville, Tennessee. And that the defendant did so without the consent of all persons who have a possessory, proprietary or security interest therein, and that one or more persons were present therein and that the defendant acted knowingly.

Knowingly means that a person acts knowingly with respect to the conduct when the person is aware of the nature of the conduct. . . .

If you have a reasonable doubt as to the defendant’s guilt of aggravated arson, as charged in . . . the indictment, then your verdict must be not guilty as to this offense

. . . .

Any person who commits the offense of reckless burning is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements. That the defendant started a fire to the structure of another and that the defendant acted recklessly. Recklessly means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. . . .

In the instant case, the record reflects that the jury instructions fully and fairly state all the elements of aggravated arson and reckless burning. With respect to the trial court's refusal to define the term "structure," we note that a trial court is not required to define or explain words or terms in common use which are understood by persons of ordinary intelligence. *See State v. Summers*, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985). Also, in this case, it appears that the trial court's initial decision to omit a definition of "structure" was consciously made in deference to the jury's role as the "trier of fact." Thus, pursuant to the aforementioned standard of review, we perceive no error in the trial court's charge on aggravated arson. With respect to the trial court's charge on reckless burning, we determine that the charge was in accordance with the reckless burning statute. Pursuant to the statute, an individual can be convicted of reckless burning if he "recklessly starts a fire on the land, building, structure *or* personal property of another." Tenn. Code Ann. § 39-14-304 (emphasis added). As seen, the language of the statute includes the disjunctive conjunction "or." It is well-established that "when the disjunctive conjunction 'or' is used in a statute, the various elements are to be treated separately, with any one element sufficient to meet the objectives outlined in the statute." *State v. Cleveland*, No. W2004-02892-CCA-R3-CD, 2005 WL 1707975, at *3 (Tenn. Crim. App., at Jackson, July 21, 2005). This disjunctive or alternative construction found in the reckless burning statute is reflected and emphasized in the Tennessee Pattern Jury Instruction. Thus, we perceive no error in the trial court's charge on reckless burning. In sum, the jury charge did not serve to mislead the jury as to the applicable law, nor did it fail to fairly submit the legal issues pertinent to the facts of this case. Consequently, the defendant is not entitled to relief on this issue.

III. Extraneous Information

The defendant next complains that he was denied a fair trial by the jury's exposure to an electronic dictionary when it was used to ascertain the definition of "structure" after the trial court declined to provide such a definition. The state responds by arguing that the defendant failed to show he was prejudiced as a result of the exposure.

While the court has a duty to give a complete charge of the law, it is the duty of the jury to apply the law, as directed by the court, to the facts in evidence. *Ford v. State*, 101 Tenn. 454, 47 S.W. 703, 705 (Tenn. 1989). Due to the importance of the trial judge's charge and the jury's role as finder of fact, "[the accused] is entitled to have the propositions of law governing [his] case, plainly stated to the jury, in such manner as to enable them to comprehend the principles involved." *Lancaster v. State*, 43 Tenn. 339, 343 (1866); *but see Summers*, 692 S.W.2d at 445 (noting that a trial court is not required to define or explain words or terms which are understood by persons of ordinary intelligence).

When confronted with questions from the jury regarding the definition of legal terms, it is appropriate for a trial court to provide the jury with supplemental instructions after consultation with counsel. *See Leach v. State*, 552 S.W.2d 407, 408 (Tenn. Crim. App. 1977); *State v. Pamela Sue King*, No. M2000-00148-CCA-R3-CD, 2001 WL 1398135, at *6 (Tenn. Crim. App., at Nashville, Nov. 9, 2001). However, a trial court should not allow a jury to have unfettered access to a dictionary during jury deliberation of their verdict. *See King*, 2001 WL 1398135, at *7. The danger being that when a jury consults with sources outside the governing law as described by the trial judge, the jury engages in self-help, constructing "their own definitions of legal terms which do not accurately or fairly reflect applicable law." *See id.* at *6 (quoting

United States v. Griffith, 756 F.2d 1244, 1251 (6th Cir. 1985); *see also Smith v. State*, 95 So.2d 525, 528 (Fla. 1957) (“dictionaries should [n]ever be allowed to define legal terms to a jury unless such definitions go through the medium of the trial judge, the only one authorized by law to give definitions and explanations to a jury.”).

A jury’s use of a dictionary to define a relevant legal term is error, but it is not prejudicial *per se*. *Griffith*, 756 F.2d at 1251 (citations omitted). For a new trial to be warranted in this case, the defendant must first establish his trial was prejudiced by the jurors’ exposure to extraneous information such as a dictionary. *See King*, 2001 WL 1398135, at *7 (citing *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997)). When it has been shown that a juror was exposed to extraneous prejudicial information, a rebuttable presumption of prejudice arises, and the burden shifts to the state to demonstrate that the exposure was harmless. *See id*; *see also Walsh v. State*, 166 S.W.3d 641, 647 (Tenn. 2005) (holding that juror testimony involving the introduction of extraneous information admissible, but juror testimony concerning the effect of such information on juror’s deliberative process inadmissible).

Although not entirely clear, the record reflects the following: The jury, during its deliberation, submitted a request asking the trial court for a definition of the word “structure.” The trial judge declined to provide further definition of the word “structure,” deciding instead to let the jury use its common sense to determine whether or not damage to carpet included damage to a structure. One of the jurors, without prior court approval, then consulted an electronic dictionary. The jurors could not find a definition that aided them in deliberation. The jury eventually arrived at a unanimous verdict of guilt.³

After considering the whole record in this case, we conclude that the defendant’s trial was prejudiced by the jury’s consultation of an electronic dictionary. In making this determination, we emphasize the unique circumstances of this case. To begin, it is clear from the record that the jury, as trier-of-fact, was presented with the issue of whether damage to some carpet constituted damage to a structure within the framework of the arson and aggravated arson statutes. It is also clear that the jury struggled with this issue when, during its deliberation, it requested further instruction on the definition of a structure. With no supplemental instruction given, the jury engaged in self-help and consulted an electronic dictionary to gain insight into what constituted a structure. These facts, as argued by the defendant, properly establish a presumption of prejudice. In contrast, the state did not present evidence rebutting the presumption of prejudice. Without sufficient evidence demonstrating the harmlessness of the

³ From the record, we glean that the prosecutor and defense counsel hastily stipulated to these facts in effort to avoid calling the judge who presided over the trial as a witness. In our view, the summarized facts stipulated to by the parties lack specificity and require further development regarding the circumstances surrounding the jury’s exposure to the electronic dictionary during their deliberation. For instance, no evidence was presented as to the circumstances giving rise to the jury’s exposure to the dictionary, the number of jurors exposed to the definitions sought from the dictionary, the dictionary used, and what definitions were explored by the jury. Lacking the development of such evidence, we are unable to conclude that the extraneous information did not unfairly effect the outcome of the trial. In *Walsh*, 166 S.W.3d 64, our supreme court held that juror testimony can be used to establish the “fact of extraneous information or improper influence on the juror; however, juror testimony concerning the *effect* of such information or influence on the juror’s deliberative processes is *inadmissible*.” *Id.* at 649 (emphasis added). Through development of the evidence via juror testimony, appellate courts will be better situated to review the facts of a particular case under the appropriate legal standards.

jury's unsanctioned use of the electronic dictionary, we cannot say with certainty that the jury reached an impartial verdict. Accordingly, the conviction must be reversed and this case is remanded for a new trial.

J.C. McLIN, JUDGE