

Legal Decisions Relating to Fire Investigations

Recent state and federal court decisions that relate to fire investigation, arson, spoliation, evidence, liability and expert testimony. Local Court rules may apply and alter the rulings.

NINTH CIRCUIT FINDS BRADY VIOLATION RELATED TO ARSON ALLEGATION

In **Benn v. Lambert** (Feb. 26, 2002), the Ninth Circuit Court of Appeals upheld a finding that the state trial of the defendant was flawed for withholding impeachment evidence from the defendant. Defendant was convicted of murder. Some testimony was introduced to show a motive related to a claim of arson for profit. However, the prosecution withheld information that suggested that fire was electrically caused and not arson at all.

The Ninth Circuit Court of Appeals was reviewing a finding that held the failure to turn over that impeachment evidence was error. The court agreed.

Noting the prosecution had failed to provide evidence that a deputy fire marshal and electrical inspector concluded the fire was accidental. The court affirmed finding the failure to turn over this material and other issues was error.

MASSACHUSETTS COURT FINDS FAILURE TO OBTAIN DEFENSE EXPERT ON CAUSE OF FIRE NOT TO BE ERROR

In **Commonwealth v. Susan Fiore** (Feb. 15, 2002), the Massachusetts Court of Appeals reviewed the defendant's arson convictions. One of her attacks on appeal was she was denied effective assistance of counsel because he did not obtain expert testimony about the cause of the fire.

An ineffective assistance of counsel claim requires the defendant to show that counsel's performance displayed serious incompetency, inefficiency, or inattention -- behavior of counsel falling measurably below that expected of an ordinary fallible lawyer -- and, if found, that such behavior likely deprived the defendant of an otherwise available, substantial ground of defense. *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). An attorney's tactical decisions amount to ineffective assistance of counsel only if they were manifestly unreasonable when made. *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998). Counsel can be found to be ineffective when he or she fails to challenge a crucial aspect of the Commonwealth's case. *Id.* at 822-823.

Here, the defendant has failed to show that an expert witness would have testified to anything different from the expert testimony presented by the Commonwealth. More specifically, there was no evidence before the court that expert testimony would have assisted or supported the defendant's theory of the case, and thus the defendant has not established that the failure to present expert testimony deprived him of an otherwise available, substantial ground of defense. The defendant's counsel was therefore not ineffective at trial by failing to present expert testimony on the cause of the February 12, 1995, fire.

The court did find error as to other arson charges. Admissibility of John's letter as a statement against penal interest. The defendant claims the judge committed error in ruling that the statement in John's letter that he "may" have set the February 12 fire was not admissible because it did not meet the requirements of a statement against penal interest.

In *Commonwealth v. Drew*, 397 Mass. 65, 73-78 (1986), the Supreme Judicial Court reviewed the requirements for admissibility of statements against interest. A statement is admissible if (1) the declarant's testimony is unavailable; (2) the statement so far tends to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement, if offered to exculpate the accused, is corroborated by circumstances clearly indicating its trustworthiness. *Id.* at 73, citing *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978).

Here, the first test regarding admissibility was met because John's testimony was unavailable as a result of his invoking the Fifth Amendment. *Commonwealth v. Hesketh*, 386 Mass. 153, 158 n.4 (1982). *Commonwealth v. Drew*, *supra*.

In regard to the second requirement, the Commonwealth argues that John's statement in the letter that he "may of [sic] been the cause of the fire" would not have subjected him to criminal prosecution because, at most, the statement demonstrated negligence, not criminal intent.

John's statement need not have been a "direct admission of guilt," *Commonwealth v. Drew*, *supra* at 74, quoting from *Commonwealth v. Keizer*, 377 Mass. 264, 270 (1979), because the rule encompasses "disserving statements by a declarant that would have probative value in a trial against the declarant." See *Commonwealth v. Drew*, *supra*, quoting from *United States v. Thomas*, 571 F.2d at 288.

Here, John's statement satisfied the second test for admissibility as a statement against penal interest because it tended to subject him to criminal liability and "any reasonable person in his position would have known as much, and for that reason would not have made the statement without believing it to be true." *Commonwealth v. Tague*, 434 Mass. 510, 516 (2001).

Finally, the court concluded that John's statement was properly corroborated and therefore meets the third test for admissibility. "In applying 'the corroboration requirement, judges are obliged to exercise a discriminating judgment'. *Commonwealth v. Charles*, 428 Mass. 672, 679 (1999), quoting from *Commonwealth v. Carr*, 373 Mass. 617, 624 (1977). "[I]n evaluating whether a statement is adequately corroborated, a court should 'not be stringent.'" *Commonwealth v. Charles*, 428 Mass. at 679-680, quoting from *Commonwealth*

v. Drew, 397 Mass. at 75 n.10. "If the issue of sufficiency of . . . corroboration is close, the judge should favor admitting the statement" and rely on "the good sense of the jury [to] correct any prejudicial impact." Commonwealth v. Charles, 428 Mass. at 680, quoting from Commonwealth v. Drew, supra. See Liacos, Massachusetts Evidence § 8.10, at 519 (7th ed. 1999).

Here, the Commonwealth's evidence disclosed that the February 12 fire started in the basement. Although the Commonwealth's expert opined that the fire was started with an accelerant, no trace of one was found. There was no evidence that placed the defendant in the basement prior to the fire. Further, Karena Fiore, the defendant's daughter, testified that she saw her father (John) coming up from the basement shortly before the fire was discovered. Thus, based on the independent evidence introduced at trial, John's statement was sufficiently corroborated, and there was "some reasonable likelihood that [his] statement could be true." Commonwealth v. Charles, 428 Mass. at 680, quoting from Commonwealth v. Drew, 397 Mass. at 76. Therefore, John's statement was admissible as a statement against his penal interest and it was error for the judge to exclude it.

SIXTH CIRCUIT REVERSES SENTENCE ENHANCEMENT FOR ARSON CONVICTION

In U.S. v. Georgia, No. 00-1917 (Feb. 1, 2002), the Sixth Circuit Court of Appeals reviewed the defendant's arson sentence. On December 9, 1999, at 1:24 a.m., the Benton Harbor Fire Department, a full-time, professional department, responded to a fire at the Liberty Center Temple of Deliverance (the church) in Benton Harbor, Michigan. The firefighters broke a window to provide a vent for the smoke and proceeded to enter the building. After walking approximately five feet into the church, the firefighters quickly exited because of the size of the fire. Less than ten minutes later, part of the church's roof collapsed. None of the firefighters were injured in the fire.

Although the church was constructed primarily of brick and cinder blocks, its roof was built with wood beams and rafters. Two commercial heating, ventilating, and air conditioning (HVAC) units rested on the flat roof.

These HVAC units were approximately six to eight feet long, four to six feet wide, and two to four feet deep. A unit this size is heavy enough to crush a person if it were to fall. When part of the roof collapsed, one of the HVAC units indeed fell to the floor of the church, although no one was injured.

Investigators discovered that the fire had ten separate and distinct points of origin. A point of origin, according to the government's expert witness, is a place where the "ignition source, the heat, the energy, and the fuel come

together to start [a] fire." Several of the points of origin were electrical outlets that were stuffed with fiber material. Although these outlets ignited, they quickly self-extinguished. Other points of origin were paper fires in the pastor's office. An accelerant was used in only one of the ten different points of origin. The part of the roof that collapsed was over the area where the accelerant was used.

Georgia had performed construction work at the church in August of 1999, but he quit when he was not paid. During the investigation of the fire, Georgia was interviewed. He eventually admitted that the pastor of the church, Michael Robinson, had offered him \$5,000 to burn down the church, and that he had agreed to set the fire.

Georgia was charged with setting fire to the church as part of a conspiracy to collect the insurance proceeds, in violation of 18 U.S.C. §§ 371, 844(h)(1), and 1341. Georgia pled guilty to the charge.

The presentence investigation report concluded that a base offense level of 20 was appropriate under United States Sentencing Guidelines §2K1.4(a)(2). An objection to the report was filed by the government, which argued that an enhanced base offense level of 24 pursuant to United States Sentencing Guidelines §2K1.4(a)(1)(A) was more appropriate under the circumstances. After hearing the testimony of a special agent with the Bureau of Alcohol, Tobacco and Firearms, the district court sustained the government's objection and used a base offense level of 24 in sentencing Georgia to 78 months in prison.

Unlike the vast majority of cases where an appellate court has affirmed the application of United States Sentencing Guidelines § 2K1.4(a)(1)(A), the present case involved neither the risk of a large explosion nor the presence of any nearby residences. Instead, the district court based its conclusion that the church fire in question "create[d] a very, very dangerous situation which you might not have in every fire" on three findings of fact: (1) Georgia used an accelerant, (2) the church had an all-wood roof, and (3) two HVAC units were on the roof. But all of these factors are relatively commonplace. This court has already noted that "virtually every instance of arson includes use of accelerants to some extent." Robert Lee Johnson, 116 F.3d at 165 n.2. It is also undeniable that a large percentage of buildings have wooden roofs. Furthermore, as the district court acknowledged, HVAC units are commonly placed on, or hung from, the roofs of nonresidential buildings. The combination of these factors is therefore unlikely to have posed a risk to firefighters that was beyond the risks normally associated with responding to a typical fire.

Moreover, according to the government's expert witness, "one of the common causes for fire-fighter death in fighting fires is structural collapse." The professional firefighters who responded to this fire were thus presumably aware of the risk that the HVAC units posed and took appropriate safety measures.

Even if the firefighters did not take precautions to avoid this hazard, the actual risk that a falling HVAC unit would injure a firefighter does not appear to be "substantial." The bottom surface area of each HVAC unit was approximately 35 square feet. Although the surface area of the church is not in the record, we can safely assume that the building contained at least 3,500 square feet, given that two commercial HVAC units were used for climate control. The HVAC unit that fell would thus have occupied no more than one percent of the surface area of the church, making the likelihood of being injured from the falling unit quite small.

For all of those reasons, the court set aside as clearly erroneous the district court's determination that Georgia "created a substantial risk of death or serious bodily injury" within the meaning of § 2K1.4(a)(1)(A). The matter was remanded for resentencing.

FIFTH CIRCUIT NOTES CITY MAY BE LIABLE FOR FIRE DAMAGES

In *Commerce Industry Ins. Co. v. Grinnel Corp.*, No. 01-30373 (Feb. 1, 2002), the Fifth Circuit Court of Appeals reviewed a judgment entered for the City of New Orleans. The City was a defendant in a fire that rekindled. The trial court had granted the City summary judgment finding its activities were immunized by statute.

The Court of Appeals disagreed. It noted the Fire Department had not inspected the upper racks of the warehouse before determining the fire was out. The fire sprinklers had also been turned off and the electrical system was re-energized without an inspection taking place. The court found there were questions of fact related to building code provisions that required a permit before restoring power. There was still a fire emergency at the time attempts were made to re-energize the building. That the fire department's own policy was not to restore power when it had turned off the fire suppression system. Based on those factual disputes, the motion had to be reversed and the matter returned to the trial court for further proceedings.

SEVENTH CIRCUIT COURT UPHOLDS ENHANCEMENT FOR USE OF FIRE

In *U.S. v. Colvin*, No. 00-3400 (Jan. 17, 2002), the defendant was convicted of three fire-related felonies and carrying a firearm. He challenged his convictions arising out of a cross burning incident on double jeopardy grounds. He claimed the additional time awarded for his use of fire was not proper disagreeing with 18 U.S.C. Sec. 844(h)(i). That section allows a ten year enhancement not to run concurrently for using a fire to commit a felony.

The Court of Appeals upheld the enhancement noting the dangerousness of fire when used to commit a felony was evidenced in part by the fact gasoline was used. That is subject to federal regulation to reduce the hazard to persons and property arising from its misuse. See 18 U.S.C. sec. 842-843.

FOURTH CIRCUIT DISCUSSES IMPACT OF SPOILIATION

In *Silvestri v. G.M.*, No. 99-2142, the Fourth District Court of Appeal reviewed the trial court's granting summary judgment for the defendant based on a finding of spoliation of evidence. On November 5, 1994, Mark Silvestri was involved in a single vehicle crash in Preble, New York. Driving a 1995 Chevrolet Monte Carlo at a speed estimated by experts for both sides to be approximately 72 mph, Silvestri lost control of the vehicle on a curve and slid off the road. His car slid sideways through a split-rail fence and, moving now at 67 mph, as calculated by Silvestri's expert, obliquely hit a utility pole with the front center of his car. The car spun around the pole, which acted as a fulcrum, and continued for some distance beyond into the front yard of a residence.

The oblique impact with the utility pole caused a V-shaped depression in the front center of the automobile approximately 18 inches deep, as estimated by Silvestri's expert, causing the frame of the vehicle to buckle and moving the utility pole at ground level about four inches. The vehicle's air bag did not deploy during the accident and, although Silvestri was wearing his seat belt, he sustained severe facial lacerations and bone fractures and is disfigured as a result. At the time of the accident, the 1995 Monte Carlo was new, registering only 5,627 miles on its odometer.

Silvestri retained two accident reconstruction experts who examined the car and visited the accident scene approximately one week after the accident. They inspected the scene and took measurements and photographs. They also retained a land surveyor who prepared a survey of the scene. Based on the experts' inspections of the car, the skid marks, the accident scene, the survey, and computer calculations, they each rendered the opinion that when the front of Silvestri's vehicle obliquely hit the utility pole, the impact to the front of the

vehicle was equivalent to a 24 mph head-on collision with a fixed barrier, the "barrier impact speed." They explained that the barrier impact speed essentially measures the head-on rate of deceleration at the front of the vehicle, taking into account the "give" in both the object into which the car crashes and the car itself as it crumples. They calculated the vehicle's barrier impact speed by taking into account the forward speed of the vehicle, the angle of impact with the utility pole, and the extent of damage to the front of the vehicle.

These experts concluded that the failure of the air bag to deploy at a barrier impact speed of 24 mph was inconsistent with General Motors' statement in the Monte Carlo's owner's manual about when the air bag would deploy.

The air bag is designed to inflate in moderate to severe frontal or near-frontal crashes. The air bag will inflate only if you're going fast enough. For example, if your vehicle goes straight into a wall that doesn't move or deform, the air bag will inflate at between 9 and 15 mph. . . . However, if your vehicle strikes something that will move or deform, such as a parked car, your air bag will inflate only at a higher speed. The air bag is not designed to inflate in rollovers, side impacts, or rear impacts, because inflation would not help the occupant.

Finally, these experts concluded that Silvestri's severe facial injuries would not have occurred had the air bag functioned properly. In reaching that conclusion, they rejected as inaccurate an accident reconstruction provided by General Motors suggesting that Silvestri's face was struck by a fence rail.

Because Silvestri allowed his insurance company to repair and sell the vehicle after the investigation by his experts, General Motors was not able to inspect the vehicle only after the repairs were completed. General Motors' air bag inspector analyzed the information from the air bag's "sensing and diagnostic module," which constantly monitors and diagnoses the air bag's components, including its electronic sensors that cause the air bag to deploy during certain collisions, and found that the module had not recorded any faults. He concluded that the air bag system performed as designed during Silvestri's accident and that the air bag was not designed to deploy under the conditions of the accident.

Recognizing that the air bag system was "designed to deploy in a frontal barrier impact of 9 to 14 miles per hour," General Motors' expert formed an opinion that because the front of the vehicle had struck the utility pole obliquely or sideways, the car's change in speed and its sideways direction did not produce the conditions under which the air bag was designed to deploy.

General Motors urges us to affirm the judgment of the district court on the basis of Silvestri's alleged spoliation of evidence because he repaired the automobile without giving General Motor an opportunity to inspect it before the repairs. The court declined, however, to reach that issue because even if the doctrine of spoliation applies to the circumstances of this case, the district court has broad discretion to address the matter, and in this case, the district court did not address spoliation in its ruling on General Motors' motion for summary judgment.

The district court granted General Motors' motion for summary judgment, concluding that without the testimony of a qualified air bag expert, Silvestri could not offer competent testimony to make out a prima facie case that the air bag was defective. The Fourth Circuit reversed the summary judgment and remanded because, under applicable New York law, a plaintiff may make out a prima facie products liability case circumstantially without direct evidence of a product defect.

NEW HAMPSHIRE SUPREME COURT UPHOLDS ARSON CONVICTION SUPPORTED BY AUDIOTAPES AND VIDEOTAPES

In *State v. Dugas*, No. 99-680 (Oct. 9, 2001), the Supreme Court of New Hampshire reviewed the defendant's arson conviction. Just before midnight on October 23, 1998, the Nashua Fire Department responded to a building fire that had been reported by passersby. Upon arrival, the fire fighters found a fire inside a convenience store known as Dugas Superette. They gained entry through locked doors and determined that the fire was confined to the southeast corner of the basement.

After extinguishing the fire, fire personnel began an investigation to determine the exact cause and origin of the fire. They found no signs of forced entry into the building, no likely cause from electrical or mechanical systems, and no accidental cause. During the course of the investigation, an accelerant detection dog "alerted" on several papers that were part of business records stacked in the southeast corner of the basement. Testing of several samples revealed the presence of ignitable fluids, leading the investigators to conclude that the fire was intentionally set.

Dugas Superette was principally owned by Edgar Dugas, the defendant's father. In October 1998, the defendant managed the store and owned a minority share of the business. The store contained a basic grocery business with a fresh and fried seafood department run by the Dugas family as well as separate concession areas for pizza and video rentals operated by others.

The defendant immediately responded and assisted the fire fighters by providing information about the building.

Later, the defendant consented to a search of the building by the police. In their search, the detectives noted that an electrically powered clock had stopped at 10:44. An investigator later determined that the wiring that powered the clock failed due to the heat of the fire. The detectives seized a videotape from the store's camera surveillance system. The defendant agreed to interviews at the fire scene and again the next morning at the police station.

In a tape-recorded interview at the police station, the defendant described his role as manager of the store. He also described the two independently operated concessions within the store, and identified and explained the role of each person who worked in the building the day of the fire. The defendant provided information regarding the store's security system, which included video cameras, motion detectors and alarms. The defendant then described his activities the day of the fire. He reported that he arrived at 8:00 a.m. and, except for an afternoon break, worked through the day, closing the store just before 10:00 p.m. He left with a pizza he had purchased from the pizza concession in the store and drove to the bank to make the night deposit. After arriving home, he ate, showered and then left to pick up his daughter at the movies.

During the interview, the defendant also reported that he was aware the building was covered by fire insurance but did not know what losses the policy covered or its limitations. When asked whether he had any problems with past employees, the defendant named Paul "P.J." Kulas. The police later determined that on October 23, 1998, Kulas and his family spent the evening dining at a restaurant in Nashua.

The police audiotaped a second interview with the defendant after they reviewed an enhanced version of the videotape sized from the store's surveillance camera video recorder. A camera located in the southeast corner of the store's main floor recorded activities within the store as they occurred at closing time on October 23, 1998. About three minutes after the lights were shut off and the defendant locked up the store, the defendant re-entered the store. He then proceeded to the rear office of the store, and exited the office within seconds.

After leaving the office and turning off the light, the defendant disappeared from view for about one minute, then reappeared from the rear of the store and moved toward the front door. The defendant then walked very quickly back into the store. Thereafter, the videotape recorded a blank field for approximately thirty minutes before it shut down completely.

In the second audiotaped interview, on November 12, 1998, the defendant again described his activities the evening of the fire. When asked whether he re-entered the store, the defendant stated that he did not re-enter the store after closing and locking up. When the police confronted him with pictures taken from the videotape depicting his re-entry, he questioned the validity of the pictures and refused to say anything more than "I did not light the fire, did absolutely not light the fire."

During trial, the jury viewed and the court admitted into evidence the videotape from the store's surveillance camera, including a scientifically enhanced version of the videotape. The jury also listened to the audiotapes of the two police interviews with the defendant and the court admitted these audiotapes into evidence as well.

The defendant requested that the jury not be permitted to review these videotapes and audiotapes during deliberations. Instead, the defendant suggested that the jury should be required to rely only upon their recollections of both the videotapes and audiotapes in their deliberations.

On appeal, the defendant contended the videotapes and audiotapes are part of the defendants testimony, and, therefore, like other witnesses' testimony, the jurors should rely only upon their recollections of this "taped testimony" when deliberating. In *State v. Monroe*, the court decided that where, as here, videotapes and audiotapes were admitted as exhibits into evidence, they are not testimonial but rather tangible exhibits. Consequently, as with other admitted exhibits, the presumptions videotapes and audiotapes "are available to the jurors to consider while deliberating, without limitation."

Id. Because the defendant did not argue that the jury unfairly focused upon this evidence, see *State v. Brough*, the court found no error.

MASSACHUSETTS APPELLATE COURT SUPPRESSES MINORS ARSON CONFESSIONS

In *Commonwealth v. Leon L.*, No. 99-P-796, 99-P-797 (Oct. 15, 2001), the Massachusetts Appellate Court reviewed a finding by a trial court suppressing juveniles confessions related to an arson fire. In Worcester, an historic one hundred-year-old dining car, which had graced various public places over the years, suffered severe damage on October 20, 1998. Vandals set it ablaze at East Park late at night. Every effort was made to douse the fire, but the diner sustained severe damage. A police investigation ensued that focused on two juveniles, Leon and Carl, whose statements to the police are the subject of this appeal.

On October 20, 1998, Detectives Michael Sabatalo and Michael Mulvey of the Worcester police arson squad drove to fourteen-year-old Leon's home to question him. Once there, Sabatalo found that Leon's mother spoke no English. A neighbor was called to translate. Leon was not home. His mother left to bring him back from a nearby basketball court.

When Leon and his mother returned to the house, Mulvey observed that Leon spoke and understood only "broken English." The detectives made a decision to take the mother and son to the police station. They agreed, and Sabatalo drove them in an unmarked police van while Mulvey traveled in a separate vehicle. There was no one to interpret en route, but it does not appear that any conversation of consequence occurred. At the station, Leon and his mother waited in an interview room for the interpreter to arrive. While waiting for the interpreter, Sabatalo began speaking to Leon in a raised voice and banging his open hand on the table. Leon's mother did not understand what Sabatalo said, but his anger was so apparent that she broke down and cried.

The tension was broken when Officer Miguel Lopez, who was bilingual and had no part in the investigation of the fire, came to interpret for Leon and his mother. Lopez explained Leon's Miranda rights in English and Spanish. Both Leon's and his mother's signatures appear on the Miranda warnings form, his signature appearing below the English version and hers beneath the Spanish one.

After Lopez completed the Miranda warnings, Sabatalo and two other officers left the room so that Leon and his mother could speak with each other alone. When the officers returned, the questioning began, with Officer Lopez translating. Leon denied any involvement with the fire. Sabatalo told him that someone named Michael Brown had spoken to the police and had implicated Leon and thirteen year old Carl as the persons who set the fire. After speaking with his mother and with Officer Lopez, Leon, in response to Sabatalo's questions, broke down and admitted being a participant. His answers were transcribed, and it was this document that he sought to suppress.

Carl arrived at the police station after Leon. Miranda warnings, in Spanish and English, were read to him and his mother. Lopez again served as an interpreter. Both Carl and his mother signed a waiver card indicating their understanding of the warnings. At first, Carl denied any wrongdoing. Carl was crying, and his mother was nervous. His mother left the room briefly to use the ladies' room. When she returned, Carl was in the process of making a statement confessing his involvement in the fire. Carl's mother was having difficulty understanding the nature of the interrogation. She became distraught and uncertain as to what to do. In her testimony, she described Carl as "nervous" and "crying" throughout the time he made the statement.

The second question raised in this appeal is whether the ensuing answers to the questions put by Sabatalo were voluntary. That determination involves examining "the totality of the circumstances surrounding the making of the statements themselves in an effort to determine whether they were the product of a 'rational intellect' and a 'free will.'" *Commonwealth v. Edwards*, 420 Mass. 666, 673 (1995), quoting from *Commonwealth v. Selby*, 420 Mass. 656, 662 (1995). Due process requires a separate inquiry into the voluntariness of the statement, apart from the validity of the Miranda waiver. See *ibid.* The factors we take into consideration include "promises or other inducements, conduct of the juvenile, the juvenile's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the juvenile or the police), and the details of the interrogation, including the recitation of Miranda warnings."

The judge was within her discretion in finding that Leon and Carl, who had only been in the United States for a short time, were unable to withstand the pressure to confess. There was strong evidence that their admissions were the product of Sabatalo's inquisitorial style. The juveniles' emotional states and those of their mothers, as described in the judge's findings, indicate a loss of mental freedom of action. There is lacking proof beyond a reasonable doubt, see *Commonwealth v. Allen*, 395 Mass. 448, 456-457 (1985), of the juveniles' voluntary participation at the point Sabatalo pressured each of them to confess. Nor did the motion judge make any finding that the situation changed during any stage of the interrogation. The motion to suppress was upheld.

WISCONSIN COURT AFFIRMS ARSON CONVICTION

In *State v. Dixon*, No. 2000-KA-00686-COA, Oct. 16, 2001, the Wisconsin Court of Appeals reviewed the defendant's arson conviction. On October 28, 1997, the fire department was called to a burning property at 200 East Washington Street in Milwaukee. The property consisted of a bar called "Fannie's," which occupied the first floor, and an apartment on the second floor. Dixon owned the building and the bar and maintained her residence in the second floor apartment. It took over twenty firefighters to finally extinguish the fire. Detective Jeffrey Fennig, an arson investigator for the Milwaukee police department, immediately began an investigation.

Based on his experience and evidence sent to the state crime lab, Detective Fennig concluded that the fire had been set intentionally. At the time of the fire, Dixon was away from the building, having dinner with friends.

Detective Fennig began interviewing employees and patrons of the bar. These individuals stated that, in the week preceding the fire, Dixon had removed personal property from the bar and her residence and placed them in a storage unit. Detective Fennig also discovered that Dixon was experiencing severe financial problems.

Detective Fennig interviewed Dixon, who confirmed that she was experiencing financial difficulties not only with Fannie's, but also with a restaurant she owned named "Mike and Anna's." Dixon admitted that she was presently in a dispute with the I.R.S. over \$30,000 in various tax obligations. Dixon also owed the City of Milwaukee approximately \$6,000 in unpaid property taxes.

Pursuant to a search warrant issued on November 20, 1997, the police searched Dixon's residence. They seized assorted papers, mail, and financial records. The police also seized two safes. One of the safes was later found to contain various personal documents and three prescription pill bottles containing 274 morphine tablets. Dixon was arrested and charged with one count of arson, one count of possession of a controlled substance, and one count of possession of explosives. A jury ultimately convicted Dixon on the two remaining counts.

Dixon claims that her right to confront the witnesses against her was denied when the trial court allowed preliminary hearing testimony of Johnson and Gutjhar to be read to the jury. The State responds that they made reasonable attempts to produce these witnesses, and, in the alternative, the State argues that if the admission of the witnesses' former testimony denied Dixon her confrontation right, the error was harmless.

Assuming that the State failed to take reasonable efforts to produce these witnesses, we conclude the error was harmless because the testimony was duplicative and Dixon has failed to demonstrate any resulting prejudice.

In regard to the insurance investigator's report, Dixon concludes that "had the jury heard the insurance company's own expert adjusters conclude that the bar was broken into, the outcome of this trial would have been different." After reviewing this report, we disagree. The report does not state that the bar had been broken into on the night of the fire. The report only indicates that a door at the north entrance of the bar "revealed evidence of forcible entry." As noted by the State, these marks could have existed before the fire or may have been made in the ten days between the date of the fire and the insurance company's investigation.

In addition, evidence of forced entry does not negate the following evidence supporting the verdict: (1) Detective Fennig testified that another door had been left open, the west door, which the detective suspected was the one that the arsonist entered; (2) an employee of Fannie's, Carrie Pocerich, testified that on the night of the fire, Dixon instructed her not to turn on the alarm system although Dixon was normally "fanatical" about security and the alarm; (3) Detective Fennig testified that he saw no evidence of damage to the north door other than old marks, and concluded that the door had not been forced; and (4) David Fass, a firefighter, testified that he had opened the north door, which was unlocked, and observed no signs of forced entry, corroborating Detective Fennig's testimony.

Dixon's counsel cross-examined Detective Fennig and Firefighter Fass concerning the north door. Counsel specifically questioned Detective Fennig's conclusion that the north door had not been forced. Given this evidence, the insurance adjuster's observation of evidence of forcible entry to the north door was immaterial. Thus, Dixon has failed to show that counsel's alleged errors were so serious that the defendant was deprived of a fair trial and a reliable outcome.

EIGHTH CIRCUIT FINDS EXCLUSION OF EXPERT UNDER DAUBERT WAS ERROR

In *Lauzon v. Senco Products*, No. 01-1058 (10/26/01), the Eighth Circuit Court of Appeals reviewed the exclusion of plaintiff's design defect expert. The trial court had applied the Daubert test to find the proposed expert's testimony lacking. The case involved a pneumatic nailer. The plaintiff was injured while using the nailer. He brought a product liability action against the manufacturer.

Based on this expert's testing he contradicted the plaintiff's testimony about how the injury occurred. The trial court did not allow that testimony. The Eighth Circuit disagreed. The court noted this expert performed testing to support his conclusion that there was a design error in the product. The expert had also published a paper on the hazards of pneumatic nailers before being hired in the case. That article was subject to peer review.

Other articles supported his contentions published by others. The court also found his opinion was generally accepted in the community of experts he belonged to. The court reversed the exclusion of the testimony and also the judgment for the defendant.

MISSISSIPPI SUPREME COURT UPHOLDS MURDER CONVICTION BY ARSON

The Mississippi Supreme Court reviewed the defendant's murder conviction by arson in *Linda Leedom v. State of Mississippi*, No. NO. 1999-KA-01754-SCT (Aug. 30, 2001) . Lula Young was asleep in her house on December 19, 1994, between 5:50 and 6:00 a.m., when a neighbor heard two explosive sounds coming from her house, and shortly thereafter saw the house enveloped in flames. Young died in the fire. Firefighters called to the scene found a propane tank and several oxygen bottles. Upon closer inspection, it appeared the tank's release valve was vented out and opened one fourth of the way. Investigators initially attributed the cause and intensity of the fire to the combination of propane and oxygen in the house. At trial, an expert testified that the fire was intentionally started and caused by propane leaking from the tank.

Linda Leedom met Charles Wayne Dunn shortly after moving in with her daughter and son-in-law in December of 1993. At trial, Dunn testified Leedom approached him with the idea to kill Young, explaining that Young was her best friend and was dying of cancer. Leedom said Young asked her to kill her, but she did not have the heart to do it so she offered Dunn \$5,000 to do it for her. He agreed to kill Young, Dunn said he suggested they use an electrical heater to start a fire and purchased the heater with funds given to him by Leedom. He could not recall, however, who purchased the propane tank. Another witness, however, testified that on the day of the incident, Leedom said she purchased a grill for her daughter and son-in-law for Christmas and stored the propane tank in Young's home.

On the night before the fire, Dunn parked his car in Young's driveway and entered the house. He retrieved the heater from his truck, crushed some newspaper nearby, opened the valve on the propane tank, turned on the heater, and left the house. He testified the next day he went to Leedom's home and collected \$1,000 from her with the balance to be paid in smaller amounts over time. A confidential informant later told the police that Dunn had been talking about the fire. The police picked him up for questioning, and he confessed to the murder and to conspiring with Leedom.

In a search of Leedom's home in March of 1997, two life insurance policies on Young's life in the amounts of \$75,000 and \$500,000, designating Leedom as the primary beneficiary, were discovered along with a third policy designating Leedom's husband as the beneficiary in the amount of \$200,000. A partnership agreement was also discovered between Leedom and Young with a power of attorney granted to Leedom from Young.

In a search of Leedom's home during the investigation, life insurance policies were also found on Robert Stovall, who is unrelated to Leedom by blood or marriage and was unaware of the insurance policies on his life. Another agent, Thomas Cooper, for Kansas City Life Insurance, testified that he also met with Leedom to issue a policy on Robert Stovall, who was listed this time on the application as Leedom's son-in-law. The face value of this policy was \$250,000 with an additional \$200,000 accidental death rider. Leedom was listed as the contingent beneficiary and her address as Stovall's address. Agent Cooper also testified that he was introduced to a person said to be Robert Stovall, but could not identify the real Stovall in court as the person he met.

When asked at trial about Stovall, Dunn testified that after Young's death Leedom approached him with a request that he kill Stovall. She did not give a reason for wanting him killed, he said, but offered him \$10,000 to commit the murder, and he agreed. He then obtained a fraudulent identification card with Stovall's name and his (Dunn's) photograph. With money given to him by the defendant, he purchased a 1979 Toyota Celica to be used in a car wreck with Stovall and testified that the defendant took him to Stovall's hometown to commit the murder.

The State elected to try Leedom for the conspiracy to commit capital murder and the capital murder of Young and prior to trial moved to amend the indictment to charge Leedom as a habitual offender. The jury found the defendant guilty of conspiracy and murder and sentenced her to life without parole and twenty (20) years respectively.

Leedom's primary argument on appeal charges the lower court with error in admitting evidence that she engaged in a second conspiracy to kill Robert Stovall for insurance money. Prior to trial, she filed a motion in limine to preclude the prosecution from offering evidence regarding Stovall. It was denied, and over her objection Dunn testified that he and Leedom conspired to kill Stovall. All evidence of the Stovall Plan is inadmissible, Leedom contends, under Miss. R. Evid. 404(b), which contemplates prior not subsequent acts, like those here.

Leedom was mistaken. The general rule in criminal trials, with certain exceptions, is that proof of other criminal conduct by the accused is inadmissible. The sequence in which offenses are committed is immaterial in determining whether in a prosecution for one offense proof of the other offense is admissible, since "it is their integration into the incident, interwoven with similar provocation and purpose which makes it impractical to draw a curtain at the end of any particular act behind which the jury may not peer." Evidence of other bad acts is thus admissible regardless of whether they occur before or after the charged offense.

Whether such proof is admissible depends, rather, upon whether it is introduced for one of the express purposes set out in Rule 404(b) of the Rules of Evidence, which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, preparation, plan, knowledge, identity, or mistake or accident. As there exists an inherent danger of prejudicial effect in the use of other acts evidence, the 404(b) exception for which the crime is introduced must be a material issue in the case. Moreover, its probative value must substantially outweigh the prejudicial effect, Miss. Rules of Evidence 403, there must also be plain, clear and convincing evidence of the other offense, and it must not be too remote in time. *Darby v. State*, 538 So. 2d 1168, 1173 (Miss. 1989) (relying upon *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978)).

Leedom argues the Stovall Plan cannot demonstrate anything meaningful regarding motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. The court disagreed.

In *Ford v. State*, 546 So. 2d 686 (Miss. 1989), defendants on trial for bank larceny objected to the State introducing evidence that they committed a second bank larceny the next day. The court concluded that evidence that the defendants went into a second bank reenacting essentially the same manner of theft as had occurred the day before, showed they had acted according to a predetermined plan in the larceny charged more probable than without such evidence. The same is true here. The fact that there is other crime evidence showing that Leedom had essentially the same plan and preparation to kill Stovall, has a tendency to make the fact that she and Dunn were acting according to a predetermined plan or agreement to kill Young more probable than it would be without such evidence, particularly in light of her defense-- that Dunn was solely responsible for the fire that killed Young. The convictions were affirmed by the court.

CONNECTICUT COURT UPHOLDS FINDING INSURED COMMITTED ARSON DENYING RECOVERY UNDER INSURANCE POLICY

In *Travelers Ins. Co. v. Namerow*; (SC 16375); Supreme Court Of Connecticut; September 4, 2001, the court reviewed a finding denying the insured recovery under its property policy on the grounds of arson. The insureds contended the fire started in the Mercedes in the garage. The wife claimed she heard an exploding noise and saw dark smoke coming from the car. The insurer initially provided an advance based on the statement of the wife. The fire department initially concluded a catalytic converter may have over heated causing the fire.

Tests of samples from the Mercedes revealed unweathered gasoline. They claimed this ruled out an accidental cause. They also took samples from the garage and found unweathered gasoline. The investigators decided the fire was intentionally set. The jury found on behalf of the insurer. The Supreme Court upheld the finding based on the intentional act exclusion in the insurance policy.

OHIO APPELLATE COURT UPHOLDS AGGRAVATED ARSON CONVICTION

In *State v. Marcum*, No. 2001CA00041, the Fifth Appellate District of Ohio, reviewed the defendant's attempted aggravated arson conviction. Due to the acts of vandalism and violence, the victim Copp hired a private detective and installed a surveillance camera and an alarm system. The incident which gave rise to this conviction occurred on September 19, 2000. On that morning appellant awoke at about 4:30 A.M. and took a shower. After the shower, Copp heard her dog barking and heard a "scratching" noise. Copp opened her bathroom window and yelled at whoever might be there. Copp then went downstairs and noticed that the outside lights were not illuminated. Realizing that the lights should be illuminated, she hit the panic button on her alarm system. The alarm admitted a loud sound and automatically dialed the police.

When the police arrived they found that plants and glass were strewed around the front porch. The surveillance tape was retrieved and showed to the police officers. As the police officers and Copp spoke, they smelled gasoline or kerosene. One of the officers and Copp followed the odor to her back French doors which opened onto her deck. The officer discovered that the area outside the doors of the deck was covered in a liquid that was subsequently found to be kerosene. The kerosene was spread over her wood deck, the back of her house, over a gas grill which was connected to the house by a natural gas pipe line and over a wood bench that was part of the deck. Further, the bulbs in the floodlights that would have illuminated the area had been unscrewed. When asked by the officers who she thought might have done this, Copp identified appellant.

Some of the officers went to appellant's home which was about a mile away. One of the officers looked in a garage window. That officer saw a mask and gloves sitting on a car in the garage. The officer could smell kerosene. When an officer approached the house, appellant's mother let them inside and consented to a search of the house. Appellant was found in the garage. Appellant smelled of kerosene and kerosene was later found to be on his shorts and shoes. A can containing kerosene was found in the garage. A trail of what appeared to be kerosene led from appellant's car to the can in the garage. Further, the floor mat in appellant's car had kerosene on it. The gloves and mask were recovered and also contained kerosene.

The surveillance tape from that night was played for the jury. The tape showed someone unscrewing the outdoor lights and taking a scarecrow. The tape also showed that man smashing the plants in the front of the house. Copp identified the person committing those acts as appellant. Further, Copp's sister testified that at around 1:00 a. m. on September 19, 2000, appellant called her and said there would be a death in the family on October 3. October 3rd is Copp's birthday.

On January 12, 2001, the jury returned a verdict of guilty to the offense of attempt to commit aggravated arson as charged in the indictment. A sentencing hearing was conducted January 16, 2001. By Judgment Entry filed January 24, 2001, appellant was found guilty and sentence was imposed. The trial court sentenced appellant to a stated term of incarceration of seven years. The appellant challenged his conviction claiming he did not carry out enough acts to constitute an attempt.

In order to find appellant guilty of attempted aggravated arson, the jury had to find that appellant took a substantial step towards his plan to knowingly cause a substantial risk of serious physical harm to Copp by means of fire or explosion. Viewing the evidence in a light most favorable to the prosecution, the court found a rational jury could have found that appellant's actions constituted a substantial step, strongly corroborative of his purpose to commit aggravated arson. Therefore, the court found there was sufficient evidence to support his conviction.

During the night and/or early morning hours of September 19, 2000, appellant attempted to conceal his identity and unscrewed floodlights which illuminated Copp's back deck and yard. Appellant concedes that he spread kerosene, a flammable accelerant, on the back of Copp's home, in the track outside of Copp's back doors, upon the wooden deck of Copp's home, and across a gas grill that was attached to the home via an active natural gas pipe. Copp testified that she occasionally used the grill and that the natural gas line was connected and working. Appellant was drawn to appellant's activity when she heard a "scratching" noise.

The court found appellant's conduct to be a substantial step toward the commission of arson and corroborative of appellant's intent to create a substantial risk of serious physical injury to Copp by fire or explosion. The spreading of the kerosene over the gas grill and natural gas line is especially corroborative of appellant's criminal intent to commit aggravated arson. Evidence showed that an explosion could have been caused if the kerosene had been ignited on the gas grill. In conclusion, the court found that the evidence adduced at trial was sufficient to support appellant's conviction for attempted aggravated arson.

SIXTH CIRCUIT UPHOLDS ARSON CONVICTION OVER DEFENSE OBJECTION ON FAILURE TO PRESERVE EVIDENCE

In *U. S. v. Wright*, No. 00-5010, the defendant challenged his arson conviction arguing the fire investigator should have preserved evidence from the fire scene. On October 6, 1993, a 124,342 square foot Wal-Mart retail and warehouse building in Memphis, Tennessee was destroyed by fire. The day after the fire, the National Response Team of the Bureau of Alcohol, Tobacco and Firearms ("ATF") assisted local fire departments with the investigation of that fire. John Mirocha, an ATF special agent and certified fire investigator, examined the fire scene and interviewed witnesses in order to determine the cause of the fire. After completing his investigation, Mirocha eliminated all accidental causes, including electrical malfunction, from being the cause of the fire. In his opinion, the fire's cause was arson.

During the course of his investigation, Mirocha learned that there had been a previous fire at the same Wal-Mart on October 1, 1993. In a report from the October 1 fire, a fire lieutenant, who was not a trained fire investigator, had indicated that the cause of that fire appeared to be an electrical wiring problem. Based on his awareness of that report, Mirocha examined the electrical system that was suspected to have been the origin of the October 1 fire. He determined that the electrical system in question had not been the origin of either fire. By examining all relevant electrical evidence, Mirocha determined that the October 6 fire was not electrical. While no electrical evidence was preserved for future inspection, Mirocha documented and photographed that evidence before it was destroyed.

In September 1997, Wright was indicted on one count of arson in violation of 18 U.S.C. § 844(i) for the October 6, 1993 Wal-Mart fire. He filed a motion to dismiss the indictment, claiming that government investigators, by failing to preserve relevant electrical evidence, "destroyed and/or disposed of all of the critical physical evidence from [the] scene of the fires on October 1, 1993 and October 6, 1993," in violation of his due process right to access exculpatory evidence. The district court denied Wright's motion.

Wright was convicted after a jury trial and was sentenced to fifty-seven months incarceration. He contends that the district court erred by denying his motion to dismiss the indictment. Wright contends that fire investigators' failure to preserve electrical evidence recovered from the October 6, 1993 Wal-Mart fire violated his constitutional right to access exculpatory evidence. Because that evidence was only potentially useful and the government did not act in bad faith by failing to preserve it, Wright's due process right to access exculpatory evidence was not violated.

While Wright contends that the evidence in question was material exculpatory evidence, the evidence was only potentially useful. The heart of Wright's argument is that the destruction of electrical evidence prevented his expert from conducting future tests, the results of which may have exonerated him by showing that an electrical malfunction could have been the cause of the fire. Pursuant to *Youngblood*, such evidence was not material exculpatory evidence. Instead, it was only potentially useful evidence.

Because the court found no bad faith on the part of fire investigators who failed to preserve the potentially useful electrical evidence, it, like the *Youngblood* court, rejected Wright's due process claim without further analysis. The record contained no allegation of official animus toward Wright or of a conscious effort to suppress exculpatory evidence. There is no evidence that any fire investigator considered any electrical apparatus to be the cause of the October 6 fire. Even if the fire investigators were negligent in failing to preserve electrical evidence, negligence does not constitute bad faith.

The record demonstrated that a professional, good faith fire investigation was conducted. Wright argues that Mirocha acted in bad faith because he was aware of a fireman's report that an October 1 fire at the Wal-Mart was electrical, suggesting that the same electrical apparatus could have caused the October 6 fire, but Mirocha, a certified fire investigator, independently examined all relevant electrical evidence, including the apparatus suspected to have caused the October 1 fire, before concluding that the October 6 fire was not electrical. Thus, having determined that an electrical malfunction did not cause the October 6 fire, investigators destroyed electrical evidence along with other items which were ruled not to be relevant or material to the fire investigation. The fire scene encompassed over 120,000 square feet of retail and warehouse space and, given the enormity of physical evidence that could have been preserved, we

conclude, as did the district court, that the investigators did not act in bad faith by failing to preserve items that it found not to be the source of the fire. His conviction was affirmed.

FIFTH CIRCUIT HOLDS HOME OFFICE MEETS INTERSTATE REQUIREMENT UNDER FEDERAL ARSON STATUTE

In *United States v. Jimenez*, No. 00-50323, the United States Court of Appeals for the Fifth Circuit (June 29, 2001), reviewed the defendant's arson conviction. The defendant along with others went to house that included a home office. He threw two Molotov cocktails into the residence resulting ultimately in the death of one man. The defendant challenged the federal arson conviction arguing a home office did not meet the requirements for interstate commerce to permit federal jurisdiction of the arson.

In the instant case, the jury heard significant, un rebutted evidence that the Cruz family's home office was the primary location for their construction business. As an initial matter, because A-1 Plastering's address for tax purposes was 2414 Townbreeze, the location of the home, this case is quickly distinguishable from the garden-variety situation of a lawyer or salesperson who occasionally works from home. A-1 Plastering's gross receipts in 1993 averaged nearly \$20,000 per month, and the company paid over \$8,000 month in wages to its employees. At a more fundamental level, an office building having the same characteristics as the Cruzes' home office - where business records and supplies were stored, where employee paychecks were written and picked up, and where business vehicles occasionally parked overnight - would easily be classified as substantially affecting interstate commerce. Federal jurisdiction over the firebombing of the Cruz home is not undermined simply because the "locus of the family's commercial undertaking," was a private home.

What remains is the equitable argument presented by Jimenez and Santivanez, that they had no reason to believe that the Cruz home contained an office. In this view, a quiet street lined with single-family homes becomes a trap for the unwary firebomber. But this analysis ignores the other side of the equation. Several defendants who burned down commercial buildings have benefited by those buildings' lack of economic viability.

In one case, a defendant who set fire to an abandoned fitness center had his conviction overturned, because the court held that a completely abandoned building has no substantial nexus to interstate commerce. See *United States v. Ryan*, 227 F.3d 1058 (8th Cir. 2000). In another case, a defendant escaped the application of § 844(i) because, even though she knew the house was rented to tenants, the house was vacant and uninhabitable at the time of the arson. See *United States v. Gaydos*, 108 F.3d 505, 511 (3d Cir.

1997). It would be inconsistent to reward the defendants in Ryan and Gaydos - who had the good fortune of setting fire to buildings that were not commercially viable, but not to punish defendants who inadvertently destroy a commercially viable office located in a private home. Hence, the convictions were affirmed.

FOURTH CIRCUIT FINDS USE OF CARS SUFFICIENT TO MEET INTERSTATE COMMERCE REQ. UNDER ARSON STATUTE

In *United States v. Rowe*, No. 00-4458 ; United States Court of Appeals for the Fourth Circuit (July 5, 2001), the defendant challenged his federal arson conviction claiming insufficient contacts with interstate commerce.

Rowe was a frequent guest at the home of Brian Ross, who lived in the same townhouse complex as Alonzo and Shirley Webb. Because of parking regulations at this complex, Rowe's vehicle was often towed when he parked near Ross' townhouse. Rowe blamed the Webbs for calling the towing company and occasionally expressed a desire to "get retribution."

Other evidence suggested that Rowe was hostile to the Webbs because of their race. Rowe is white; the Webbs are black. Several witnesses testified that Rowe regularly made racist remarks, including in his references to the Webbs.

On the evening of October 30, 1998, Rowe and several other people congregated at Ross' house. Rowe and another guest, Charles Jewell, stayed overnight; the others departed some time after midnight. At that point, Ross was so intoxicated that he had passed out.

Jewell went to sleep after the other guests left, while Rowe stayed up and collected the trash strewn around Ross' house.

Between 3:00 and 4:00 in the morning on October 31, a resident of the townhouse complex observed Ross' automobile being moved out of the space next to Shirley Webb's vehicle. Shortly thereafter, Shirley Webb's vehicle was destroyed by fire. After the fire, Alonzo Webb found an unexploded Molotov cocktail near his automobile, which was parked next to his wife's vehicle. This device consisted of a Budweiser beer bottle filled with flammable liquid, with a paper towel in the mouth. Investigators discovered the remnants of a second Molotov cocktail, this one made from a Coors Light bottle, under Shirley Webb's vehicle. In Ross' house, investigators found a Budweiser bottle, several Coors Light bottles, and a roll of paper towels with the same print as those found in the two Molotov cocktails.

When confronted by Ross and Jewell, Rowe denied setting the fire, but he was "smiling and smirking" as he said this. Later, he made inculpatory statements to Ross. First, he told Ross, "If you don't say anything, I won't get in trouble. Don't say anything." He then expressed dissatisfaction with the results of the arson: "That wasn't good enough. I should have blown up the damn house." The jury found Rowe guilty of arson and attempted arson of vehicles. See 18 U.S.C.A. S 844(i).

Rowe contends that the Webbs' vehicles were not used in interstate commerce; thus, he asserted, the district court lacked jurisdiction over these offenses. In the district court, Rowe stipulated that the Webbs' vehicles "were used in interstate commerce and in an activity affecting interstate commerce within the meaning of those terms in Title 18, United States Code, Section 844(i)."

The evidence described above amply demonstrates Rowe's guilt. Rowe does not directly dispute this, but instead contends that the testimony most damaging to him, that of Brian Ross, should not be accepted because it was contradicted by Rowe's testimony. It is not our place to resolve such conflicts in the evidence, however. See *United States v. Russell*, 221 F.3d 615, 618 n.1 (4th Cir. 2000). His convictions were affirmed.

TEXAS COURT UPHOLDS ARSON CONVICTION BASED ON CIRCUMSTANTIAL EVIDENCE

In *Weaver v. State*, No. 04-00-00166-CR, the Texas Court of Appeals for the Fourth District (July 25, 2001), reviewed the defendant's arson conviction. The defendant challenged his conviction claiming there was no direct evidence to support his conviction.

According to the court, there was ample circumstantial evidence to link appellant to the fire. The arresting officer, Deputy Jack Heinesh, testified that as he was driving home on Blue Wing Road after work, he noticed a white Isuzu parked on the side of the road with its lights on. He observed appellant exit the driver's side door and walk towards the left front tire. He also observed a Nissan auto backing up towards the Isuzu as if it were going to give appellant assistance. Deputy Heinesh drove past the Isuzu. About fifteen seconds later, he observed in his rear view mirror the Isuzu "in full bloom," meaning it was on fire. From past experience on this road, Deputy Heinesh deduced that the car was likely stolen and intentionally set on fire. He turned around and pursued the Nissan. He stopped the Nissan and arrested both occupants. Deputy Heinesh testified that appellant had urged the driver to "Go, go..." in an attempt to evade arrest. While flight alone will not support a guilty verdict, it is a circumstance from which an inference of guilt may be drawn.

In the Nissan on the floor in front of the passenger's front seat appellant had just occupied, the officer found a slam hammer which he knew to be a tool favored by car thieves to pop out the ignition and/or the ignition locking mechanism on a vehicle in order to bypass the system and start a car with a screwdriver. There was such a locking mechanism still attached to this particular slam hammer.

The Isuzu was reported stolen. The owner of the vehicle, who was related to appellant, first stated that he had parked the car at McCreless Mall and it had disappeared. He did not report the car missing or stolen until the police informed him that the car had been found. The owner later tried to withdraw the stolen vehicle report once the owner learned that appellant had been arrested. The owner had taken out a loan for approximately \$16,000 and insured the vehicle on July 9, 1998. It was reported stolen on October 10, 1998.

The loan was paid in full on October 13, 1998, the coverage was canceled, and no insurance claim was ever filed on this loss. Arson investigator Worthy, responding to a hypothetical question based on these facts, testified that one might do so in an attempt to avoid prosecution either for themselves or the person whom they had enlisted to burn the vehicle for them.

Arson investigator Stephen Worthy testified that in his opinion the fire which demolished the Isuzu was intentionally set, and that the cause of the fire was arson. This uncontroverted testimony is sufficient for a rational trier of fact to conclude that the fire was intentionally set. In *Machado v. State*, the arson investigator's undisputed testimony that fire was intentionally set was sufficient to support finding that fire was intentionally set.

Worthy found an aerosol can in the front passenger area of the Isuzu, the area where the fire started. He testified that one method favored by car arsonists is to light a match and, using the contents of the aerosol can as an accelerant, spray the contents of an aerosol can onto the upholstery. Worthy also testified that he had ruled out other potential causes of the fire, such as an engine fire or an electrical short, concluding that the fire was intentionally set. He further testified that a burning vehicle posed a danger to any passerby and described the potential dangers in detail. The jury also heard that Deputy Heinesh, three firefighters and a fire chief were placed in a dangerous situation when responding to the fire.

The court found the cumulative effect of this circumstantial evidence to be sufficient to sustain the jury's verdict of guilty. The judgment of the trial court was affirmed.