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2018 IL App (3d) 150650-U

Order filed August 16, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0650
JASON E. ANDERSON,	)	Circuit No. 14-CF-861
Defendant-Appellant.	)	Honorable Walter D. Braud, Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Evidence presented at discharge hearing that abandoned building caught fire and that defendant was in the area when the fire started was insufficient to prove defendant “not not guilty” of arson and residential arson beyond a reasonable doubt.

¶ 2 Defendant Jason E. Anderson appeals the trial court’s determination that he is “not not guilty” of arson and residential arson after a discharge hearing pursuant to section 104-25 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-25 (West 2014)). On appeal, he

contends that the circumstantial evidence presented by the State does not prove beyond a reasonable doubt that he committed the alleged acts. We agree and reverse.

¶ 3

### FACTS

¶ 4

In October 2014, defendant was charged in a two-count information with arson (720 ILCS 5/20-1(a)(1) (West 2014)) and residential arson (720 ILCS 5/20-1(b) (West 2014)). Count I alleged that on September 27, 2014, defendant committed the offense of arson in that he knowingly damaged, by means of fire, a building owned by Ray Berger. Count II alleged that defendant committed the offense of residential arson in that, while committing arson, he knowingly damaged the dwelling place of Daniel Bonowski.

¶ 5

The trial court ordered an evaluation of defendant's fitness to stand trial. Dr. Kirk Witherspoon, the clinical psychologist who evaluated him, stated that defendant was 34-years old and had been deaf since birth. He also noted that defendant's mother was deceased and that he lived at home with his father. Witherspoon reported to the court that, among other things, defendant (1) showed signs of moderate intellectual disability; (2) was congenitally deaf and mute; (3) did not understand the significance of standing trial, entering a plea or undergoing sentencing; (4) could not communicate sufficiently with counsel or actively participate in his defense; and (5) could not demonstrate adequate awareness of his alleged criminal conduct. Based on these observations, Dr. Witherspoon recommended that defendant be found unfit to stand trial and deemed unlikely to attain fitness within one year. The trial court found defendant unfit and remanded him to the Choate Mental Health Center for further evaluation and treatment.

¶ 6

Pursuant to section 104-25 of the Code, a discharge hearing was held to determine defendant's guilt. At the hearing, witnesses testified that around 4 a.m. on the morning of September 27, 2014, a fire broke out in the Mississippi Café building in downtown Rock Island.

The fire erupted quickly, destroying the building of origin and damaging several other buildings nearby.

¶ 7 Ray Berger, the owner of the Mississippi Café building, testified that the building is located at 213 18th Street between 2nd and 3rd Avenue in the downtown district of Rock Island and has been vacant for about a decade. He purchased the site in July 2014 for the purpose of demolishing the unstable building and turning it into a parking lot. Berger had hired a demolition contractor to stabilize the structure so it could be safely demolished by hand. The scheduled demolition day was Monday, September 29.

¶ 8 Daniel Bonowski owned the building located immediately to the south of the Mississippi Café building. His building shared a common wall with Berger's building. Bonowski operated a business on the first floor and lived upstairs. The building to the south of Bonowski's building housed a restaurant called Huckleberry's Great Pizza and Calzones. Bonowski was in his apartment sleeping on the morning of the fire when he heard a popping or sprinkling noise along the north wall of his building. He looked out the window and saw fire coming out of every window of the café building.

¶ 9 Bruce Scott worked at a downtown tavern, called MD Greens, in September 2014. He testified that the three or four block area in downtown Rock Island is usually referred to as "the District." MD Green is housed in a building just to the north of the Mississippi Café building. An alley separates the two properties. The back alley door of MD Greens faces an unused doorway along the north wall of the Mississippi Café building. The doorway opens a few feet above the ground. Scott testified that the doorway had been boarded up with plywood by the city and some "neighborhood people" had cut a 10-inch square hole in the plywood to allow a collection of feral cats to sleep in the building. He believed that the hole was not big enough for

a human to crawl through. He said that, even if it was, no one could really walk in the building because so much trash had accumulated inside it. He thought that the trash was about 4 feet deep.

¶ 10 After M.D. Green's closed on the morning of September 27, Scott went to the back of the alley to feed the cats, which he did regularly. He did not smell smoke or see a fire. He estimated that he was in the alley between 3:30 a.m. and 3:45 a.m. Around 4 a.m., Scott and his girlfriend walked out the front of the bar, following a group of people. As they reached the corner of 2nd Avenue and 18th Street, they saw flames "bursting" out of the Mississippi Café building.

¶ 11 Rock Island Fire Marshall Greg Marty testified that he responded to the fire at 4:40 a.m. It was one of the worst fires he had seen in his 14 years as a Rock Island firefighter. The fire caused the Mississippi Café's south wall to collapse and fall onto the building Bonowski lived in, which in turn fell onto the Huckleberry building. In addition to structural damage, both Bonowski's building and the Huckleberry building were heavily damaged by water and smoke. In total, eight buildings were damaged by the fire.

¶ 12 Due to the instability of the Mississippi Café building after the fire, Marty was prevented from entering it to determine if an accelerant had been used. He was unable to use interior chemical testing methods and was limited to investigating the fire from the exterior. Marty admitted that he did not conduct any forensic tests because he could not enter the building for safety reasons. He assessed the structure from the outside and established that there were eight ground level openings to the building. Berger, the building's owner, confirmed that most of them were either locked or boarded up. However, one of the boarded up doors along the north side alley had a hole cut open so the cats could get in and out of the building. Berger also informed Marty that there were large piles of combustibles on the first floor of the building.

Berger believed the piles of debris and scrap material were so high no one could even get the doors open.

¶ 13 Marty concluded that the only place the fire could have been started was the hole that had been made in the plywood for the cats. It was the only point of access to the building. The V-shaped pattern of charring found above the hole and the manner in which the building collapsed supported the theory that the boarded doorway was the situs of the fire's origin.

¶ 14 Marty also investigated the possible causes of ignition. He ruled out weather and natural causes because the skies were clear that day and the gas and electrical services had been cut off to the building since 2012. He determined that the fire was an incendiary fire, meaning that "a fire was initially set in a place where one would reasonably believe a fire should not be." Marty testified that in his opinion the most likely cause of ignition was an open flame. He believed an open flame with the lightweight papers in the building had the potential to cause sustained burning. He ruled out an accidental dropping of a cigarette as the cause because, based on security footage, he was not able to place anyone at the scene who was smoking.

¶ 15 Officer Timothy Metzger assisted with the fire marshal's investigation by collecting video surveillance footage from more than ten nearby buildings and businesses. Most of the edited clips show a man, investigators believed to be defendant, riding a bicycle with a headlight around the District between 3:50 a.m and 4:02 a.m.<sup>1</sup> He is first seen riding east on 2nd Avenue heading toward 18th Street. He makes several circles in the middle of the street. A cat runs out from behind a car, and he follows it. He then rides through the intersection of 2nd Avenue and 18th Street, into the courtyard between 18th Street and 19th Street, and heads south on 19th Street.

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<sup>1</sup> As Metzger testified, the time stamps on several video clips are inaccurate. The time stamps referenced in this order have been adjusted to reflect the actual time the video was recorded.

¶ 16 A video from the Daiquiri Factory, a courtyard restaurant, shows Scott and his girlfriend conversing in front of MD Green's at the corner of 2nd Avenue and 18th Street. Around 3:52 a.m., the cat runs past them. Twenty seconds later, defendant rides his bicycle into the camera's view. Just before 3:54 a.m. on the same video, two people walk past Scott and his girlfriend and enter a bar next door to MD Green's.

¶ 17 Another video shows five people walking through the intersection of 2nd Avenue and 19th Street around 3:52 a.m. As they cross the street, a man on a bicycle pulling a trailer crosses in front of them heading south on 19th Street. Approximately 30 seconds later, a bicycle with a headlight can be seen looping around the east end of the courtyard near 2nd Avenue and 19th Street.

¶ 18 The video from the federal courthouse building on 19<sup>th</sup> Street shows the bicycle pulling the trailer at the corner of 3rd Avenue and 19th Street at 3:53 a.m. Approximately 40 seconds later, around 3:54 a.m., defendant can be seen riding south on 19th Street. About half way between 2nd Avenue and 3rd Avenue, he turns west and heads down a sidewalk. The sidewalk leads to an alley behind Huckleberry's, which provides access to the alley behind the old Mississippi Café building a block away. He is not seen for several minutes and then reappears riding back onto 19th Street from the same sidewalk at 3:59 a.m. He turns north on 19th Street and returns to 2nd Avenue. Next, he is seen at the corner of 2nd Avenue and 20th Street. He turns and rides south on 20th Street.

¶ 19 At 4:01 a.m., defendant reappears on the federal courthouse camera at the corner of 3rd Avenue and 20th Street. He is now headed west on 3rd Avenue. He makes a loop at the corner of 3rd Avenue and 19th Street and then continues south on 19th Street. He disappears from view at approximately 4:02 a.m.

¶ 20 The MD Green's camera was also edited and played for the trial court. The camera is located in the alley behind MD Green's and is motion sensitive. It points to the east but records only a small surveillance area directly underneath the camera. The video shows a person riding his bike from the west to the east at 3:59 a.m. The rider is wearing the same jacket that defendant is wearing in the other video clips. The camera stops recording shortly after defendant passes. At 4:01:50 a.m., flames activate the motion sensor on the video.

¶ 21 The last video is taken from the alley behind Huckleberry's, which runs north and south between 18th Street and 19th Street. The alley opens on 3rd Avenue and provides access to the alley behind MD Green's and the Mississippi Café building. The video shows two people entering the alley and getting into their vehicles around 3:56 a.m. They both back out of the alley and head east on 3rd Avenue. Approximately ten minutes later, at 4:08 a.m., a man appears from 3rd Avenue and walks to the north end of the alley quickly. He is holding a flashlight and appears to be smoking. Metzger identified the man as Ty Summers and believed he was the first person to call 911 to report the fire. Dispatch received the 911 call at 4:09 a.m.

¶ 22 As part of his investigation, Metzger talked to Matthew Edwards, an off-duty police officer who was working as security personnel for a tavern in the District that evening. Edwards was familiar with defendant and had seen him riding his bike in the area before. He told Metzger that defendant usually rode his bicycle in circles. Edwards saw defendant ride his bike down the alley between 17th Street and 18th Street around midnight or 1 a.m. on the morning of the fire. His bike had a headlight on it. Edwards identified the cyclist as defendant from the MD Green's video.

¶ 23 At the close of the hearing, the trial court found the evidence showed that the fire was started intentionally and that, based on video camera footage, defendant was the only person in

the area who had access to the alley at the precise time when the building fire started. Relying on the circumstantial evidence presented by the State, the court concluded that defendant started the fire that destroyed the Mississippi Café building. It entered an order finding defendant “not not guilty” of arson and residential arson and remanded him to the custody of the Department of Human Services.

¶ 24

#### ANALYSIS

¶ 25

Defendant claims that the evidence was insufficient to establish that he committed arson and residential arson beyond a reasonable doubt. He therefore argues that the trial court’s verdict of “not not guilty” should have instead been a judgment of acquittal.

¶ 26

During a discharge hearing, the trial court determines the sufficiency of the evidence to convict, but the hearing does not result in a technical determination of guilt. *People v. Orengo*, 2012 IL App (1st) 111071, ¶ 25. At the conclusion of the proceedings, no conviction is entered. Rather, the court must enter either a verdict of “not not guilty” or a judgment of acquittal. *Id.* ¶ 24. If the defendant is found “not not guilty,” he or she can be held for further treatment. If, however, a judgment of acquittal is entered, no further criminal proceedings may be undertaken against the defendant on that charge. *People v. Peterson*, 404 Ill. App. 3d 145, 150 (2010).

¶ 27

Although a discharge hearing is not a criminal proceeding, the State still bears the burden of presenting sufficient evidence to establish the defendant’s guilt beyond a reasonable doubt. *People v. Mayo*, 2017 IL App (2d) 150390, ¶ 3. Because the State is required to present sufficient evidence, the standard for reviewing the trial court’s judgment at a discharge hearing is the same as assessing the sufficiency of the evidence to convict at a criminal trial, i.e. whether the evidence, when viewed in the light most favorable to the State, would permit any rational trier of fact to find that the State proved the elements of the offense beyond a reasonable doubt.

*Peterson*, 404 Ill. App. 3d at 150. This standard applies in all cases, whether the evidence is direct or circumstantial. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004).

¶ 28 In this case, there is no direct evidence linking defendant to the fire that started in the Mississippi Café building. Nonetheless, “circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged.” *People v. Hall*, 194 Ill. 2d 305, 330 (2000). Such evidence must produce a reasonable and moral certainty that the defendant committed the crime. *People v. Morton*, 95 Ill. App. 3d 280, 282 (1981). A defendant’s guilt may not rest on speculation. *People v. Escort*, 2017 IL App (1st) 151247, ¶ 21.

¶ 29 To commit the offense of arson, a person must knowingly damage the property of another by means of fire. 720 ILCS 5/20-1(a)(1) (West 2014). Proof of any criminal offense requires proof of two concepts: (1) that a crime occurred, and (2) that it was committed by the person charged with the offense. *Ehlert*, 211 Ill. 2d at 202. A burning building does not establish that a crime of arson occurred and mere presence at the scene is not sufficient to establish guilt. See *People v. Gugliotta*, 81 Ill. App. 3d 362, 365 (1980) (arson conviction reversed because circumstantial evidence presented by the State could not establish the elements of arson).

¶ 30 In *Gugliotta*, the appellate court reversed the defendant’s conviction for arson arising from a fire in an apartment building. *Gugliotta*, 81 Ill. App. 3d at 366. The fire started about 10 to 15 minutes after the defendant was thrown out of a party in one of the units in the building. One person testified that he saw the defendant at the scene around the time the fire started. But no one actually witnessed the defendant lighting a match or starting the fire. At trial, a fire expert testified that he had analyzed the debris where the fire occurred and he believed the fire was of incendiary origin, that is to say it was caused by human agency. However, he could not

determine the cause of the fire or the source of the ignition, and he offered no evidence that an accelerant was used. On appeal, the court reversed the defendant's conviction because the State's circumstantial evidence failed to show that the fire was caused by human agency and because the evidence was insufficient to prove that the defendant was responsible for starting the fire. *Id.* at 365-66.

¶ 31 As in *Gugliotta*, the State's circumstantial evidence in this case was insufficient to prove defendant's guilt. At the discharge hearing, the State was required to prove beyond a reasonable doubt that the Mississippi Café building fire was caused by human agency and that defendant was the person responsible for starting it. See 720 ILCS 5/20-1(a)(1) (West 2014). The State's evidence failed to satisfy both of those elements.

¶ 32 First, the circumstantial evidence failed to establish that a crime of arson occurred. Testimony revealed that it was impossible for the fire to be thoroughly investigated because the structural damage to the buildings rendered it unsafe for investigators to enter the property. Investigators could not go inside the building. As Marty acknowledged, no chemical testing was performed. Thus, it could not be determined whether an accelerant had been used. Moreover, without the ability to examine the remains of the building, he could only attempt to determine the cause of the fire by engaging in the process of elimination. Marty determined that it could not have been the weather or a natural gas explosion, and it could not have been a cigarette because surveillance footage did not show anyone smoking in the area. He could not positively identify the ignition of the fire. He simply testified that the "most likely" source was an open flame. Where, as here, there is no evidence that an accelerant was used and the State cannot identify the source of the ignition, the evidence is insufficient to prove beyond a reasonable doubt that a crime occurred. See *Gugliotta*, 81 Ill. App. 3d at 366.

¶ 33 Second, the State failed to prove beyond a reasonable doubt that defendant was responsible for starting the fire. Mere presence at the scene of a fire is insufficient to establish defendant's guilt beyond a reasonable doubt. See *In Interest of D.A.*, 114 Ill. App. 3d 522, 525 (1983); *Gugliotta*, 81 Ill. App. 3d at 365. Here, the evidence showed that defendant was in the area at the approximate time the fire broke out. However, defendant did not confess to the crime, surveillance video does not depict defendant lighting the fire, and there were no eyewitnesses.

¶ 34 At the discharge hearing, the State argued that no one else could have committed the crime based on the circumstantial evidence of the 15 surveillance video clips. In those videos, defendant is depicted riding his bike around the District, through the courtyard on 2nd Avenue, and up and down 19th Street around 4 a.m. on September 27, 2014. In addition to defendant, other individuals can be seen on the surveillance videos in and around the Mississippi Café building at approximately the same time. The video images suggest that, along with defendant, several other people had access to the alley behind the Mississippi Café building that morning. Two people are shown walking into a bar on the corner of 2nd Avenue and 18th Street. Five people are walking across the courtyard at the corner of 2nd Avenue and 19th Street. A man is seen riding a bicycle towing a trailer on 19th Street and again on 3rd Avenue, and another man is shown walking through Huckleberry's alley.

¶ 35 Two of the fifteen videos place defendant in or around the alley behind the Mississippi Café building at the time the fire allegedly started: the federal courthouse video and the MD Green's alley video. The federal courthouse video shows defendant riding his bike south on 19th Street between 2nd Avenue and 3rd Avenue and disappearing down a sidewalk at 3:54 a.m. He is not observed again on any camera for approximately five minutes. He then reappears riding his bike in the opposite direction at approximately 3:59 a.m. His short absence from the

cameras' view is insufficient to prove that he lit a fire in the alley behind the building. The video from MD Green's shows defendant riding past the camera in the same direction as the fire's origin at 3:59 a.m. From the initial image on the video, it does not appear that defendant has a lighter or any other means of ignition, and nothing in the video suggests that he is carrying an accelerant or otherwise intends to start a fire. Within 90 seconds, a blaze erupts with enough energy to activate the motion sensor on the camera. But the blaze is outside the camera's view, and defendant does not appear in the video again.

¶ 36 When viewed in a light most favorable to the State, the video clips could reasonably support only a determination that defendant rode his bike through the alley a few minutes before the fire started. Further, the State could not show that defendant was in possession of materials used to start a fire, such as matches or an accelerant. None of the circumstantial evidence satisfies proof beyond a reasonable doubt of the elements of arson. See *Escort*, 2017 IL App (1st) 151247 ¶¶ 20-21; *Morton*, 95 Ill. App. 3d at 283 (finding circumstantial evidence insufficient to sustain a criminal conviction where State failed to present a reasonable certainty that defendant and no one else committed the crime).

¶ 37 The insufficiency of the evidence creates a reasonable doubt as to defendant's guilt. The conclusion that arson was committed and that it was committed by defendant was based on a probability, which is not proof beyond a reasonable doubt. See *Ehlert*, 211 Ill. 2d at 213 ("the fact that defendant is 'probably' guilty does not equate with guilt beyond a reasonable doubt"). Because the evidence presented at the discharge hearing failed to prove defendant "not not guilty," a judgment of acquittal should be entered on both counts.

¶ 38

## CONCLUSION

¶ 39 We reverse the trial court's finding of "not not guilty" and acquit defendant of arson and residential arson.

¶ 40 Reversed.

¶ 41 Judgment of acquittal entered.