2012 IL App (1st) 102419-U

THIRD DIVISION
May 30, 2012

No. 1-10-2419

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 11551
	)	
KRISTY BALLARD,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

Held: State's evidence sufficient to establish knowledge element of arson prosecution, and the trial court did not abuse its discretion in imposing sentence.

¶ 1 Following a jury trial, defendant Kristy Ballard was found guilty of aggravated arson and residential arson, and after merging the convictions, the trial court sentenced defendant to eight-and-a-half years in prison. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that she knew or reasonably should have known that one or more persons were in the building when she set the fire, and that her sentence was an abuse of the trial court's discretion.

¶ 2 Defendant's conviction arose from a fire that occurred the afternoon of June 1, 2009, in a two-story, four-unit apartment building located at 5203-5205 West Palmer Street in Chicago, Illinois. The fire originated in the first-floor bedroom of defendant's estranged husband, Patrick Butler. Patrick shared an apartment with his cousin, Philip Carey. Patrick's aunt and uncle, Christine and Siegfried Luck, lived in the apartment across the hall, and Patrick's 72-year-old grandfather, Guillermo Herrera, and another uncle, Billy Herrera, lived above them. The other second-floor apartment was vacant. Only Siegfried and Guillermo were home at the time of the fire.

¶ 3 At trial, Siegfried testified that he was watching television when he smelled smoke and found Patrick's apartment door ajar and smoke inside. He ran out of the building, and a firefighter carried his father-in-law, Guillermo, from the second floor to an ambulance.

¶ 4 Chicago police officer Domenico Cerami testified that he was patrolling the immediate vicinity when he saw smoke coming out of the apartment building and called the fire department. He went inside the building to investigate, but retreated because the thick, dark smoke inside Patrick's apartment made it difficult to see or breathe.

¶ 5 Chicago police officer Kevin Gibbons testified that he arrived at the scene and learned, from a resident of the building, that an elderly, bedridden individual lived on the second floor. Moments later, firefighters arrived and carried the elderly tenant out of the building.

¶ 6 Detective Thomas Leva of the Chicago police bomb and arson unit testified that the fire originated in Patrick's apartment and was caused by an open flame on Patrick's bed. The mattress was extensively burned and the box spring heavily charred. The fire spread to the living room and there was smoke damage throughout the apartment.

¶ 7 Patrick testified that he and defendant were married, but they had been separated for about one year before the incident. After their separation, he moved into an apartment with his

cousin Philip. Defendant visited there numerous times and occasionally stayed overnight. She last visited two nights before the fire.

¶ 8 The morning of the fire, Patrick went directly to work from his girlfriend's home. He learned about the fire from his aunt, who called him at work. In court, he identified photographs of his bedroom which looked like an "ash tray" and the fire damage to his mattress and box spring. He further testified that a few days later, while checking his voice mail, he came across a message from defendant stating, "I set your fucking shit on fire."

¶ 9 On June 12, 2009, defendant turned herself in to police. She confessed to setting the fire in Patrick's bedroom and gave a written statement, which was read aloud to the jury. In her statement, defendant described the layout of the apartment building as follows:

> "Kristy states that Patrick lives at 5203 W. Palmer on the first floor. Kristy states that the apartment building that Patrick lives in has one front door. Kristy states that there are four apartment units in this building. Kristy states that Patrick's apartment is on the first floor to the left when you enter the building. Kristy states that Patrick shares the apartment with his cousin, Philip Carey. Kristy states that the apartment unit above Patrick is empty. Kristy states that Patrick's aunt and uncle, Christine and Siegfried Luck, live on the first floor apartment to the right when you enter the building. Kristy states that Patrick's grandfather, Guillermo Herrera, and uncle, Billy Herrera, live on the second floor above Christine and Siegfried. Kristy states that she has been to Patrick's apartment many times and sometimes stays overnight still."

¶ 10 Defendant further stated that she was angry with Patrick and decided to confront him in person. She climbed through Philip's bedroom window on the side of the building and waited for Patrick inside his bedroom. There, she saw a pair of Nike shoes that she bought for Patrick and set them on fire. She then tried to put the fire out by fanning it with some clothes, which made the fire spread even more. She ran out the front door of the apartment to the intersection of Grand and Armitage Avenues, near a firehouse, where she called Patrick's voice mail and said, "your shit's on fire." She did not know that anyone was home when she started the fire.

¶ 11 Additional evidence at trial included the stipulated testimony of Philip Carey that the lock on his bedroom window was not functioning before the fire and an audio recording of the message that defendant left on Patrick's voice mail. After the State rested its case, the trial court ascertained that defendant did not want to testify, and the defense rested without presenting any evidence. The jury found defendant guilty of aggravated arson and residential arson.

¶ 12 Subsequently, the trial court denied defendant's motion for a new trial and proceeded to sentencing. In pronouncing the sentence, the trial court stated:

> "I've looked at the factors, statutory factors in aggravation and mitigation, reviewed the evidence at trial, and listened to the lawyers and the presentation during the aggravation and mitigation portions of the sentencing, and also, I've paid attention to [defendant's] right of allocution.
>
> There's a lot of factors involved in this. One is I have to look at, you know, if it wasn't for the intervention of God, or – I don't mind saying God – but, *I mean, the elderly gentleman could have been dead.* I mean, and then you could have been looking at felony murder charges, first-degree murder charges and things like that with minimum sentences of 20 years in the state penitentiary.

> So I have to, you know – and I also take a look at – that you have been absent of any criminal background before this, too.
>
> So, it's just this – seeing what an appropriate sentence is, which every judge does – I was thinking of a much higher sentence, but I've listened to your right of allocution and what you said there, and I'm not going to sentence you to that higher level.
>
> All right, but seriously, I have to take into consideration all the harm that was done that day, so I'm going to sentence you to eight and a half years in the state penitentiary." (Emphasis added.)

¶ 13 In this court, defendant first contends that the State failed to prove beyond a reasonable doubt that she knew, or reasonably should have known, that one or more persons were in the building when she set the fire. She acknowledges that the evidence at trial showed that Siegfried Luck and Guillermo Herrera were home when she set the fire, but she maintains that this does not prove that she knew or should have known of their presence. She reasons that there was no evidence that the personal vehicles of the building occupants were parked nearby, that she was able to hear any noises like Siegfried's television, or that she knew Guillermo was bedridden.

¶ 14 When a defendant challenges the sufficiency of the evidence to sustain her conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any 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); *People v. Collins,* 106 Ill. 2d 237, 261 (1985). This standard gives " 'full play to the responsibility of the trier of fact fairly to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *People v. Jackson,* 232 Ill. 2d 246, 281 (2009) (*quoting Jackson,* 443 U.S. at 319). In employing that standard, we deny defendant's request to apply a *de novo* standard of review because she challenges the inferences drawn from the evidence about her

mental state, which presents disputed questions of fact. *People v. Lattimore,* 2011 IL App (1st) 093238, ¶ 36.

¶ 15 To sustain a conviction of aggravated arson, the State must show that (1) defendant committed an arson (720 ILCS 5/20-1 (West 2008)) and knowingly damaged the real property of another, and (2) knew or reasonably should have known that one or more persons were present in that building. 720 ILCS 5/20-1.1 (West 2008). These elements may be inferred from the surrounding facts and circumstances. *People v. Stewart,* 406 Ill. App. 3d 518, 526 (2010). The focus of the statute is on the knowing act of arson, which becomes elevated due to the fact that defendant knew or should have known of the presence of others. *People v. Myers,* 352 Ill. App. 3d 684, 690 (2004).

¶ 16 Considering the evidence in the light most favorable to the State, the evidence at trial showed that defendant committed an act of arson when she knowingly and deliberately set Patrick's shoes on fire, causing extensive fire and smoke damage to the apartment. Her conduct rose to the level of aggravated arson because she should have known that Patrick's relatives were home at the time. *People v. Bauer,* 393 Ill. App. 3d 414, 423 (2009). The lack of evidence regarding the presence of vehicles owned by Patrick's relatives, defendant's ability to hear Siegfried's television or her awareness of Guillermo's incapacity, would not preclude the jury from inferring that defendant knew or reasonably should have known that Siegfried and Guillermo were home, where the evidence established defendant's acquaintance with Patrick's relatives, familiarity with the building layout, and numerous visits in the year leading up to the incident. *People v. Burrett,* 216 Ill. App. 3d 185, 190 (1991).

¶ 17 In her written statement, defendant stated that Patrick's aunt and uncle, Christine and Siegfried, lived on the first floor, across the hall from Patrick and Philip, and that Patrick's grandfather, Guillermo, and uncle, Billy, lived on the second floor above Christine and Siegfried. In addition, she stated that she visited Patrick's apartment many times and occasionally stayed

overnight, statements which were corroborated by Patrick's testimony (*People v. Carter*, 200 Ill. App. 3d 760, 765 (1990)), and reflected her knowledge of the occupants of the building and their particular circumstances. Viewing defendant's statement, the logical inferences therefrom, and the other evidence presented at trial, we do not believe that the jury could rationally determine that defendant neither knew, nor reasonably should have known, that certain of these people were home when she set the fire. *Bauer*, 393 Ill. App. 3d at 425.

¶ 18 Defendant next contends that the trial court erred in imposing a sentence in excess of the statutory minimum by considering an improper factor in aggravation. She argues that the risk of injury or death to those inside the building, is inherent in aggravated arson, and points to the trial court's statement, "the elderly gentleman could have been dead."

¶ 19 Where, as here, defendant's sentence is within the statutory limits, we will not disturb that sentence unless the trial court abused its discretion. *People v. Haley*, 2011 IL App (1st) 093585, ¶ 65. In making that determination, we will consider the record as a whole and not focus on a few words or statements made by the trial court. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 20 The trial court may not consider, in aggravation, a factor implicit in the underlying offense. *Dowding*, 388 Ill. App. 3d at 942. However, the trial court may consider as an aggravating factor the degree of harm, or threatened harm, caused to the victim, "*even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.) *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986).

¶ 21 It is sound public policy that defendant's sentence is tailored to the particular circumstances of the offense committed, as certain criminal conduct may warrant a harsher penalty than other conduct punishable under the same statute. *Saldivar*, 113 Ill. 2d at 269. It follows that a sentencing court may consider the degree of harm, or threatened harm, caused by a certain aggravated arson, though injury and threat of harm are implicit in the offense. *People v.*

Myers, 292 Ill. App. 3d 757, 759 (1997). Moreover, the requirement that "the judge specify on the record the factors that led to his sentencing determination was not intended to be a trap for the sentencing judge." *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982).

¶ 22 Our review of the record reveals that the trial court did not rely on the "risk of a homicide" as an additional factor that "led the court to fashion a relatively high sentence, initially," then lowering it based on defendant's statement in allocution. At sentencing, the trial court stated that Guillermo could have been dead, in the context of commenting on the seriousness of the situation and that, but for some divine intervention, defendant could have been facing more serious charges. Ultimately, the court stated, "I have to take into consideration all the harm that was done that day," which defendant acknowledges was proper, and was also cognizant of her lack of criminal history and gave credit to her statement in allocution. We therefore find no abuse of discretion in the term imposed (*People v. Liberman*, 228 Ill. App. 3d 639, 651 (1992)), and affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.