2013 IL App (1st) 112546-U

SIXTH DIVISION
September 30, 2013

No. 1-11-2546

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 14280
	)	
SHERONDA BURNETT,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated arson affirmed over her contentions that the circuit court erred in refusing her request for a jury instruction on the lesser offense of residential arson and admitting testimony of the content of certain text messages.

¶ 2 Following a jury trial, defendant Sheronda Burnett was convicted of aggravated arson and sentenced to 12 years' imprisonment. On appeal, defendant contends the trial court erred in refusing the defense's request for a jury instruction on the lesser offense of residential arson.

Defendant also contends that the trial court erred by allowing the State to elicit testimony of the content of text messages without laying a proper foundation. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with aggravated arson (Count 1) in that she started a fire at 1053 North Lawler Avenue in Chicago on July 25, 2009, and she knew or reasonably should have known that one or more persons were present therein. She was also charged with attempted first degree murder and residential arson. On May 23, 2011, the State dropped all of the charges against defendant, except for aggravated arson. The State specifically stated, "We're going to nolle everything but count one, count one only. Aggravated arson." In response, the court stated, "Count one only. *** Count one is the only charge in the case ***."

¶ 5 After the State presented its evidence, defense counsel requested two instructions, *i.e.*, arson and criminal damage to property, which the court denied. Defense counsel never tendered to the court an instruction for residential arson. Regarding the requested arson instruction, defense counsel stated,

> "[t]he first one is the arson instruction, *** not the aggravated instruction. Basically the difference is *** reasonably knew or reasonably should have known somebody was in the dwelling. So that would be instruction - well, we have two -- 15.01 I believe there is two ways it can be done. The second way it could be done is a paragraph just stating what the definition of 'property of another' is."

The State then informed the court that arson was a Class 2 felony, and the court reiterated that arson was a Class 2 felony with a sentencing range of three to seven years' imprisonment, or the possibility of probation. The court denied counsel's request for an arson instruction, finding that

the evidence showed that defendant knew or reasonably should have known the building was occupied when she set the fire during the early morning hours of July 25, 2009. Defendant did not raise any jury instruction issue in her posttrial motion.

¶ 6 The evidence at trial revealed that the fire department received an alarm at 2:42 a.m. on July 25, 2009, of a fire at 1053 North Lawler, a two-flat apartment building. When firefighters arrived shortly thereafter, smoke was coming from the rear of the building and Shireen Williams, who lived on the second floor of the building, was observed in the second floor window. Firefighters removed Williams through the window and extinguished the fire. An examination of the scene showed that two incendiary fires were started with a flammable liquid on the second floor. In particular, one fire was started on the landing in front of the second floor entrance, while the other fire was started on the back stair landing.

¶ 7 Shireen Williams testified that she was in a five-year relationship with defendant and had been living with her at 1053 North Lawler Avenue until the relationship ended about a week before the fire. Defendant moved out and Williams changed the locks to the apartment. Nevertheless, the women discussed reconciling, and, on July 24, Williams invited defendant over to the apartment that evening. During the evening of July 24, Williams went out to dinner with a friend and did not expect defendant to arrive because she had not communicated with her after 4 p.m. that day. Williams returned home at about 11 p.m. and went to sleep. Williams did not hear any banging on the door and woke up when the smoke detectors went off. After Williams was removed from the apartment by firefighters and was safely outside, she checked her phone and saw text messages from defendant. Over defense counsel's objection, Williams testified that the text messages said, "You bogus, *** you got somebody in there ***." Williams identified her phone number and defendant's phone number.

¶ 8 Raynard Carlton testified that he was 18 years old and lived in the first floor apartment at 1053 North Lawler Avenue with his mother, who was out of town at the time of the incident, and his brother Raymond Beecham. At about 1 a.m. on the date in question, Carlton heard continuous knocking coming from the front door of the upstairs apartment for over 30 minutes. He also recognized defendant's voice and heard her say "open the door." After the knocking stopped, he looked out of the window and saw a person who resembled defendant walking north. About 20 to 30 minutes later, Carlton heard fire trucks, saw smoke upstairs, and went outside.

¶ 9 Raymond Beecham, who was in the garage at about 1 or 2 a.m., testified that he saw defendant go upstairs to the apartment in question and then heard loud knocking. Beecham left the scene in his car, and when he returned about 20 minutes later, he saw fire trucks in front of the subject building.

¶ 10 Officers Emil Bux and Emily Hock were working together and responded to the fire. Hock testified, over defense counsel's objection, that the text messages on Williams' phone stated, "What's up, you hear me out here, what you got, a Mo-fo in there and you bogus." Bux testified that he recovered a gas cap and a gas can near the scene of the fire. At about 3:50 a.m. on July 25, Bux observed defendant sticking her head out from a behind a garbage can in a nearby alley and arrested her.

¶ 11 Detective Darrell Mills testified that defendant stated that Williams told her to come to the subject apartment, but when she arrived, the locks were changed. Defendant knocked on the door and tried to call Williams, but she did not receive a response. Defendant got angry, walked to a gas station, and bought a gas can and some gasoline. When Mills asked defendant if she started the fire, she responded by stating, "she set me up. I know somebody else was in that apartment, somebody else was up there."

¶ 12 Alan Osoba, a forensic scientist, testified that the shirt and shorts recovered from defendant tested positive for the presence of gasoline. Jennifer Barrett, a latent print examiner, testified that she received the gas spout and plastic gas container that was recovered from the scene. She examined the fingerprint on the gas spout, as well as the palm print from the gas can, and concluded that they matched defendant's finger and palm prints.

¶ 13 Donna Hernandez, who worked for Sprint Nextel as a custodian of records, testified that between 10:53 p.m. on July 24, and 1:18 a.m. on July 25, Williams' phone number received 40 calls and 6 text messages from defendant's phone number.

¶ 14 The defense rested its case without presenting any evidence, and the jury found defendant guilty of aggravated arson.

¶ 15 On appeal, defendant contends that she was "entitled to have the jury instructed on the lesser offense of residential arson where the jury could have rationally concluded that she did not know that anybody was in the apartment where she had knocked on the door for 45 minutes and had called the occupant 40 times during the evening and never received any response." Defendant maintains her conviction should be reversed and this cause remanded for a new trial so that her case can be deliberated by a properly instructed jury.

¶ 16 ANALYSIS

¶ 17 As pertinent to this appeal, a person commits the Class 2 felony of arson when, by means of fire, she knowingly damages any real property of another without her consent. 720 ILCS 5/20-1 (West 2008). A person commits the Class 1 felony of residential arson when, while committing an arson, she knowingly damages a building that is the dwelling place of another. 720 ILCS 5/20-1.2 (West 2008). A person commits the Class X felony of aggravated arson when, in the course of committing an arson, she knowingly damages any building and knows or

reasonably should know that one or more persons are present therein. 720 ILCS 5/20-1.1 (West 2008).

¶ 18 The residential arson instruction that defendant now contends on appeal should have been given to the jury was never tendered to the trial court. See *People v. Dunsworth*, 233 Ill. App. 3d 258, 266 (1992) (stating that, in general, no party may raise on appeal the trial court's failure to give a jury instruction unless it was first tendered during trial). Instead, the record reveals that defense counsel only tendered to the trial court jury instructions for criminal damage to property and arson. In requesting a jury instruction on arson, counsel specifically stated, "[t]he first one is the arson instruction, *** not the aggravated instruction. Basically the difference is, you know, reasonably knew or reasonably should have known somebody was in the dwelling." Defense counsel made no mention of a residential arson instruction during the jury instruction conference. Accordingly, we find that defendant has waived this issue on appeal by failing to tender a residential arson instruction and raise the issue in a posttrial motion. *People v. Foster*, 103 Ill. App. 3d 372, 376 (1982), citing *People v. Masini*, 78 Ill. 2d 17 (1979), and *People v. Foster*, 76 Ill. 2d 365 (1979).

¶ 19 A limited exception to the forfeiture rule is contained in Supreme Court Rule 451(c) (eff. July 1, 2006), which provides that "substantial defects" in criminal jury instructions are not waived by the failure to make timely objections if the interests of justice require. This rule is coextensive with the plain error doctrine (*People v. Keene*, 169 Ill. 2d 1, 32 (1995)), and is limited to the correction of "grave errors," or is to be applied where the case is close factually and fundamental fairness requires that the jury be properly instructed (*Foster*, 103 Ill. App. 3d at 376).

¶ 20 Here, the trial court did not commit a "grave error" when it instructed the jury on aggravated arson and not residential arson. In fact, the State had previously *nolle prossed* the

residential arson charges in defendant's indictment, and thus residential arson was no longer an issue at trial. A defendant may not be convicted of an offense that he or she has not been charged with committing. *People v. Jones*, 149 Ill. 2d 288, 292 (1992). However, a defendant is entitled to have a jury instructed on a less serious offense that is included in the charging instrument if the evidence rationally supports a conviction on the lesser included offense. *People v. Leia*, 204 Ill. 2d 332, 359-60 (2003).

¶ 21 In this case, we disagree with defendant that there was evidence from which a jury could conclude she did not believe anyone was inside the building. Defendant primarily relies on four pieces of evidence: Carlton's testimony that he heard defendant banging on the door upstairs for several minutes without a response, the State's evidence that defendant failed to contact Williams through her cell phone, evidence establishing the absence of the mother and son in the first floor apartment, and the lack of testimony that any lights were on in the apartment. Nevertheless, none of this evidence supports the conclusion that defendant did not know or should not have known people were inside the building. Defendant ignores Carlton's testimony that he heard defendant state "open the door," and further ignores defendant's statements to police indicating she believed defendant was inside of her apartment. Moreover, while defendant is correct that some of the residents on the first floor were not inside the apartment, Carlton was inside the apartment and the fact that the lights may have been off in the apartments at about 2 a.m. would certainly not be unusual. In sum, the evidence showed that defendant set fire to a multi-family two flat during the early morning hours of July 25, her text messages indicated that she believed someone was inside of the second floor apartment, and she told police that she knew someone was inside. Accordingly, we find there was no evidence to support an instruction on the lesser included offense of residential arson.

¶ 22 In an apparent attempt to circumvent forfeiture, defendant maintains that her counsel was ineffective for failing to address the court's denial of a residential arson instruction in the posttrial motion. Contrary to defendant's representation on appeal, defendant never requested an instruction on residential arson and, in turn, the court did not make any ruling on it. The court is generally under no obligation to give instructions not tendered. See *People v. Enoch*, 122 Ill. 2d 176, 199 (1988). Nevertheless, in order to establish such a claim, defendant must show that her counsel's performance fell below the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), *i.e.*, counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that the deficiency prejudiced the defense. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). In this case, it would have been futile for defense counsel to argue that the court should have given a residential arson instruction to the jury where such an instruction was never tendered to the court, the residential arson counts that were initially charged against defendant were *nolle prossed*, and, as we have found, the evidence did not support the instruction on the noncharged lesser offense. Therefore, because "[a]n attorney is not required to make futile motions to avoid charges of ineffective assistance of counsel" (*People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000)), defendant's contention that his trial counsel was ineffective for failing to include this issue in her posttrial motion is meritless.

¶ 23 Defendant next contends that the trial court erred in allowing the State to elicit testimony from Williams and Officer Hock regarding the content of text messages received by Williams without establishing a proper foundation for this evidence, *i.e.*, who sent the messages and at what time. In particular, defendant points to Williams' statement that she received a text message from defendant stating that "you bogus, *** you got someone else in there," and Hock's statement that she viewed Williams' phone and saw text messages stating, "you hear me out here, what you got, a Mo-Fo in there" and "you bogus." Defendant thus asserts that the admission of

this evidence was reversible error because the substance of the messages prejudiced her where the State argued the messages constituted evidence that she knew the apartment was occupied.

¶ 24 Defendant forfeited any challenge to the admission of testimony regarding the substance of the text messages by failing to include the issue in her posttrial motion. *Enoch*, 122 Ill. 2d at 186. We thus review this claim pursuant to the plain error doctrine, which permits review of claims that were not properly preserved for appeal when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under either prong, defendant bears the burden of persuasion. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 25 Even assuming, *arguendo*, that the trial court improperly allowed the testimony regarding the text messages into evidence, defendant is not entitled to a new trial because she failed to meet the requirements of either prong of the plain error doctrine. Defendant failed to meet the first prong because the evidence was not closely balanced. Even without the content of the text messages, the evidence against defendant was substantial and showed that she knew or should have known people were inside the building. The fact that defendant started the fire in a residential building during the early hours of the morning established that she should have known people would be inside, and Detective Mill's testimony established that defendant believed Williams was home when the fire started. Defendant also failed to meet the second prong of the plain error doctrine. The supreme court has equated second prong plain error with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010), citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural error is systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *Glasper*, 234 Ill. 2d at 197-98. Defendant has failed to show that the alleged error here fits into that category.

¶ 26 Finally, as with the first issue, defendant raises an ineffective assistance challenge based on counsel's failure to preserve this issue for appeal. Defendant, however, cannot meet the *Strickland* requirements because even if defendant could show that his counsel was deficient, she cannot show prejudice since the testimony regarding the text messages was cumulative to Mills' testimony where defendant told him that she was set up and expressed her belief that someone else was inside of the apartment. See *Enis*, 194 Ill. 2d at 377, citing *Strickland*, 466 U.S. at 697 (stating that the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel).

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 29 Affirmed.