2019 IL App (1st) 163249-U

No. 1-16-3249

February 25, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 17671
	)	
TERRI DONEHUE,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to find defendant guilty of aggravated arson beyond a reasonable doubt where it established that she knowingly started a fire in an occupied building. The trial court did not abuse its discretion in imposing a sentence within the statutory range. The fines and fees order is corrected to vacate a $5 electronic citation fee.

¶ 2 Following a bench trial, defendant Terri Donehue was found guilty of aggravated arson and residential arson, and sentenced to eight years' imprisonment on the aggravated arson count. Defendant appeals, arguing that the evidence was insufficient to sustain her conviction as to

aggravated arson where the State's expert could not conclude that the fire was started intentionally. In the alternative, defendant contends that her sentence is excessive in light of mitigating factors and should be reduced because the trial court considered improper factors in aggravation. Finally, she maintains that her fines and fees order should be corrected by vacating an inapplicable $5 electronic citation fee and applying her presentence incarceration credit to other charges. We affirm the judgment of the circuit court, vacate the $5 electronic citation fee, and correct the fines and fees order.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with one count of residential arson (720 ILCS 5/20-1(b) (West 2014)) and one count of aggravated arson (720 ILCS 5/20-1.1(a) (West 2014)). The latter count alleged that she, by means of fire, knowingly damaged a building in which she knew or reasonably should have known that a person was present.

¶ 5 At trial, Michael Dorsey, defendant's longtime boyfriend, testified that defendant was staying at his apartment at 8340 South Cottage Grove in Chicago on September 19, 2015. That morning, Dorsey woke up around 1 a.m. and noticed defendant had left the apartment. He fell back asleep and woke up again when defendant returned around 6:30 or 6:45 a.m. Defendant was "babbling" like she had been drinking, so he asked her to leave and called her sister, Miranda Everett, to pick her up. Dorsey and defendant argued, but did not physically fight. Upset, Dorsey dressed and left the apartment shortly before 7 a.m. After he left, defendant was still in the apartment, packing her clothes and smoking cigarettes. Dorsey testified that defendant is a smoker who kept cigarettes and a butane lighter in his apartment. Approximately 20 minutes after Dorsey left the apartment, he received a phone call from his neighbor regarding the fire.

When he returned to his apartment, the fire department was present and the front room was "burnt up." Dorsey walked through the apartment with a detective and did not see defendant's belongings. On cross-examination, Dorsey testified that in the 30 years he dated defendant, he had never noticed her fall asleep with a lit cigarette or leave a lit cigarette on furniture. When he left the apartment, he did not see a drink or cigarette in defendant's hands.

¶ 6 Everett testified that Dorsey called her on the morning of September 19, 2015, and asked her to pick up defendant from his apartment. When Everett arrived at around 7 a.m, Dorsey was gone. Defendant was upset and told Everett that she had been drinking. Everett briefly entered the apartment, but went out on the back porch because the apartment was "smoky" and bothered her asthma. Defendant then came outside with a black garbage bag full of her possessions, which she tossed over the second-story banister before reentering the apartment to retrieve another bag. Everett went inside approximately one minute later and saw flames in the living room. Everett asked defendant if she saw the fire, and defendant responded "Oh Michael [Dorsey] did that." Defendant also stated that Dorsey "kicked her" and that a drink and cigarette that she was holding "flew out of her hand." Everett called 911, reported that defendant started a fire, and knocked on apartment doors to warn the residents. She told defendant to leave the apartment and "walk down the alley" because she was concerned that Dorsey and defendant would fight again. On cross-examination, Everett clarified that when she reported the fire, she believed that defendant started the fire accidentally.

¶ 7 In response to questioning by the trial court, Everett testified that she did not recall precisely when defendant told her that Dorsey "kicked her," "beat her up," and knocked a cigarette out of her hand. Everett stated that she told a police officer at the scene about the

physical altercation, and she later told Detective Jeong Park while at the police station in the days following the fire. She did not see any marks or bruises on defendant on the day of the fire.

¶ 8 Detective Park testified that he first spoke with Everett on the phone the day after the fire and she did not tell him Dorsey struck defendant. Park next spoke with Everett at the police station when defendant was arrested several weeks later. In this second conversation, Everett told Park that Dorsey pushed defendant and knocked a drink and a cigarette out of her hand.

¶ 9 Nicole Smith, who lived in Dorsey's apartment building with her husband and four children, testified that she heard loud noises at 7:17 a.m. on the morning of the fire. She opened her back door and saw defendant, whom she knew and identified in court, carrying a golf club and a black garbage bag. Smith twice called out to defendant, but, uncharacteristically, defendant ignored her. Smith then heard a woman knocking on doors and screaming "my sister set a mother fucking fire, get out."[1] As Smith fled with her children, she smelled smoke and saw flames inside Dorsey's apartment.

¶ 10 Michael Cosentino, a fire marshal and investigator in the Chicago Fire Department, testified as an expert in the cause and origin of fires. Based on burn-pattern analysis and a lack of other potential ignition sources in the apartment, Cosentino determined that the fire was caused by "open flame ignition," possibly a lighter or cigarette, on the living room sofa. He stated that a "latent" cigarette would cause "probably more of a smoldering fire." However, the fire in this case was more likely started as an open flame fire because a smoldering fire could last for several hours before it produces visible flames. On cross-examination, Cosentino acknowledged he could not "rule out" that the fire was caused by careless smoking.

[1] Over the defense's objection, the trial court stated that it admitted this statement for the limited purpose of explaining Smith's actions and not as evidence of who started the fire.

¶ 11 The State rested and defendant moved for a directed verdict, arguing that the State failed to prove beyond a reasonable doubt that she intentionally started the fire. The court denied the motion. The defense rested without putting on any evidence.

¶ 12 After closing arguments, the court found defendant guilty of aggravated arson and residential arson. The court stated that defendant had both the motive and opportunity to start the fire, and that her actions were inconsistent with defense counsel's theory that the fire resulted from "careless smoking." The court noted that defendant failed to warn other people in the apartment building about the fire, and also stated that "no evidence" showed that Dorsey struck defendant or knocked a cigarette out of her hand. The court found Dorsey was "very credible," and that defendant told Everett inconsistent versions of the events.

¶ 13 The court denied defendant's motion for a new trial and the case proceeded to a sentencing hearing, where the court acknowledged receipt of defendant's presentence investigation (PSI) report. The PSI report stated that defendant had no criminal background, maintained relationships with her parents, five siblings, and two children, and had been employed as her mother's caretaker prior to her arrest. Defendant denied associating with those "who are in trouble with the law," but reported drinking alcohol socially four times per week. She also reported regularly using crack cocaine during the past 25 years, and that she had joined a drug treatment program while in custody.

¶ 14 In aggravation, the State emphasized the potential harm the fire could have caused to residents in the apartment building. In mitigation, defense counsel stated that defendant was 55 years old at the time of the sentencing hearing, had no criminal history, and cared for her mother.

In allocution, defendant stated she was "sorry about the cigarette and people in the building," but denied starting the fire intentionally.

¶ 15 The court merged the counts for aggravated arson and residential arson, sentenced defendant to eight years' imprisonment for aggravated arson, and assessed $739 in fines, fees, and costs. In announcing the sentence, the court stated it considered that defendant had no criminal record, and she came from a "strong family" that supported her throughout the proceedings. However, the court noted defendant had "fault" because her substance abuse caused her to act emotionally without considering the potential consequences. Additionally, the court observed that defendant did nothing to warn others in the apartment building about the fire, and did not "accept responsibility in any way" or exhibit remorse for her actions. It noted that, had Everett not been present, the fire could have caused far greater damage. The court told defendant, "If you can't realize what you have done and you can't stop trying to blame other people for what you have done, you know, it makes it hard to rehabilitate somebody."

¶ 16 Defendant filed a motion to reconsider sentence through counsel, and a second motion to reconsider sentence *pro se*.[2] In denying the motion filed by counsel, the court acknowledged defendant had no criminal history, but opined, "remarkably she seemed to show absolutely no remorse whatsoever or any acceptance of responsibility." But for Everett's actions, the court continued, there could have been "extraordinarily serious consequences to other human beings living in the same building."

[2] Although the trial court did not expressly rule on the motion to reconsider sentence that defendant filed *pro se*, it was not obligated to entertain the motion, as she was represented by competent counsel and made no indication that she wished to abandon her right to counsel. *People v. Stevenson*, 2011 IL App (1st) 093413, ¶¶ 31-32.

¶ 17 ANALYSIS

¶ 18 For her first assignment of error, defendant contends that the evidence was insufficient to prove that she committed aggravated arson. In particular, she argues that the evidence failed to show that she started the fire knowingly because Cosentino, the State's expert, could not conclude that the fire was not the result of an accident. In response, the State maintains that Cosentino's expert testimony and the circumstantial evidence support the inference that defendant started the fire intentionally.

¶ 19 On a claim of insufficient evidence, a reviewing court must determine whether, taking 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. *People v. Gray*, 2017 IL 120958, ¶ 35. This standard applies in all criminal cases, even when the evidence is entirely circumstantial. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). A reviewing court does not retry the defendant and must not substitute its own judgment on the weight of the evidence for that of the trier of fact. *Gray*, 2017 IL 120958, ¶ 35. Rather, it is the trier of fact's responsibility to weigh and draw reasonable inferences from the evidence. *Id.*; *Jonathon C.B.*, 2011 IL 107750, ¶ 59. The trier of fact is not required to disregard inferences that flow naturally from the evidence, nor is it required to accept all possible explanations consistent with defendant's innocence and raise them to the level of reasonable doubt. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. A conviction will be reversed for insufficient evidence only where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *Gray*, 2017 IL 120958, ¶ 35.

¶ 20 A person commits aggravated arson when, in the course of committing arson, she knowingly damages any building or structure that she knows or reasonably should have known was occupied by one or more persons. 720 ILCS 5/20-1.1(a) (West 2014). A person commits arson when, by means of fire, she knowingly damages any real property of another, or any personal property of another with a value of $150 or more, without his consent. 720 ILCS 5/20-1(a)(1) (West 2014).

¶ 21 In this case, defendant challenges only whether the evidence proved she acted knowingly. A person acts "knowingly" or "with knowledge" when she acts intentionally or when she is "consciously aware" that her conduct makes a result "practically certain" to occur. 720 ILCS 5/4-5 (West 2014). Knowledge, as an element of an offense, is decided by the trier of fact. *People v. Frazier*, 2016 IL App (1st) 140911, ¶ 23. Direct evidence that a defendant acted knowingly is not required, as knowledge is usually proven circumstantially. *People v. Ortiz*, 196 Ill. 2d 236, 260 (2001).

¶ 22 Making all reasonable inferences in favor of the State, a rational trier of fact could find that defendant intentionally started the fire. There is strong circumstantial evidence of defendant's motive and opportunity to commit aggravated arson. See *People v. Nasser*, 223 Ill. App. 3d 400, 403 (1991) (affirming the defendant's arson conviction where defendant was "the only person with both a strong motive and a clear opportunity to set the fire"). Defendant argued with Dorsey on the morning of the fire, and he told her to leave his apartment. Defendant was in the apartment alone with cigarettes and a butane lighter when Dorsey left at 7 a.m. Dorsey's testimony that he received a call approximately 20 minutes after leaving his apartment, Everett's testimony that she saw flames in the living room minutes after arriving at 7 a.m., and Smith's

testimony that she heard Everett yelling about the fire at 7:17 a.m. all suggest that the fire started when defendant was alone in the apartment.

¶ 23 Defendant's behavior also supports the inference that she intentionally started the fire. Testimony from Everett and Smith established that defendant packed her belongings in a garbage bag and removed them from the apartment before the fire, and Dorsey did not see any of defendant's possessions when he returned after the fire. Defendant seemed unsurprised when Everett drew her attention to the fire, and at no point did she call 911 or warn anybody else in the building. Instead, defendant ignored Smith when she called out to her, and left the scene before emergency responders arrived.

¶ 24 Cosentino, the State's fire causation expert, concluded the fire was ignited by an open flame such as a lighter or cigarette. He explained that a dropped cigarette could also ignite a sofa, but, in that case, it could take hours to generate visible flames. Although defendant notes that no testimony established how quickly the particular type of fabric on the couch could burn, it is apparent that the fire started within a short window of time. While defendant also notes that Cosentino could not conclusively exclude the possibility that the fire started accidentally from "careless smoking," the trial court was not required to raise that possibility to a reasonable doubt or find that defendant's conduct was merely reckless. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. Dorsey, whom the court found to be "very credible," testified that he had never known defendant to leave a lit cigarette on furniture or fall asleep with a lit cigarette in the 30 years they had been dating. The trial court heard all the evidence and inferred that defendant started the fire intentionally. *People v. Green*, 339 Ill. App. 3d 443, 452 (2003) (it is the trier of fact's responsibility to decide which of competing inferences to draw from the evidence, including a

defendant's mental state). Based on the foregoing evidence, this inference was supported and a rational trier of fact could conclude that defendant intentionally started the fire. Accordingly, we affirm the trial court's finding that defendant was guilty of aggravated arson beyond a reasonable doubt.

¶ 25 Next, defendant urges this court to reduce her sentence because she was 55 years old at the time of sentencing and had no criminal record. Defendant also contends that it was improper for the trial court to consider her substance abuse and that her conduct threatened the lives of others as aggravating factors. The State responds that the trial court considered the appropriate factors and imposed a sentence within the statutory sentencing range.

¶ 26 The Illinois Constitution requires that a sentence reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11. A trial court has broad discretion when imposing a sentence, and a trial court's sentencing decisions are entitled to deference because it is able to evaluate the defendant's demeanor, moral character, mentality, and age firsthand. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). Therefore, a reviewing court will reduce a defendant's sentence only when the trial court has abused its discretion. *Id.* at 212. A trial court abuses its discretion only when it imposes a sentence that varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Fern*, 189 Ill. 2d at 54. Although the trial court must consider all mitigating factors, it need not recite each factor and the weight it was given. *People v. Neasom*, 2017 IL App (1st) 143875, ¶ 48. Without an indication to the contrary, we must presume the trial court considered all relevant mitigating factors. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 27 We find that the trial court did not abuse its discretion in sentencing defendant. Defendant was convicted of aggravated arson (720 ILCS 5/20-1.1 (West 2014)), a Class X felony that carries a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2014)).

¶ 28 Defendant's sentence is not manifestly disproportionate to the seriousness of the offense. Although the trial court must also consider mitigating factors, the seriousness of the offense is an important factor for the trial court to consider when imposing a sentence. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 12. It is clear from the trial court's statements and receipt of the PSI report that it considered the appropriate mitigating factors, such as defendant's age and lack of criminal history. However, the trial court was not required to assign more weight to the mitigating factors than to the circumstances surrounding the offense. *Alexander*, 239 Ill. 2d at 214. In recounting the seriousness of the present offense, the court noted that defendant did nothing to alleviate the danger to others in the building after she started the fire, even though she had a clear opportunity to do so. It was Everett, not defendant, who warned the other residents and called 911. Defendant continued packing her things so she could leave the apartment. The trial court noted the damage could have been far worse if Everett had not been present.

¶ 29 Defendant, citing *People v. Gonzalez*, 243 Ill. App. 3d 238 (1993), argues that it was improper for the trial court to rely on the threat posed to others as an aggravating factor because danger to others is inherent in the offense of aggravated arson. See *Gonzalez*, 243 Ill. App. 3d at 245 (reducing a defendant's sentence for arson where the trial court improperly relied on the fact that defendant's actions threatened the lives of others, rather than the nature and extent of the offense). While a trial court may not use the existence of an element inherent in the offense as an

aggravating factor, it has the discretion to consider the "nature and circumstances" specific to a case, including "the nature and extent of each element of the offense as committed by the defendant." (Internal quotation marks omitted.) *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). Thus, it was proper for the trial court to consider that defendant created a danger to not just one person, but at least five other people, including Smith and her four children. Additionally, the trial court imposed an above-minimum sentence based not on the general threat to others inherent in the offense, but rather on what defendant did—or did not do—to exacerbate the danger *after* starting the fire. It is not inherent in the offense that defendant failed to call 911, warn others about the fire, or remain on the scene until emergency crews arrived.

¶ 30 Finally, defendant argues that her fines and fees order should be corrected to vacate an improperly imposed electronic citation fee and apply her presentence incarceration credit to several charges that were denominated as fees, although they were actually fines. The State agrees that the electronic citation fee was wrongly imposed, but maintains that defendant's presentence incarceration credit does not offset the remaining challenged assessments.

¶ 31 At sentencing, the trial court ordered defendant to pay a total of $739 in fines, fees, and costs. Those assessments included, *inter alia*: a $5 Electronic Citation Fee (705 ILCS 105/27.3e) (West 2014)); a $190 "Felony Complaint Filed, (Clerk)" charge (705 ILCS 105/27.2a(w)(1)(A) (West 2014)); a $25 "Automation (Clerk)" charge (705 ILCS 105/27.3a(1) (West 2014)); a $25 "Document Storage (Clerk)" charge (705 ILCS 105/27.3c (West 2014)); a $2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2014)); and a $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(c) (West 2014)). According to defendant's fines and fees order, none of the above charges were offset by her $5-per-day credit for her 372 days in

presentence custody, as allowed by section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)).

¶ 32 Although defendant did not challenge her fines and fees in her postsentencing motions, she asserts that we may review them under the plain-error doctrine. The State notes that defendant failed to preserve the issue for appeal, but agrees that we may review the fines and fees. Consequently, the State has forfeited any forfeiture argument, and we will address defendant's fines and fees argument on the merits. We review the validity of a trial court's imposition of fines and fees *de novo*. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 25.

¶ 33 A defendant incarcerated on a bailable offense who does not post bail is allowed a $5 credit for each day spent in presentence custody, which offsets fines assessed against her upon conviction. 725 ILCS 5/110-14(a) (West 2014). Here, defendant spent 372 days in presentence custody and is thus entitled to a credit of up to $1860. The presentence incarceration credit applies only to fines and not fees. 725 ILCS 5/110-14(a) (West 2014); *People v. Jones*, 223 Ill. 2d 569, 599 (2006).

¶ 34 First, defendant argues, and the State concedes, that the $5 electronic citation fee should be vacated. We agree, as this assessment does not apply to felonies. 705 ILCS 105/27.3e (West 2014); *People v. Smith*, 2018 IL App (1st) 151402, ¶ 12. We accordingly vacate the $5 electronic citation fee because defendant was convicted of a felony.

¶ 35 Second, defendant contends that the other charges listed above, although designated as fees, are actually fines, and should therefore be offset by her presentence incarceration credit. However, the Illinois Supreme Court recently settled this issue in *People v. Clark*, 2018 IL 122495, ¶ 51, by ruling that the "Felony Complaint Filed, (Clerk)" charge; the "Automation

(Clerk)" charge; the "Document Storage (Clerk)" charge; the Public Defender Records Automation Fee; and the State's Attorney Records Automation Fee are, in fact, fees and not fines. Thus, they are not offset by defendant's presentence incarceration credit. *Id.*

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm defendant's conviction and sentence for aggravated arson. We also order the clerk of the circuit court to correct defendant's fines and fees order to reflect the vacation of the $5 electronic citation fee.

¶ 38 Affirmed in part and vacated in part; fines and fees order corrected.