FIRST DIVISION
October 14, 2014

No. 1-13-0197

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. 11 CR 5668
	)	
SYLVIA ROJAS,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held*:** Defendant's conviction for aggravated arson was affirmed where the evidence established her guilt beyond a reasonable doubt, and her trial counsel was not ineffective for failure to call a witness to impeach a State witness.

¶ 2 Following a bench trial, defendant Sylvia Rojas[1] was convicted of aggravated arson and sentenced to six years in prison. On appeal, she asserts the evidence did not establish the

[1] While defendant's name is spelled "Sylvia" on her notice of appeal, resulting in the docketing of this appeal under that name, the trial court pleadings and transcripts spell her name "Silvia."

commission of aggravated arson because the State failed to prove that she was the person who set fire to her apartment, nor that she damaged the property "of another," nor that she damaged "a building or structure" beyond a reasonable doubt as required by the arson statute. She also contends her trial attorneys were ineffective for failing to call a witness to impeach a key prosecution witness. We affirm.

¶ 3 Defendant was indicted on two counts of aggravated arson in connection with a fire that occurred within a three-unit apartment building at 3809 North Lawndale in Chicago. Multiple witnesses testified that defendant and Julio Tapia resided in the basement apartment. The building's tenants were Mirabel Reyes and her two sisters who resided in the first-floor apartment, and the Ontiveros family who resided on the second floor. The tenants described defendant and Tapia as the building's landlords. In the late evening of March 25, 2011, about 10 law enforcement officers from a narcotics and currency interdiction task force of the Illinois State Police were gathered outside the apartment building conducting a narcotics investigation follow-up when Julio Tapia left the rear door of the basement apartment and was later escorted to the front of the building. At approximately the same time, State Police Master Sergeant Frank Spizzirri spoke through the front door of the apartment, demanding entry. Inside the apartment, defendant's 17-year-old daughter, Marilynn Rojas, refused the police entry and told Spizzirri to get a warrant. At about 11 p.m., as the police officers were waiting outside the building for the delivery of a warrant, fire was detected within the basement apartment. The following testimony was adduced at trial.

¶ 4 Mirabel Reyes testified that at about 11 p.m., she and one of her sisters were in their first-floor apartment when Reyes noticed gray-white smoke coming out of the floor vent in the bathroom. About 15 or 20 minutes before that, Reyes had heard loud knocking on a door and

voices saying, "Open the door, this is the police." After seeing the smoke, Reyes went to her front door and saw police officers who ordered her and her sister out of the apartment. When she returned to the apartment, the walls and ceiling had not sustained any fire damage.

¶ 5 Gerardo Ontiveros testified that he, his wife and their four children lived in the second-floor apartment. At about 11 p.m. Ontiveros noticed smoke coming out of floor vents in several rooms. He described it as "dark smoke. I know there was some residue that was left on there. So I remember it being dark smoke, strong smell. *** [I]t would get you to start coughing." Knowing that the police were "on the scene," Ontiveros called the police upstairs and told them about the smoke. The police told them to leave, and he and his family exited the building. When Ontiveros returned to the apartment a couple of hours later, nothing was burned but "there was just smoke everywhere ***, and you could smell the stuff for a couple of days *** because it got into the furniture and everything." The smoke left a "residue." However, no one had to come to fix any damage.

¶ 6 Bedford Park Police Detective Michael Coppolillo and about 8 to 10 other police officers were at the Lawndale apartment building, waiting for the delivery of a search warrant. Coppolillo was in the rear of the building when he heard Officer Garcia say there was a possible fire in the basement apartment. Garcia kicked in the back door, and Coppolillo and Garcia entered the basement apartment together. Coppolillo observed a young woman, later identified as 17-year-old Marilynn Rojas, in the hallway about two to three feet from the back door. The hallway was filled with smoke and the girl was hysterical and screaming. The officers motioned her to go out the back door. Then Coppolillo saw defendant come out of the bathroom; she was talking on a cell phone. She took the cell phone from her ear, pointed it at Coppolillo, and told him, "[T]alk to my attorney." He told defendant to get out of the house because it was on fire.

Coppolillo entered the bathroom and saw flames in the sink and in the bathtub. He saw papers and rubber bands burning in the sink, and paper burning in the bathtub. The entire bathroom was filled with thick, black smoke. Coppolillo was coughing and could not see, and he left the bathroom. He and other officers opened up windows and searched the apartment. He saw the bathroom after the fire was extinguished. The walls were covered with soot and smoke, but he did not think the walls had caught on fire.

¶ 7 Chicago Police Officer Joseph Martorano was called to the second-floor apartment where a tenant complained of smoke coming into his apartment. Martorano noticed "smoke billowing out of the vents" and ordered a tenant, his wife, and their children out of their apartment. Martorano returned downstairs and entered the basement apartment through the front door. He went to where he thought the source of the fire was and entered the bathroom. By then both of the women were out of the building. Martorano saw a substantial fire in both the sink and the bathtub and he tried to extinguish it. He managed to douse the flames but not the smoke. He found it very hard to breathe and left the bathroom. He was coughing up black material. Martorano was taken to the hospital and treated for smoke inhalation and burns to his hands.

¶ 8 Detective Anthony Anderson of the Morton Grove Police Department was in the front of the Lawndale building in a common hallway. When Anderson learned there was a fire in the building, he grabbed an entry tool and made entry into the basement apartment's front door behind a uniformed State trooper. Thick smoke was billowing from the apartment. Anderson saw defendant on the threshold of the bathroom doorway and a younger woman in the hallway beyond defendant. Anderson estimated that about 45 to 50 minutes passed between the time Julio Tapia left the basement apartment and someone noticed the fire.

¶ 9 Detective Michael Vogenthaler, assigned to the bomb and arson unit of the Chicago Police Department, was qualified by the trial court as an arson expert. At about 8 a.m. on the day after the fire, he went to the Lawndale building. He observed fire damage in the bathroom of the basement apartment. There were two separate areas of fire origin, one in the sink and one in the bathtub. He stated that both fires were man-made and were caused by igniting rubber bands and different types of paper with an open flame. There was fire damage to the sink, countertop, mirror, and wall; damage to the bathtub and to the walls and ceiling in the bathtub area; and to a corner of the bathroom door. Vogenthaler indicated the fire damage in State photographic exhibits.

¶ 10 John Garcia, a Northbrook police officer assigned to the Illinois State Police narcotics and currency interdiction unit, testified for the defense. Garcia was among the officers outside the Lawndale apartment at about 11 p.m. when he noticed a glow and then smoke coming from the bathroom area of the basement apartment. He notified other officers of the fire and made entry into the basement apartment through the rear door. Marilynn Rojas, defendant's daughter, was already in the hallway when Garcia entered the apartment. Behind Marilynn was defendant with her phone, saying, "[T]alk to my lawyer, talk to my lawyer." Master Sergeant Spizzirri was Garcia's boss, and Garcia would have told Spizzirri what he had observed at the scene. Garcia denied telling Spizzirri that he saw defendant exit the bathroom with a phone in her hand being followed by Marilynn Rojas.

¶ 11 Following Garcia's testimony, defense counsel requested a short continuance to obtain the presence of Spizzirri to impeach Garcia. Upon the trial court's request, defense counsel read the relevant portion of Spizzirri's report: "Inspector Garcia entered through the rear door with Inspector Coppolillo. And Inspector Garcia said he observed Silvia exiting the bathroom with a

telephone in her hand being followed by Marilynn." The State and defense then stipulated to the content of Spizzirri's report as read. Both parties rested.

¶ 12 The trial court observed at the close of trial that the case was "largely circumstantial." The court found defendant guilty of Count 2 of the indictment, charging defendant with aggravated arson in that, in committing arson by means of fire, she knowingly damaged the building at 3809 North Lawndale, and that officer Joseph Martorano, acting in the line of duty, was injured as a result of the arson. The court found defendant not guilty of aggravated arson in Count 1 which charged that, in the course of committing the arson, she knew or should have known that one or more persons were present therein. Based on the State's photographic exhibits, the court found there was damage to the walls and fixtures of the bathroom and, consequently, that defendant knowingly damaged the structure of the building. The court also found Spizzirri's police report "poorly drafted," but that it did not diminish the State's case in chief. The court sentenced defendant to six years in prison.

¶ 13 On appeal, defendant contends that the evidence failed to establish three elements of the offense of aggravated arson beyond a reasonable doubt.

¶ 14 On review of a sufficiency of the evidence claim, the critical inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review recognizes the responsibility of the trier of fact to assess witness credibility, weigh the evidence and draw reasonable inferences therefrom, and resolve any conflicts in the testimony. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). It is not our function to

resolve any conflict or inconsistency in the testimony where the trial court was in a superior position to do so. *People v. Jordan*, 218 Ill. 2d 255, 269 (2006).

¶ 15 Defendant's first claim of insufficiency of the evidence is that aggravated arson was not proven because the State was required, but failed, to establish defendant committed simple arson by damaging the property "of another."

¶ 16 Count 2 of the indictment charged defendant with aggravated arson pursuant to section 20-1.1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/20-1.1(a)(3) (West 2010)), which provides that a defendant is guilty of committing aggravated arson when, "*in the course of committing arson*, he or she knowingly damages, partially or totally, any building or structure, *** and *** (3) a fireman, policeman or correctional officer who is present at the scene acting in the line of duty is injured as a result of the fire ***." (Emphasis added.) To prove defendant committed aggravated arson, therefore, the State was required to prove the elements of arson, including the element that defendant damaged the property of another by means of fire. *People v. Smith*, 253 Ill. App. 3d 443, 446 (1993). The arson statute provides:

> "A person commits arson when, by means of fire or explosive, he knowingly:
>
> (a) Damages any real property, or any personal property having a value of $150 or more, *of another* without his consent;
>
> ***
>
> "Property 'of another' means a building or other property, whether real or personal, in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also

have an interest in the building or property." (Emphasis added.) 720 ILCS 5/20-1(a) (West 2010).

¶ 17 The clear and unambiguous meaning of the arson statute is that arson is committed when one knowingly causes damage by fire to a building whereby the interest therein of any other person, without his consent, is defeated or impaired. *People v. Ross*, 41 Ill. 2d 445, 448 (1968). The criminal damage provision of the arson statute "was designed to protect the property of individuals from criminal harm." *People v. Schneider*, 139 Ill. App. 3d 222, 225 (1985). Defendant asserts the State failed to prove that she damaged the property "of another" "[b]ecause she did not damage her tenants' apartments and did not in any way impair their interest in their tenancies." We disagree.

¶ 18 Defendant asserts her tenants' apartments suffered no fire damage. However, "burning" is not an essential element of arson; it is sufficient that the evidence show the offender knowingly damaged the property of another. *People v. Lockwood*, 240 Ill. App. 3d 137, 143 (1992). Here, smoke attributable to the fires set by defendant in her basement apartment permeated the entire building. The evidence did not establish that smoke entering the Reyes first-floor apartment caused actual damage there. However, the evidence did establish that the heavy smoke entering the second-floor Ontiveros apartment did cause damage in that unit. Officer Martorano noticed "smoke billowing out of the vents" in the Ontiveros apartment and he ordered the entire Ontiveros family out of the apartment. Gerardo Ontiveros described the smoke coming out of floor vents in several rooms as being "dark smoke, strong smell. *** [I]t would get you to start coughing." When Ontiveros returned to the apartment a couple of hours later, nothing was burned but "there was just smoke everywhere ***, and you could smell the

stuff for a couple of days *** because it got into the furniture and everything." He also testified that "some residue" was left by the smoke.

¶ 19 We reject defendant's contention that the fire damage was limited to her own apartment. Damage to the Ontiveros apartment was established where, as the result of defendant's intentional setting of the fires, the apartment was smoke-damaged to the extent that it was rendered at least temporarily uninhabitable and dangerous to the health of the tenants, the smoke permeated "the furniture and everything," the presence of smoke was felt for days, and a "residue" was left behind in the apartment. We conclude the State established a key element of arson: that the fires defendant set in her apartment's bathroom resulted in damage to the property of another.

¶ 20 Defendant next contends the State's evidence failed to establish beyond a reasonable doubt that it was she, and not her daughter Marilynn Rojas, who set the fires in the bathroom. Defendant asserts she made no incriminating statement that she set the fires, no physical evidence linked her to the fires, and no one saw her set the fires.

¶ 21 As noted earlier, when reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *De Filippo*, 235 Ill. 2d at 384-85. The elements of aggravated arson need not be proven by direct evidence and instead may be inferred from the surrounding facts and circumstances. *Id.* at 526; *People v. Gonzalez*, 243 Ill. App. 3d 238, 241 (1993). Here, as defendant asserts, there was no direct evidence to link defendant to the crime. However, "the crime of arson is, by its very nature, secretive and usually incapable of direct proof." *People v. Dukes*, 146 Ill. App. 3d 790, 794 (1986); *Smith*, 253 Ill. App. 3d at 449.

¶ 22 Julio Tapia, a co-resident of the basement apartment, had left the building some 45 to 50 minutes before the fire was detected, and defendant does not suggest that he could have set the fires. From the time Tapia left the apartment, it was surrounded by police officers, and only defendant and her daughter Marilynn remained in the apartment. Defendant postulates there was more than a reasonable doubt that Marilynn, not defendant, set the fires.

¶ 23 We reject defendant's claim as being contrary to the trial evidence, which showed that defendant was the second and last person to leave the bathroom where the fires were ignited. When Officer Coppolillo entered the back door into the basement apartment, he saw Marilynn standing just two or three feet from that door and instructed her to get out of the apartment. He then saw defendant emerge from the bathroom, talking on a cell phone. She took the phone away from her ear, pointed it at Coppolillo, and told him to talk to her attorney. The testimony of Officer Garcia, who entered the back door with Coppolillo, was substantially the same. Detective Anderson testified that when he entered the apartment from the front door at the opposite end of the hallway, he observed defendant on the threshold of the bathroom, and Marilynn was beyond defendant in the hallway. Defendant notes that Garcia was impeached by a police report in which his superior, Master Sergeant Spizzirri, wrote: "Garcia said he observed [defendant] exiting the bathroom with a telephone in her hand being followed by Marilynn." However, Garcia denied making that statement to Spizzirri. There was no direct testimony that Marilynn was the last person to leave the bathroom.

¶ 24 In *Smith*, 253 Ill. App. 3d 443 (1993), defendant was charged with arson despite the fact there was no direct evidence linking her to the commission of the crime. Defendant was a waitress in a restaurant that burned down shortly after closing time, and it was uncontroverted that she was the last person in the restaurant that night. In affirming defendant's arson

conviction, this court noted that, in criminal cases based on circumstantial evidence, it is unnecessary for the trier of fact to exclude every reasonable hypothesis of innocence before finding a defendant guilty, and that the trier of fact may convict if it is satisfied of the defendant's guilt beyond a reasonable doubt. *Smith*, 253 Ill. App. 3d at 447. Defendant acknowledges the *Smith* decision but claims it was "wrongly decided, and should be disregarded by this court."

¶ 25 Here, the evidence established that defendant, who was the last person to leave the bathroom, was the person who set fire to the materials in the bathroom sink and bathtub. Viewed in the light most favorable to the State, the evidence presented at trial was not so improbable or unsatisfactory that it created a reasonable doubt as to defendant's guilt.

¶ 26 Defendant's next assignment of error is that her aggravated arson conviction must be reversed because the evidence failed to show that she knowingly damaged "a structure." One of the elements of aggravated arson requires proof that, in the course of committing arson, an accused "knowingly damages, partially or totally, any building or structure." 720 ILCS 5/20-1.1(a) (West 2010). Defendant maintains that the only damage sustained in her bathroom was to the sink and bathtub fixtures, the only damage to the walls was that they were blackened by soot, and that there was no testimony that the fixtures were required to be repaired or replaced. She argues that there was no evidence of "burning" as required in *People v. Oliff*, 361 Ill. 237 (1935). However, as we explained in *Lockwood*, the statute in effect when *Oliff* was decided defined arson as the burning of a structure. Under the present statute, evidence of burning is no longer required. *Lockwood*, 240 Ill. App. 3d at 143. "The damage element of aggravated arson is satisfied by proof of even partial damage to the structure." In *Lockwood*, the structural damage consisted of blackened vestibule floor tiles portions of the front door that were scorched and

charred or blackened. *Id.* at 143-45. Here, the arson expert testified there was "fire damage" to the bathroom sink, the countertop, and the wall surrounding the sink; there was damage to the bottom of the bathtub and the walls near the tub; there was "heavy smoke damage" to the top of the tub; "there is also radiant heat damage done to the top of the structure and to the ceiling as well"; and a portion of the bathroom door was also damaged. In announcing its factual findings, the court noted that the State's photographic evidence portrayed the damage to the bathroom: "I do find based on State's Exhibits No. 4 and 5 that there was damage to the walls of that bathroom as well as fixture damage. As a result, I do find that [defendant] knowingly damaged the structure ***."[2] We conclude that the damage element of aggravated arson was satisfied by proof beyond a reasonable doubt that the fires defendant set in the bathroom caused damage to the structure.

¶ 27 Defendant's final contention is that she was deprived of the effective assistance of counsel when her trial counsel failed to call Master Sergeant Spizzirri as a witness to impeach the testimony of Officer Garcia.

¶ 28 Claims of ineffective assistance of trial counsel are judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). In order to prevail on his claim, the defendant must satisfy the two-pronged *Strickland* test, which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. *Strickland*, 466 U.S. at 687; *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

[2] The trial exhibits have not been included in the record on appeal.

¶ 29 At trial, Officer Garcia was called as a defense witness. He testified that when he entered defendant's apartment, he saw Marilynn Rojas near the back door and saw defendant emerge from the bathroom. Garcia denied telling his superior, Master Sergeant Spizzirri, that Marilynn left the bathroom behind defendant. Defense counsel requested a short continuance to obtain the presence and testimony of Spizzirri to establish the contents of his report, which stated in pertinent part: "Garcia said he observed [defendant] exiting the bathroom with a telephone in her hand being followed by Marilynn." When the State offered to stipulate to the report, however, defense counsel abandoned the request for a continuance and agreed to the stipulation. Defendant now complains that this constituted ineffective assistance because the trial court discounted Spizzirri's report, finding it inadmissible and poorly drafted. Defendant maintains there was no good strategic reason for failing to secure Spizzirri's testimony at trial.

¶ 30 Defendant has failed to satisfy the first prong of *Strickland*, as he has not demonstrated that his trial counsel were ineffective in failing to secure the testimony of Spizzirri. "Decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence [citation], and are, therefore, generally immune from claims of ineffective assistance of counsel [citation]." *Id.* Moreover, stipulations have the effect of eliminating the need for proof that might otherwise have been required. *People v. Spivey*, 351 Ill. App. 3d 763, 769 (2004). By stipulating to the report, defense counsel not only removed the need to subpoena Spizzirri, they were able to present impeaching evidence without running the risk that Spizzirri's testimony might be harmful to the defense. Defendant has failed to overcome the strong

presumption that her lawyers' decision to stipulate to Spizzirri's report, rather than calling him as a witness, was sound trial strategy.

¶ 31 Additionally, while the trial court did find that Spizzirri's report was poorly drafted, the record belies defendant's claim that the court discounted the report or ruled it inadmissible. The court did not find the report inadmissible when it observed in ruling on defendant's posttrial motion: "The State has correctly pointed out police reports are inadmissible. It's only used for admission [*sic*] for impeachment purposes ***." Nor did the court discount Spizzirri's report. On the contrary, in announcing its findings at the end of trial, the court specifically found that the report "does diminish the State's case in chief."

¶ 32 Defendant has also failed to satisfy *Strickland*'s second prong. Defendant claims that if Spizzirri had testified, there was a "reasonable probability" that she would have been acquitted. She offers no sound basis to support her claim, which ignores the fact that Spizzirri's report did not impeach the testimony of Officer Coppolillo or Detective Anderson. In denying defendant's posttrial motion, the trial court ruled: "I did not find that the [Spizzirri] police report was sufficient impeachment of the testimony that I've heard." Anderson testified that when he entered the apartment through the front door, he saw defendant at the threshold of the bathroom and Marilynn in the hallway beyond her. Coppolillo testified that when he entered through the back door, he saw Marilyn in the hallway just two or three feet from that door and he saw defendant emerge from the bathroom. Officer Garcia's testimony was virtually the same as that of Coppolillo. There was no reasonable probability that testimony by Spizzirri would have affected the outcome of defendant's trial. Consequently, defendant has failed to satisfy either prong of the *Strickland* test.

¶ 33 The trial evidence established all of the elements of aggravated arson beyond a reasonable doubt, and defendant's counsel were not ineffective in representing her at trial. We affirm the judgment of the trial court.

¶ 34 Affirmed.