MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Antonio D. McCarter,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 12, 2023

Court of Appeals Case No. 23A-CR-624

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

Trial Court Cause No. 49D28-2206-F4-16213

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] Antonio McCarter appeals his conviction for Arson, as a Level 4 felony, pursuant to Indiana Code Section 35-43-1-1(a)(1), which requires proof that there was damage to "a dwelling of another person without the other person's consent." He presents the sole issue of whether there is insufficient evidence to support his conviction, where the State alleged the victim of a non-consensual fire was Woodspring Suites ("the Hotel") but failed to prove that the corporation was "dwelling" there. The State responds that there is an immaterial variance between the charging information and the evidence adduced at trial, where the State proved that McCarter set a non-consensual fire at a place where guests dwelled. Accordingly, we address the restated issue of whether there is a fatal variance between the proof at trial and the charging information. We reverse.

Facts and Procedural History

[2] On the evening of June 14, 2022, McCarter and several others gathered outside the Hotel – located on Pendleton Pike in Indianapolis – to talk, smoke, and drink alcohol. Intoxicated and irate over his missing keys, McCarter threatened: "I'm going to burn this mother**** down if don't nobody give me my keys." (Tr. Vol. II, pg. 83.) McCarter then used a rag to set a fire at one exterior corner of the building; some of those present extinguished the fire by stomping on it. About five minutes later, McCarter moved to the back of the

building and used clothing to set another fire. This time, the fire was extinguished with liquid.

[3] Hotel guest Isheca Oliver called 9-1-1, and responding officers placed McCarter under arrest. On June 16, the State charged McCarter with two counts of Arson, one as a Level 6 felony and one as a Level 4 felony, and one count of Resisting Law Enforcement, as a Class A misdemeanor.[1] The State subsequently obtained dismissal of the second Arson charge. On February 3 and 7, 2023, McCarter was tried in a bench trial on the remaining charges. He was found guilty of Arson but acquitted of Resisting Law Enforcement. On February 24, McCarter was sentenced to five years imprisonment, with 340 days to be executed and the balance suspended to probation. McCarter now appeals.

Discussion and Decision

[4] McCarter was charged with violating Indiana Code Section 35-43-1-1(a)(1), which provides in relevant part: "(a) A person who, by means of fire … knowingly or intentionally damages: (1) a dwelling of another person without the other person's consent; … commits arson, a Level 4 felony." Pursuant to Indiana Code Section 35-31.5-2-107, a "dwelling" is "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a

[1] Ind. Code § 35-44.1-3-1(a)(1).

person's home or place of lodging." Indiana Code Section 35-31.5-2-234 includes a "corporation" within the definition of a "person." When the owner and the occupant of a building are not the same person, the property is the "dwelling" of the person living in it, rather than the "dwelling" of the owner. *Neuhausel v. State*, 530 N.E.2d 121, 124 (Ind. Ct. App. 1988).

[5] The charging information reads: "On or about June 14, 2022, ANTONIO D MCCARTER did by means of fire, knowingly damage the dwelling of Woodsprings [sic] Suites, to-wit: a hotel in which registered guests were present in the rooms in said hotel at the time of the fire[.]" (App. Vol. II, pg. 28.) At pretrial conferences, defense counsel argued that a corporation could not "dwell" as contemplated by the Arson statute; the charging information "ma[de] no sense"; and McCarter was unable to prepare a defense to the allegations because "a hotel is not a person to dwell." (Tr. Vol. II, pgs. 30, 33, 46.) However, McCarter filed no written motion to dismiss the charge.

[6] When the parties appeared for trial on February 3, 2023, McCarter directed the trial court's attention to the fact that the charging information did not include the "without consent" element of the Arson statute and suggested that the State should have filed a criminal mischief charge. (*Id.* at 61.) According to defense counsel, the State was "mixing and matching different parts of the statute to make things fit under the Level 4." (*Id.* at 64.) The State responded that "lack of consent" should be treated as an affirmative defense, but this position was rejected by the trial court upon review of the Arson statute. (*Id.* at 68.) The trial court denied McCarter's oral motion to dismiss and proceeded to trial.

[7] Oliver testified that she was a guest at the Hotel on the date of the incident and that she had seen McCarter set two fires. Montie Adams testified that she was on duty at the front desk of the Hotel during the late evening of June 14, 2022. She did not see the events unfold but testified that she did not give consent for any fire to be set on the premises and that it would have been against company policy for another employee to do so. City of Lawrence Deputy Fire Marshal Greg Gates testified that he conducted a fire investigation at the Hotel, and he had found two "areas of [fire] origin." (*Id.* at 156.)

[8] The trial court found McCarter guilty of the charged arson, explaining its reasoning as follows:

> The Court does believe that the State has proven that beyond a reasonable doubt, that Mr. McCarter set the fire. Based on the statement he made, it shows his intent. He used the towel and damaged a dwelling. I believe a hotel is a dwelling, a place of lodging of another person. It was owned by the Woodspring Suites. It was done so by means of fire and Woodspring Suites did not consent to that. So, I believe beyond a reasonable doubt, the State has proven Count I, arson, as a Level 4 felony.

(*Id.* at 197.)

[9] McCarter concedes that he set fires causing black marks on a structure. But he points to an absence of evidence that the site damaged was the "dwelling" of the Hotel, as alleged. McCarter argues that the State failed to establish that he committed Arson, as a Level 4 felony, because "the State cannot obtain a

conviction by proving that the *owner* of someone else's dwelling did not consent to the damage.[2]

[10] On the record before us, we agree that the Hotel, although considered a "person" under the Indiana Criminal Code, was not using the damaged structure as a "home or place of lodging." *See* I.C. 35-31.5-2-107. And, as previously stated, where the owner and occupant are not the same, the person who is living in the structure is the person "dwelling" in it. *Neuhausel*, 530 N.E.2d at 124.

[11] The State does not argue that it presented sufficient evidence to establish the allegations of the charging information. Rather, the State contends that it "presented sufficient evidence that McCarter damaged the dwelling of a hotel guest without her permission." Appellee's Brief at 9. The State directs our attention to *Daniels v. State*, 957 N.E.2d 1025, 1030 (Ind. Ct. App. 2011), for the proposition that a variance between the proof at trial and a charging information is an essential difference that is fatal only if it is material. The test for determining whether a variance is fatal is: "(1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby; (2) will the defendant be protected in [a] future criminal

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[2] The offense of Arson may be enhanced from a Level 6 felony to a Level 4 felony if the building or structure is a "dwelling." I.C. § 35-43-1-1. Here, however, McCarter is not conceding that the State proved a Level 6 felony Arson and simply challenging the enhancement. This is because establishing arson as a Level 6 felony includes an element that the greater offense does not, that is, intent to defraud. *Id.*

proceeding covering the same event, facts, and evidence against double jeopardy?" *Id.*

[12] "[T]he law exacts that the name of the person upon whom the offense was committed shall be given in the pleading in order that the accused party may be fully advised in respect to the crime which he is charged to have committed." *Padgett v. State*, 167 Ind. 179, 78 N.E. 663, 665 (1906). Here, the State deems the substitution of the identity of an arson victim from owner to guest to be an immaterial variance, albeit without citing authority for that proposition. To be sure, "not all variances involving a victim's identity are fatal." *A.A. v. State*, 29 N.E.3d 1277, 1282 (Ind. Ct. App. 2015). However, where the charging information "identified a different victim entirely, not the correct victim by way of a nickname," we have found the variance to be material. *Id.*

[13] Here, the State filed an information to the effect that it would prove that McCarter, by fire, damaged the dwelling of a corporation; the information omitted the element of lack of consent. McCarter objected that he could not marshal a defense to the stated allegations and, although no amendment was made, the trial court advised the State that lack of consent would have to be proven. The State introduced evidence that: McCarter set two exterior fires – one in a pile of rocks and one near a drainpipe; damage consisting of black marks was subsequently observed at the sites; the Hotel had guests in residence at the time; Adamson did not give permission for a fire; it would have been against corporate policy to give permission for a fire; hotel guests acted to put out the fires.

[14] In closing argument, the State acknowledged that it "had to prove that it was the dwelling of Woodspring Suites" and continued:

> we proved that it was a dwelling through the testimony of Isheca Oliver, who testified she was living at the hotel. Other people were living at the hotel. So, we've proven [that] under the definition of dwelling.

(Tr. Vol. II, pg. 186.) According to the State, an inference could be drawn as to lack of consent on Oliver's part because:

> Oliver … testified that other residents of the hotel who were out there and saw the fire being started, actually went and put the fire out, further evidence that this fire was set without consent.

(*Id.* at 187.)

[15] In sum, the State acknowledged throughout the trial that it had charged McCarter with committing arson at the dwelling of the Hotel and was obligated to prove as much. However, the State lacked evidence that the Hotel used the premises as a dwelling, consistent with the statutory definition. Thus, the State alternately identified the victim as a corporation or guest, placing McCarter in the position of defending against either or both contentions. Notably, the fact finder focused upon lack of consent by the Hotel. Although the State now argues that it proved McCarter committed Arson, as a Level 4 felony, against Oliver, such would amount to a material variance between the proof adduced at trial and the charging information.

Conclusion

[16] The State did not satisfy its burden of proof to convict McCarter of Arson, as a Level 4 felony, as charged.

[17] Reversed.

May, J., and Felix, J., concur.