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IN THE
COURT OF APPEALS OF INDIANA

DEXTER JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0703-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No.49G02-0610-FB-197952

December 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Dexter Johnson appeals his conviction of arson, a Class B felony. Johnson raises the sole issue of whether the evidence is sufficient to support his conviction. Concluding that there was sufficient evidence to prove his guilt beyond a reasonable doubt, we affirm. We also remand with instructions that the trial court ensure only one judgment of conviction was entered.

Facts and Procedural History

On October 9, 2006, Crystal Coleman called 911 to report a fire in her apartment, located at 2130 Emerson Knoll Place in Indianapolis. Coleman is the mother of Johnson's infant son, Delasjuan Coleman. At the time of the fire, Delasjuan was using a ventilator to assist his breathing. Johnson regularly visited and cared for Delasjuan, but Johnson did not live with him.

On the evening of October 9th, Johnson and Coleman argued, and Johnson retreated to the bedroom of the apartment. Coleman later walked to the bedroom and found a pair of pants on fire in the closet. She ran to another apartment and placed an emergency call. Upon her return, the fire was extinguished and Johnson was not in the apartment.

Firefighters responded to Coleman's call, but found the fire extinguished upon arrival. The fire was confined to the bedroom closet. In the fire, two pairs of jeans, a plastic clothes hanger, and a shoe were burned. The carpet was charred in and around the closet. Initial responders blew smoke out of the apartment's hallway with a fan.

On October 13, 2006, the State charged Johnson with the following five counts: 1)

arson, a Class B felony; 2) arson, a Class B felony; 3) arson, a Class D felony; 4) criminal recklessness, a Class D felony; and 5) interfering with the report of crime, a Class A misdemeanor. On January 8, 2007, the State dismissed counts three and four. On January 9, 2007, a jury found Johnson guilty of the remaining arson counts and not guilty of count five. On January 31, 2007, the trial court merged the arson verdicts and sentenced Johnson to a ten-year period of incarceration.[1]

Discussion and Decision

I. Standard of Review

When reviewing the sufficiency of the evidence, we "neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005) (quoting Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004)). We consider conflicting evidence most favorably to the verdict. Id.

II. Sufficiency of Evidence

[1] We note that the Case Chronology report indicates that judgments of conviction were entered on Counts 1 and 2. The Abstract of Judgment, on the other hand, indicates that a conviction was entered only on Count 1. Appellant's Appendix at 17. During the sentencing hearing, the court said, "I will sentence the defendant to ten (10) years in the Department of Correction on Count 1." Transcript at 303. There were no objections or requests for clarification from either party. Convictions for both counts would violate double jeopardy because damage to a single property constitutes only one arson, even if it fits under more than one subsection of Indiana Code section 35-43-1-1(a). Mathews v. State, 849 N.E.2d 578, 586 (Ind. 2006). ("[A] single set of facts that satisfies more than one of the circumstances enumerated in section 1(a) . . . supports only one B felony as a violation of section 1(a) because only one property is damaged."). To ensure that

Indiana Code section 35-43-1-1(a) states in pertinent part:

> A person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages:
> (1) a dwelling of another person without the other person's consent; [or]
> (2) property of any person under circumstances that endanger human life . . .
> commits arson, a Class B felony.

Johnson was charged with and found guilty of two counts of arson: one for damaging a dwelling and one for endangering human life. Johnson argues that the State did not prove either charge.

To convict Johnson of arson as a Class B felony, the State had to prove beyond a reasonable doubt that Johnson knowingly or intentionally damaged either Coleman's dwelling or her property under circumstances which endanger human life. See Ind. Code § 35-43-1-1(a).[2]

A. Damage to a Dwelling

Johnson argues insufficient evidence supports his conviction under subsection one of the statute, which requires damage to "a dwelling of another person." Ind. Code § 35-43-1-1(a)(1). Johnson argues that the only damage was to carpet, which is not part of the dwelling. He cites Lynch v. State, 175 Ind. App. 111, 370 N.E.2d 401 (1977), in his attempt to establish that carpet is not an integral part of the dwelling's structure and thus, does not satisfy the statutory requirement that the fire cause damage to a dwelling.

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double jeopardy was not violated, we remand with instructions to vacate one of the convictions. If only one judgment of conviction was entered, no action is necessary.

[2] Neither party addressed the "knowingly or intentionally damages" portion of the statute, and we therefore do not analyze whether sufficient evidence exists to satisfy the statute's mens rea requirement.

However, we agree with the panel of this court that decided Williams v. State, 600 N.E.2d 962 (Ind. Ct. App. 1992). In Williams, the court discussed Indiana Code section 35-43-1-1(a) and noted that the word "damages" is not defined in the statute. The court discussed the common law approach, including Lynch,[3] which required proof of an actual burning. The common law approach determined that a mere discoloring, smoking, or scorching was not sufficient to support a conviction for arson. However, after this discussion, the Williams court construed the current arson statute and held that smoke damage and soot on a basement wall were sufficient to support a conviction for arson under Indiana Code section 35-43-1-1(a)(1). 600 N.E.2d at 965.

Johnson argues that his case should be distinguished from Williams because no soot or smoke residue was left inside the closet. He argues that this court should therefore conclude that damage was not actually done to the dwelling. Johnson further argues that his case should be distinguished from Williams because the carpet was not permanently affixed to the dwelling, and therefore does not satisfy the definition of "dwelling." We disagree.

Modern Indiana courts have not specifically determined whether carpet in an apartment is a permanent fixture for the purposes of proving arson. However, in O'Daniel v. State, 188 Ind. 477, 123 N.E. 241, 241 (1919), our supreme court found that to prove arson, the State "should show clearly . . . that there was a burning of the building; a burning of that which was a part of the structure that belonged to the real estate, and not appellant's personal

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[3] Lynch was decided under the previous arson statute, which provided: "Any person who willfully and maliciously sets fire to or burns or causes the setting of fire to or the burning, or who aids, counsels or

property . . . which he had right to remove." Although the arson statute has changed since O'Daniel was decided, the rationale of O'Daniel indicates that the arson statute, at one point in time, was meant to include damage to property that was not the personal property of the tenant.

The burned carpet was most likely not an item which Coleman brought with her when she moved into the apartment. Nor was the carpet an item which Coleman would take with her when she vacated the apartment. Therefore, the jury had sufficient evidence to conclude that the carpet was part of the dwelling in order to satisfy the arson statute. See Gunkel v. Renovations, Inc., 822 N.E.2d 150, 156-57 (Ind. 2005) (recognizing that installed carpet is part of the residence); cf. In re Vic Bernacchi & Sons, Inc., 170 B.R. 647, 651 (N.D. Ind. 1994) (recognizing that under Indiana law, "A fixture is 'a thing that originally was a chattel, but has become a part of the real estate by reason of attachment thereto by one having an interest therein.'" (quoting Ochs v. Tilton, 181 Ind. 81, 103 N.E. 837, 838 (1914)).

B. Damage to Property under Circumstances which Endanger Human Life

Johnson also contends that there was not sufficient evidence to convict him under subsection two of the arson statute, which requires damage to property that endangers human life.

In Thacker v. State, 477 N.E.2d 921 (Ind. Ct. App. 1985), this court established that a fire occurring in a residential area is sufficient proof that human life was endangered. In Thacker, the court said, "The record discloses that the fire was set in a pile of rubbish inside a

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procures the setting of fire to or the burning of any dwelling house . . . ." Lynch, 175 Ind. App. at 117, 370

garage just some seventy-five feet from the main house in a residential area. To say that this fire posed no eminent threat to spreading or enveloping the residential neighborhood . . . goes against all reason." Id. at 924.

Johnson argues that his case should be distinguished from Thacker because the fire was extinguished by the time that emergency personnel arrived. Johnson further argues that because the fire was extinguished before any material damage was done to the dwelling, no human life was endangered. The court in Thacker did not make a distinction between the actual endangerment of human lives and potential endangerment of human lives. Instead, the court said, "The fact that the fire occurred in a residential area is alone sufficient to establish that human life was endangered." Id. at 924. However, in Faulisi v. State, 602 N.E.2d 1032, 1036 n.3 (Ind. Ct. App. 1992), trans. denied, this court recognized that "[f]or arson to be elevated to a class A or class B felony in Indiana, the State must prove beyond a reasonable doubt that there was actual endangerment; a greater burden than showing that endangerment was foreseeable."

This court will not reweigh the evidence presented to the trial court. Wright, 828 N.E.2d at 906. If there was sufficient evidence for the jury to have determined that there was actual endangerment, we will affirm the trial court's decision. Id.

Although we recognize that the facts in this case are different from Thacker, we also hold that Johnson's conduct endangered human lives because he set a fire in an area where he knew there were other human beings. The evidence that Johnson's son was sleeping while

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N.E.2d at 404 (White, J. dissenting) (quoting Ind. Code § 35-16-1-1 (Burns Code Ed., 1975)).

using a ventilator in the room next to the one where the fire was set, and the fact that Coleman and her daughter were present in the apartment was sufficient evidence from which the jury could determine that Johnson actually endangered human life.

Conclusion

We conclude the State introduced sufficient evidence to support a finding that Johnson knowingly or intentionally set a fire that either damaged Coleman's dwelling or endangered human life. Johnson's conviction of arson is therefore affirmed.

Affirmed and remanded.

KIRSCH, J., and BARNES, J., concur.