

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERTRUDE CARR,

Defendant-Appellant.

UNPUBLISHED

January 18, 2002

No. 225968

Wayne Circuit Court

Criminal Division

LC No. 99-004175

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of burning a dwelling house, MCL 750.72, and sentenced to four to twenty years' imprisonment. She appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant argues that the evidence was insufficient to show that she was able to form the requisite intent to commit arson. She contends that evidence of her voluntary intoxication established a defense to the charged crime and that the prosecution failed to establish that the fire was not accidental or caused by reckless or careless conduct. In reviewing the sufficiency of the evidence presented in a bench trial, an appellate court views the evidence de novo and in the light most favorable to the prosecutor to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. Deference is given to the trial court's determinations of credibility. *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999).

Defendant's contention that arson is a specific intent crime, and that her intoxication is therefore a defense against the charge, is incorrect. MCL 750.72 prohibits the act of "wilfully or maliciously burn[ing] any dwelling house, either occupied or unoccupied."

. . . To establish that a defendant acted wilfully or maliciously and voluntarily, the prosecution must prove one of the following: 1) that the defendant intended to do the physical act constituting the actus reus of arson, i.e., starting a fire or doing an act that results in the starting of a fire (intentional arson); or 2) that the defendant intentionally committed an act that created a very high risk of burning a dwelling house, and that, while committing the act, the defendant knew of the risk

and disregarded it (wanton arson). [*People v Nowack*, 462 Mich 392, 409; 614 NW2d 78 (2000).]

Neither type of arson requires a finding that the defendant acted with specific intent. “The wilful and wanton commission of an act that creates a very high risk of burning a dwelling house is an alternative method of proving malice” for the offense of arson. *Id.* at 410. Because the burning of a dwelling house is not a specific intent crime, voluntary intoxication is not an available defense. See *People v Langworthy*, 416 Mich 630, 638; 331 NW2d 171 (1982); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

Although defendant also contends that the fire could have been accidental, or characterized as reckless or careless, the evidence, viewed most favorably to the prosecution, was sufficient to enable the court to find that the fire was neither accidental nor the result of reckless or careless conduct. Prosecution witnesses testified that defendant padlocked the door to her burning apartment as she left and hesitated to give the key to the building manager. Defendant was observed yelling in the hall that she was going to burn the building and everybody in the building. Immediately after the fire started, defendant deflected blame from herself and accused her boyfriend of climbing through a window and setting the fire. When she was apprehended after the fire, defendant accused her boyfriend of having affairs with other tenants. Defendant’s claim in her statement to the police that she called 911 was contradicted by the 911 tape. This evidence points to defendant’s intention to burn the building, her motivation for doing so, and her consciousness of guilt in that she immediately tried to blame someone else for the fire. The arson investigator testified that the fire was started in multiple locations on the couch in defendant’s living room, which negates a finding of careless smoking as a cause of the fire. The evidence was sufficient to establish, at a minimum, that defendant intentionally committed an act that created a very high risk of burning a dwelling house, and that, while committing the act, she knew of the risk and disregarded it.

Next, defendant argues that the trial court abused its discretion by departing from the legislative sentencing guidelines recommended minimum sentence range of twelve to twenty months. As scored by the trial court, defendant received a prior record variable score of zero and was scored ten points for offense variable (OV) 9, for there being two to nine victims.¹ The resulting guidelines range was twelve to twenty months. The Department of Corrections recommended that defendant receive two years’ probation. Characterizing the Department of Corrections’ recommendation as “irresponsible,” the trial court departed from the recommended sentence range and sentenced defendant to a term of four to twenty years, noting that defendant had started a fire in an apartment building and it was such a bad fire that people could have been killed. No other explanation was given for departing from the guidelines.

Under the statutory sentencing guidelines act, a court must impose a sentence within the appropriate sentence range, MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000), but may depart from the recommended range if there are substantial and compelling reasons to do so and the court states on the record the reasons for departure. MCL

¹ According to the guidelines instructions, “each person who was placed in danger of injury or loss of life” is a victim.

769.34(3); *Babcock, supra* at 72. A court shall not base a departure on an offense characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

We conclude that the trial court abused its discretion in sentencing defendant. The court did not articulate any reason for departing from the guidelines other than stating that defendant started a fire in an apartment building and that people could have been killed. We believe these facts are reflected in the scoring of the guidelines. Because the statute under which defendant was convicted, MCL 750.72, is not restricted to the burning of an occupied dwelling house, defendant was properly scored points for multiple victims, who were placed in danger of injury or loss of life. Although testimony from the building manager indicated that there were forty-three units in the building, no evidence was presented indicating how many units were occupied. Even if the court could properly find that there were ten or more victims, the recommended sentence range in that instance would be only fifteen to twenty-five months.

Furthermore, the record does not support the prosecution's claim that defendant was sentenced as a third habitual offender. The presentence report identifies only one prior felony conviction and four prior misdemeanor convictions. Moreover, defendant was not assessed any points in the sentencing information report for prior record variables. Nor did the trial court mention that defendant was being sentenced as an habitual offender. Thus, this argument does not explain the sentence defendant received.

Accordingly, we vacate defendant's sentence and remand for resentencing. On remand, the trial court may not depart from the applicable guidelines range unless it finds a substantial and compelling reason to do so and states its reason on the record.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder