

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBRA A. SIMMONS,

Defendant-Appellant.

UNPUBLISHED

April 16, 2002

No. 228698

Wayne Circuit Court

LC No. 99-011049

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial conviction for arson of a dwelling house, MCL 750.72. The trial court sentenced defendant to three to twenty years' imprisonment. We affirm defendant's conviction, vacate defendant's sentence, and remand the case for resentencing consistent with this opinion.

Defendant contends that insufficient evidence supported her conviction because no one witnessed who started the fire. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of arson are (1) defendant set fire to a building, (2) the building was a dwelling house, and (3) when defendant burned the dwelling, she intended to set a fire knowing this would cause injury or damage to another person or property, and defendant acted without just cause or excuse. *People v Nowack*, 462 Mich 392, 402; 614 NW2d 78 (2000); CJI2d 31.2(4). Because proof of a fire alone gives rise to the presumption "that the fire was the result of accident," the prosecutor must also show that the defendant set the fire intentionally. *People v Lee*, 231 Mich 607, 612; 204 NW 742 (1925). As our Supreme Court stated regarding evidence in arson cases:

There is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from

an accidental cause. [*Nowack, supra*, 462 Mich 402, citing *Fox v State*, 179 Ind App 267, 277; 384 NE2d 1159 (1979).]

Viewing the evidence in the light most favorable to the prosecution, the evidence supports a reasonable inference that defendant set the fire. Defendant and Catherine Perry, the mother of defendant's former boyfriend, had a very strained relationship. Because of violent conduct by defendant, Perry obtained a personal protection order against her. Defendant threatened Perry on multiple occasions and, importantly for our analysis, threatened to burn down Perry's apartment on the day before the fire. Perry saw defendant outside of her building, and heard defendant shouting and banging on her apartment door moments before a burning paper was placed under the door. Perry then saw defendant leaving the apartment building shortly after the fire was set. Also, evidence established that the fire was caused by a burning piece of paper, which was contrary to defendant's version of the facts when she asserted that her friend, Shonda Reynolds, started the fire using alcohol. This circumstantial evidence supports a finding that defendant set the fire, and therefore, the essential elements of arson were proven beyond a reasonable doubt. *Nowack, supra*, 462 Mich 402-404; *Wolfe, supra*, 440 Mich 515; *Hutner, supra*, 209 Mich App 282.

Defendant also argues, and the prosecutor agrees, that she is entitled to be resentenced because the trial court failed to state a substantial and compelling reason for its upward departure from the sentencing guidelines range. MCL 769.34(3). Because the offense in question occurred after January 1, 1999, the Michigan Supreme Court sentencing guidelines do not apply to this case; instead, the newly enacted legislative guidelines apply. MCL 769.34(1) and (2). The trial court must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2). A trial court may not depart from the recommended sentencing range unless it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). Moreover, when a trial court makes an upward departure from the sentencing guidelines range, it must inform the defendant, orally and in writing, that she may appeal the sentence on the basis of the departure. MCL 769.34(7); MCR 6.425(E)(4); *Babcock, supra*, 244 Mich App 73.

Here, the applicable sentencing guidelines range was fifteen to twenty-five months. The trial court sentenced defendant to a minimum term of three years. The prosecutor concedes in his appeal brief that the trial court failed to indicate its departure from the guidelines and did not articulate a substantial and compelling reason for its decision. Because the trial court failed to do so, defendant's sentence is vacated and we remand this case for resentencing. On remand, the trial court may impose any minimum sentence within the appropriate guidelines range or depart from that range if there is a substantial and compelling reason to do so. MCL 769.34(11); *Babcock, supra*, 244 Mich App 80.

Defendant says that the sentence she received is disproportionate to the offense committed because the sentencing judge exceeded the maximum of the guidelines range. Defendant's claim of proportionality is of no consequence because proportionality is no longer the test when evaluating a trial court's imposition of a sentence and the issue is moot in light of our ruling to vacate the sentence and remand for resentencing.

Defendant's conviction is affirmed, her sentence is vacated, and the case is remanded to the lower court for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad