[Cite as *State v. Williams,* 2010-Ohio-3453.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23650
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4021
v.	:	
	:	(Criminal Appeal from
JAMES D. WILLIAMS, III	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 23rd day of July, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant James Williams appeals from his conviction and sentence on charges of Aggravated Arson (Occupied Structure), Aggravated Arson (Agreement for Hire), Arson (Harm to Property of Another), Murder (Aggravated Arson-Occupied Structure), Murder (Aggravated Arson-Agreement for Hire), Arson,

Involuntary Manslaughter, and two counts of Possession of Criminal Tools. After the conviction, the trial court merged the two murder charges, and sentenced Williams to a total of fifteen years to life in prison.

{¶ 2} Williams contends that he could not be convicted of Aggravated Arson or Murder, because the State failed to prove that he knowingly caused physical harm to an occupied structure.

{¶ 3} We conclude that the State presented sufficient evidence to establish that Williams knowingly caused physical harm to an occupied structure. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} The charges against Williams arose from an August 2008 fire at the Ivy Lounge, which resulted in the death of Robert Fabia. The circumstances surrounding the fire are largely undisputed.

{¶ 5} In late August 2008, the defendant, James Williams, was approached by an individual whom he knew as "Unc." Unc told Williams that someone he knew was upset with the owner of the Ivy Lounge, because the owner had cheated him out of some money. Unc stated that Williams would be paid $500 if he helped set the Ivy Lounge on fire.

{¶ 6} On August 25, 2008, Williams told his mother that he needed to drop off equipment for performing a lawn job and roof repair. Williams's mother drove him to Unc's address, where he was given $30 for gasoline. Williams filled a gas can, and dropped off the gas can and a ladder in an area near the rear of a muffler

shop located on Main Street in Dayton, Ohio. The muffler shop is next door to the Ivy Lounge. Williams then returned home to his apartment.

{¶ 7} The Ivy Lounge is a private club that opened in January 2008. The Ivy Lounge is a large two-story brick building with a flat roof that fronts on the west side of North Main Street in Dayton, Ohio. A one-story addition, also containing a flat roof, is located on the north side of the building. The addition contained a drive-up beer store called The Ice House, but was no longer in use at the time of the fire.

{¶ 8} The parking lot for the Ivy Lounge is located on the east, or front side of the building, facing North Main Street. The muffler shop is located to the north of the Ivy Lounge, and there is a small wooden fence between the north side of the lounge building and the muffler shop. Because of this fence, persons who wish to access the north side of the Ivy Lounge must go around the north side of the muffler shop and walk to the south, down an alley.

{¶ 9} The main entrance for the Ivy Lounge is on the east, or front, side of the building. When patrons enter the building, they come into a foyer area and a desk where they sign in. They then go through double doors into the main bar/restaurant seating area. The kitchen is beyond the seating area, and an office area is to the side of the kitchen. A patio on the south side of the building is enclosed by a wooden fence that runs most of the length of that side of the building.

{¶ 10} The Ivy Lounge is bordered on the south side by a Rooster's Restaurant and a parking lot owned by Rooster's. The parking lot is located between Rooster's and the Ivy Lounge, and is used by Rooster's patrons to park, and

by Ivy Lounge patrons for overflow parking.

{¶ 11} Sylvester Ballard owns the Ivy Lounge, and employed the fire victim, Robert Fabia, as a chef. Fabia also took care of day-to-day club operations. On the evening of August 25, 2008, the club hosted a "Women for Obama Rally," because Michelle Obama was speaking at the Democratic National Convention that night. Ballard arrived around 7:00 p.m., and a number of people were already there, including five employees. Fabia was in the banquet area, helping prepare things.

{¶ 12} Ballard stayed until at least 11:00 p.m. that evening. When Ballard left, the rally was over, and only Fabia and two cub members, Julia Ewing and Tonya Dillard, were still there. Dillard and Ewing stayed until around 12:55 a.m., and left from the front door. Dillard was parked in the Rooster's lot, in a fenced area, close to Rooster's, while Ewing was parked in the Ivy Lounge's front lot. Fabia stood at the door and watched to make sure the two women got safely to their cars. Dillard thought she saw someone in the dumpster area to her left, and jumped. Fabia and Ewing asked her what was wrong, and she said nothing. They told her to go ahead, that they were watching her. Dillard later described the person to police as a black male, wearing dark pants and a white shirt.[1]

{¶ 13} Fabia did not leave the Ivy Lounge that night. Fabia had his own residence, but occasionally stayed overnight at the club if he drank more alcohol than he should. Some employees were aware that Fabia stayed overnight occasionally, but the owner was not aware of this fact. The building did not have an apartment or

[1]This does not fit the Defendant's description. It does fit Williams's description of Unc.

beds, nor was there a place to take showers. The office did have a couch.

{¶ 14} On the night of the fire, Fabia had parked his van in the Rooster's parking lot, right next to the wooden fence that encloses the patio area of the Ivy Lounge. Fabia generally parked there, next to a gate in the fence, because it was easier for him to unload food or other items.

{¶ 15} During the daylight hours of August 25, 2008, James and Unc parked in the Rooster's lot to look at the Ivy Lounge. They also drove over to a Shell station on the corner, and Unc pointed out a vent in the roof into which they could pour gasoline and hopefully start a fire. Later in the evening, Unc picked Williams up after 1:30 a.m., and they drove over to the area where the Ivy Lounge was located. They parked on a side street and walked around three sides of the Ivy Lounge: (1) the muffler shop or north side; (2) the North Main or east side; and (3) and the Rooster's parking lot or south side. Williams saw the van parked close to the front door of the Ivy Lounge, and asked Unc if someone was inside. Williams asked this because he was afraid the car belonged to someone in the building. Unc told Williams that no one was there, so they went to the north side of the building. Williams placed the ladder against the side of the Ivy Lounge that had the lower roof. Williams then went up the ladder with the gas can, and Unc came up after him.

{¶ 16} Williams walked across the lower roof and went up to the higher roof with the use of a second ladder that was already there. Williams stomped on the roof, pulled on electrical wires, and walked around in a manner that would wake someone or get them to come out of the building. Williams then opened an access door on the vent and poured gasoline down the shaft. He tried to light the gas with a

lighter, but had trouble getting it to light. Williams then poured gas on the actual vent door and lit it. In Williams's words, "It exploded." Williams ran off the roof, and Unc and Williams ran to the car. Williams could see the flames on the roof.

{¶ 17} The dispatch for the fire came in to the Dayton Fire Department around 1:57 a.m., and firemen arrived on the scene around 2:01 a.m. Firemen saw visible flames on the roof area of the lounge. The building was locked, and firemen did not see anything indicating that someone was in the building. They broke in the doors and began fighting the fire, which took fifteen or twenty minutes to extinguish. Victoria Carr, Supervisor for Fire Investigations, entered the building around 2:30 a.m., after the fire was extinguished. While Carr was investigating, she was informed that a firefighter had discovered a victim in the kitchen area. Carr asked everyone to leave the building, and the homicide squad was called. Robert Fabia was eventually identified as the victim.

{¶ 18} The ladder that Williams used was found at the north side of the building, and a gas nozzle was found on the side of the vent that was in the middle of the upper roof. Fire investigators determined that the fire originated in the hallway between the bar and kitchen, which was open from the floor to the roof. The vent was right above the point of origin. The fire investigators determined that gas was poured from the roof area into the vent, into the hallway area off the bar, and then set on fire. Fabia's death was caused by smoke inhalation.

{¶ 19} When Williams arrived home after setting the fire, he told his fiancee, Valerie, to watch the news. After learning about the fire at the Ivy Lounge and that a body had been found, Valerie woke Williams up and asked if the fire is what he

meant when he asked her to watch the news. When she told Williams that a body had been found, he began crying, and said that he didn't know anything about someone being in there. More than a week later, Williams told Valerie that he had been hired to start the fire at the Ivy Lounge.

{¶ 20} Williams also spoke with his parents a week or ten days after the fire, and told them that he had started the fire. He expressed remorse and said he thought it was an empty building. Williams's mother told him to do what he needed to clear his conscience.

{¶ 21} Williams did not go to the police. Instead, Valerie went to the police in early October 2008, and told them what she knew about the fire. The police interviewed Williams after learning that he had been arrested. Williams gave police a statement after waiving his constitutional rights.

{¶ 22} Williams was subsequently indicted on three counts of Aggravated Arson, three counts of Murder, one count of Arson, and two counts of Possession of Criminal Tools. Following a jury trial, the jury was instructed on all counts, plus the lesser included offense of Involuntary Manslaughter. The jury found Williams not guilty of Aggravated Arson (Harm to Person) and the Murder charge based on that count. The jury found Williams guilty of the remaining counts, including Aggravated Arson (Occupied Structure), Aggravated Arson (Agreement for Hire), Arson (Harm to Property of Another), Murder (Aggravated Arson - Occupied Structure), Murder (Aggravated Arson - Agreement for Hire), Involuntary Manslaughter, and two counts of Possession of Criminal Tools.

{¶ 23} Williams appeals from his conviction and sentence. After the appeal

was filed, the State filed a suggestion of death and motion for substitution of party. The State notes that Williams died while in prison, and asks that Williams's appellate attorney, William O. Cass, Jr., be appointed as Williams's representative in the appeal. At oral argument, counsel said he had no objection to being substituted as Williams's representative in the appeal; accordingly, the State's motion for substitution is granted. William O. Cass is hereby appointed as Williams's representative for purposes of this appeal.

II

{¶ 24} Williams's sole assignment of error is as follows:

{¶ 25} "THE APPELLANT WAS ERRONEOUSLY CONVICTED OF AGGRAVATED ARSON AND MURDER BECAUSE IT WAS NOT PROVEN THAT THE APPELLANT KNOWINGLY SET FIRE TO AN OCCUPIED STRUCTURE."

{¶ 26} Under this assignment of error, Williams contends that he could not be convicted of aggravated arson or murder, because there is no proof that he knew or had reason to know that anyone was inside the Ivy Lounge when he started the fire.

{¶ 27} Williams was charged with having violated R.C. 2909.02(A)(1), (2), and (3), which provide, in pertinent part, as follows:

{¶ 28} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶ 29} "(1) Create a substantial risk of serious physical harm to any person other than the offender;

{¶ 30} "(2) Cause physical harm to any occupied structure;

{¶ 31} "(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure."

{¶ 32} The term "knowingly" is statutorily defined as acting knowingly, regardless of purpose, when a person "is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such probable circumstances exist." R.C. 2901.22(B).

{¶ 33} R.C. 2909.01(C) defines an occupied structure as:

{¶ 34} " * * * any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

{¶ 35} "(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

{¶ 36} "(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

{¶ 37} "(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

{¶ 38} "(4) At the time, any person is present or likely to be present in it."

{¶ 39} The jury found Williams not guilty of violating R.C. 2909.02(A)(1), but guilty of violating R.C. 2909.02(A)(2) and (3). According to Williams, the jury's failure to convict him of creating a substantial risk of harm to a person means that the jury believed that he did not know Fabia was in the Ivy Lounge when he started the fire. Williams further contends that the elements of R.C. 2909.02(A)(2) and (3)

require proof that he started the fire knowing that the Ivy Lounge was occupied.

{¶ 40} The State argues, however, that "knowingly," as used in the statute, modifies only "cause" and refers to a defendant's state of mind when he creates a risk or causes harm. The State also contends that "knowingly" does not modify the statutory element of an "occupied structure." Accordingly, the State argues that it only had to prove that the Ivy Lounge was an occupied structure and that Williams knowingly caused harm to the structure; it did not have to prove that Williams knew the structure was occupied. The State goes on to argue that if the legislature had intended the interpretation Williams suggests, it would have specified that no person should "knowingly cause physical harm to any known occupied structure."

{¶ 41} R.C. 2909.01(C) provides four possibilities for satisfying the requirement that a structure is occupied, and these definitions are to be read disjunctively. *State v. Fowler* (1983), 4 Ohio St.3d 16, 18. The 1973 Legislative Service Commission Notes for R.C. 2909.01 also indicate the following intent regarding how the statute is to be applied:

{¶ 42} "This section supplies a definition of 'occupied structure' for use not only in connection with the arson offenses, but also for use elsewhere in the new code, e.g. sections 2911.11 and 2911.12 (aggravated burglary and burglary). The definition's general concept is that the actual or likely presence of a person in a structure, regardless of the nature of the structure itself, creates a more serious risk of harm from commission of arson, burglary, and related offenses, and thus warrants more severe treatment of offenders.

{¶ 43} "Under division (A) of the section, all dwellings are classed as occupied

structures, regardless of the actual presence of any person. Whether or not the dwelling is used as a permanent or temporary home is immaterial, so long as it is maintained for that purpose. Thus the definition includes not only the mansion on Main Street, but also the summer cottage, and the tin shack in the hobo jungle. It does not include an abandoned dwelling. Division (B) complements division (A) by classing as occupied any structure which is actually being used as a dwelling, even though it is not maintained as such.

{¶ 44} "Under division (C), all structures which at the time are specially adapted for overnight accommodation, are classed as occupied structures. This includes the tent set up for shelter and sleeping, the steamer which maintains passenger staterooms, and the cabin cruiser or houseboat which at the time is made up for sleeping accommodations. The tent camper rigged for an overnight stay is an occupied structure, but would not come under the definition when collapsed for travel.

{¶ 45} "Division (D) classes as occupied all structures in which at the time any person is present or likely to be present. This includes the otherwise deserted warehouse in which a watchman is on the scene, and also includes the retail store which is open for business but which is momentarily empty because everyone has stepped out to watch a parade. In the first case, someone is actually present. In the second case, someone is likely to be present."

{¶ 46} As noted, the first three definitions deal with situations in which a structure is maintained or occupied as a permanent or temporary dwelling or habitation, or is specially adapted for overnight accommodation of any person. See

R.C. 2909.01(C)(1),(2), and (3). These situations do not apply to the case before us, because there is no evidence that the Ivy Lounge was maintained or occupied as a permanent or temporary dwelling, nor is there evidence that the lounge was specially adapted for overnight accommodation. The fact that Fabia occasionally spent the night there is irrelevant for these purposes, since the premises did not contain an apartment, bedroom, or shower facilities, nor was it specially equipped for an individual to stay overnight.

{¶ 47} The fourth definition, in R.C. 2909.01(C)(4), provides that a structure is occupied if, "At the time, *any person is present* or likely to be present in it." (Italics added). Under the plain wording of the statute, the Ivy Lounge was an "occupied structure" at the time of the fire, because a person, Fabia, was present.

{¶ 48} However, whether the Ivy Lounge fits within the definition of an "occupied structure" because someone was actually on the premises does not complete the analysis. The question remains as to what degree of knowledge is required in order to create liability under the statute. Did Williams only have to knowingly commit an act of arson in what was admittedly an occupied structure, or did he have to also be aware that an individual was present or was likely to be present – in other words, that the structure was, in fact, an occupied structure?

{¶ 49} As a beginning point, we note that the Arson statute, R.C. 2909.03, deals with damage to property only. This statute imposes different penalties, based on the value of the property that is destroyed, the type of property involved, and whether the fire is caused by an agreement for hire. In contrast, the Aggravated Arson statute, R.C. 2909.02, creates three categories of offenses that are based on

creating a risk of harm to persons. The more severe penalties are reserved for R.C. 2909.02(A)(1), which involves creating a substantial risk of serious physical harm to another, and R.C. 2909.02(A)(3), which involves creating a substantial risk of serious physical harm to an occupied structure through agreements or offers to hire. R.C. 2909.02(A)(2), the least serious violation, involves causing physical harm to an occupied structure.

{¶ 50} The 1973 Legislative Service Commission Notes for R.C. 2909.02 state that:

{¶ 51} "This section substantially broadens former law by defining the offense not only in terms of burning an occupied structure, but also in terms of endangering any person or damaging any occupied structure by means of fire or explosion. In addition, the section represents a significant shift in emphasis from the way in which the relative severity of arson offenses was formerly determined, by using the degree of danger to persons as the key factor and placing only secondary reliance on the kind of property involved in the offense."

{¶ 52} One might argue that little distinction exists between creating a risk of harm to a person and creating a risk of harm to a structure that, unbeknownst to the perpetrator, is occupied, and that, therefore, the use of the word "knowingly" would apply, and would require the State to prove that the defendant knows that a structure is occupied. Courts have held, however, that violations of R.C. 2909.02(A)(1) and (2) are not allied offenses of similar import, because "[c]reating a substantial risk of serious physical harm to a person does not necessarily cause physical harm to an occupied structure. Nor does physical harm to an occupied structure necessarily

create a substantial risk of serious harm to a person." *State v. Stambaugh* (Sept. 30, 1999), Trumbull App. No. 97-T-0230, 1999 WL 959826, * 3, citing *State v. Simon* (Nov. 27, 1989), Clermont App. No. CA89-03-010, *State v. Price* (Apr. 22, 1993), Cuyahoga App. No. 61891, and *State v. Brady* (Mar. 27, 1998), Hamilton App. No. C-970384, unreported.

{¶ 53} An illustration serves to prove this point. For example, a defendant could pour gasoline on a person and ignite it, showing an intent to cause serious physical harm to the person. No occupied structure would be involved. A defendant could also light a minor fire in an occupied structure, without causing serious physical harm to the structure, but nevertheless resulting in injury or death to a person who is present, due to smoke inhalation. Unfortunately, case law dealing with mens rea in the context of "occupied structures" is of little help. In *State v. Simpson*, Columbiana App. No. 01-CO-29, 2002-Ohio-5374, the Seventh District Court of Appeals separated the concept of "knowingly" from the issue of the occupation of a residence, without specifically commenting on its method of analysis. In discussing whether the evidence was sufficient to support a jury verdict against the defendant on a charge of aggravated arson, the Seventh District Court of Appeals quoted the elements in the statute and then stated that "Thus, in order to support the conviction on aggravated arson the evidence had to show: (1) Appellant; (2) by means of fire or explosion; (3) knowingly; (4) caused physical harm to the Borelli residence; (5) while it was occupied." Id. at ¶ 43.

{¶ 54} By framing the elements in this manner, the Seventh District Court of Appeals connected the word "knowingly" to the phrase "caused physical harm," but

used the word "while" to separate and modify the fact of occupation. Furthermore, when the Seventh District Court of Appeals discussed the sufficiency of the evidence, it did not focus on the defendant's knowledge or lack of knowledge about whether the premises was occupied. Instead, the court focused on evidence indicating that the residence in question was actually occupied; that the fire was intentionally set; that footsteps connected the defendant's home to the scenes of both fires; and that the defendant's clothing was wet, which was inconsistent with his claim that he was asleep at the time of the fires. Id. at ¶ 46. Based on the circumstantial evidence, the Seventh District Court of Appeals concluded that the defendant had "knowingly started the fires." Id. at ¶ 49.

{¶ 55} The Ninth District Court of Appeals used a similar approach in *State v. Worthy*, Lake App. No. 2004-L-137, 2005-Ohio-5871, when it focused only on evidence that the defendant was aware that his conduct could cause damage to the buildings, not on evidence that the defendant knew the buildings were occupied. The Ninth District Court of Appeals held, based on this conduct, that "there is substantial evidence upon which the jury could have reasonably concluded beyond a reasonable doubt that * * * [the defendant] knowingly set the fires." Id. at ¶ 37. See, also, *State v. Jones*, Highland App. No. 04CA9, 2005-Ohio-768, ¶ 39 (noting that the mens rea requirement under R.C. 2902.02 is that the defendant " 'knowingly' set the fire.")

{¶ 56} However, in *State v. Sexton*, Franklin App. No. 01AP-398, 2002-Ohio-3617, the Tenth District Court of Appeals stated, in a case involving aggravated arson, that:

{¶ 57} "We likewise find that there was sufficient evidence presented to support the jury's conclusions that appellant acted knowingly and that he caused physical harm to an occupied structure in committing the aggravated arson offense. The description by the cab driver of appellant throwing an object towards the dwelling and of his motion in doing so leads to a reasonable inference that he acted knowingly. Testimony from several witnesses showed that appellant was not only aware that 107 Woodrow was someone's home, but also knew some of the people living there." Id. at ¶ 39.

{¶ 58} Again, like the other appellate districts, the Tenth District Court of Appeals did not elaborate on its reasoning. Case law, therefore, provides little guidance.

{¶ 59} In arguing that the State must prove that Williams knew Fabia was present in the Ivy Lounge, Williams relies on our prior decision in *State v. Wright* (June 18, 1984), Montgomery App. No. 8452, 1984 WL 5338. In *Wright*, the defendant argued that R. C. 2909.02(A)(2) was unconstitutional as applied to him, because the statute does not require malice or intent to do a wrongful act, and the defendant did not act with malice or intent to defraud or injure anyone.

{¶ 60} We responded to this argument by noting that:

{¶ 61} "In the stipulated facts, appellant admitted that on April 10, 1982, at approximately 4:45 p.m., he set fire to a residence which was owned and maintained by his wife and himself. He admitted he entered the house and poured a trail of gasoline from the family room through the adjoining dining room and living room and on into the hallway which led to the bedrooms. He then set fire to the gasoline. At

the time he set fire to the gasoline, the wife was present in the home, although appellant stated he had no intent to injure his wife or anyone else. The property was damaged to the extent of $22,000, but the wife escaped unharmed.

{¶ 62} "Although appellant was intoxicated and under stress, he does not dispute he acted knowingly. The evidence supports that he was aware that his conduct, pouring gasoline in his home, lighting it and causing a fire, would probably cause a certain result, i.e. cause physical harm to an 'occupied' structure. The facts are undisputed that his wife was in the home at the time he started the fire, although appellant contends he did not mean to harm her.

{¶ 63} "The gravamen of the offense is the knowing causation of a fire in an 'occupied structure.' This is unlike the situation where a contractor accidentally injures a vagrant inside an abandoned commercial building, as suggested by appellant's example. There the contractor does not act 'knowingly', i.e. aware that his actions in causing an explosion will probably result in injury to an occupant. Here, the appellant set fire to a house he maintained as his residence with his wife and his wife was present. He would be equally guilty if she were likely to be present.

{¶ 64} "In any event, we are not dealing with hypothetical applications of the statute. Appellant contends that the aggravated arson statute as applied to the facts in this case render the statute unconstitutional. We disagree. The statute does not forbid all burning of property, only the knowing setting of fires in occupied structures." Id. at * 3-4.

{¶ 65} The situation in *State v. Wright*, supra – an accidental injury to a vagrant who happens to be inside an abandoned building being rightfully demolished

by a contractor – bears little resemblance to the situation before us.

{¶ 66} Although the cases do not offer much guidance, we need not resolve this issue in the context of the case before us. Even if the State were required to prove that Williams knew that a person was present or was likely to be present, the State met its burden.

{¶ 67} The testimony and photographs admitted into evidence in the case before us support a finding that Williams knew, or should have known, that a person was likely to be present. Although Fabia's van was parked in the Rooster's parking lot, the van was in close proximity to the Ivy Lounge and to a gate leading into the patio area of the lounge. The van was not anywhere near the Rooster's Restaurant. Williams's statement to the police also indicates that he and Unc walked around three sides of the Ivy Lounge and saw the van parked close to the front door of the lounge. Williams even told the police that he had asked Unc if someone was inside, because he was afraid the van belonged to someone inside the building. Williams further stated that he made noise on the roof and pulled at electrical wires in order to wake someone or to cause them to come out of the building. Accordingly, there is sufficient evidence to justify a finding that Williams knew that a person was likely to be present in the Ivy Lounge when he Williams started the fire.

{¶ 68} Williams's sole assignment of error is overruled.

III

{¶ 69} Williams's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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