MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Deborah Sue Swenson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 31, 2024

Court of Appeals Case No. 23A-CR-966

Appeal from the Greene Superior Court

The Honorable Dena A. Martin, Judge

Trial Court Cause No. 28D01-2301-F6-6

Memorandum Decision by Judge Crone
Judges Pyle and Tavitas concur.

Crone, Judge.

Case Summary

[1] Deborah Sue Swenson appeals both her conviction for class B misdemeanor criminal mischief and the imposition of a $35 fine. We affirm her conviction and the fine.

Facts and Procedural History

[2] For "[a]bout 28 years," Robert Steed has lived in a house in Jasonville. Tr. Vol. 2 at 101-02. The house's deed includes both his name and his mother's name. Over the years, Steed "had quite a few people come through [his] house[.]" *Id*. at 120. He explained, "[t]here is a couple of people, two or three people a year that comes in and out of there." *Id*. at 121.

[3] Sometime in 2022, Steed reconnected with Swenson, a high school classmate. Swenson had been living in a garage, which had burned down. Steed told her that she could come to his house to "get a shower." *Id*. at 108. Steed knew that Swenson was in his kitchen at some point. *Id*. at 130-31. A man who was staying at Steed's house in early December 2022 stated that Swenson was "seeking refuge there from the elements" because she had "no place to go" and was "essentially homeless." *Id*. at 164. A woman who was staying at Steed's house stated that she saw Swenson at Steed's house "[f]rom December [2022] until [Swenson] ended up in jail[.]" *Id*. at 186.

[4] On January 3, 2023, Steed left his house around 1:00 pm, rode with a friend to a junkyard, and did not return for up to four hours. When he exited his house, it was "[l]ivable," though the front door was nailed shut. *Id*. at 104. While Steed

was at the junkyard, he received a phone call alerting him that "half the neighborhood and 5 cops were in" his backyard. *Id.* at 105. Upon returning to his house, Steed found that his dog was barking, Swenson was inside his house, and property was blocking the doorway. *Id*. at 87, 89. Steed eventually observed: "Everything that was in the icebox or cabinets or my countertop from my kitchen in between the washing machine and the stove had been drug into the bathroom[.]" *Id*. at 105-06. His refrigerator had been moved, baking soda and flour had been strewn about, five pounds of coffee had been dumped "all over the floor" and in Steed's bed, water was "all over" his bed, and a countertop "was ripped off the top[.]" *Id*. at 109, 113, 114. Steed described the scene as "trashed," torn up, and "in shambles." *Id*. at 105, 110, 115.

[5] In January 2023, the State charged Swenson with level 6 felony residential entry and class B misdemeanor criminal mischief. Days later, at an initial hearing, which Swenson attended virtually from jail, the following colloquy transpired:

> BY THE COURT: Alright, so, you said you just learned that your disability has been discontinued?
>
> THE DEFENDANT: Yes, Ma'am.
>
> BY THE COURT: And so you haven't had an opportunity to find any income otherwise then.
>
> THE DEFENDANT: No, Ma'am.
>
> BY THE COURT: So, at this time, no income at all.

THE DEFENDANT: No, Ma'am.

BY THE COURT: Alright and the house that burnt, did you own the real estate?

THE DEFENDANT: No, Mark, Mr. Hawkins did, the man that owns the motel and the property too.

BY THE COURT: Oh, okay, and so at this time, do you have any money saved up?

THE DEFENDANT: No, Ma'am.

BY THE COURT: Do you have any assets whatsoever?

THE DEFENDANT: The glasses on my face.

BY THE COURT: So, no vehicle or anything like that.

THE DEFENDANT: No.

BY THE COURT: Based upon your testimony, you do qualify for Court Appointed Counsel.

Id. at 6. At the conclusion of a March 2023 trial, a jury found Swenson guilty of the misdemeanor charge but not guilty of the felony charge.

[6] At an April 2023 sentencing hearing, the trial court cited Swenson's extensive criminal history, noted her substance abuse problem, and strongly encouraged her to seek treatment. The trial court imposed a 180-day sentence, gave ninety

days of credit for time already served, and fined Swenson $35. The trial court did not inquire again about Swenson's ability to pay and instead stated that it "is continuing to make a finding of indigency so there is no date when you have to have that paid." *Id.* at 241. The trial court also explained that because of good time credit, Swenson's sentence for criminal mischief was completed.[1] The trial court's written sentencing order included the following language: "The Defendant is an indigent and shall not be imprisoned for failure to pay fine or costs." Appealed Order at 1.

[7] Shortly thereafter, the trial court appointed a public defender to represent Swenson in this appeal. Appellant's App. Vol. 2 at 190.

Discussion and Decision

Section 1 - The State presented sufficient evidence to support Swenson's conviction.

[8] Swenson challenges the sufficiency of the evidence to support her conviction. In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867

[1] Swenson was not released, however, because she needed to finish serving a sentence imposed upon admission of violating probation in a separate matter. *See id.* at 232-34, 241 (discussing November 2022 guilty plea to level 6 felony theft in another cause).

N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021).

[9] For Swenson's conviction to stand, the record must contain proof beyond a reasonable doubt that she recklessly, knowingly, or intentionally damaged or defaced Steed's house without his consent. Ind. Code § 35-43-1-2(a). Swenson makes a two-part sufficiency challenge. First, she claims that simply moving another person's property does not constitute the type of damage or defacement required to support a criminal mischief conviction. Second, she asserts that the damage Steed claimed existed earlier in the day therefore was not caused by her.

[10] Both Swenson and the State cite *Haverstick v. State*, 648 N.E.2d 399 (Ind. Ct. App. 1995), for guidance as to what constitutes damage or defacement. In *Haverstick*, a panel of this Court held that toilet papering trees "detracts from the perfection or wholeness of the external appearance of trees so as to constitute criminal mischief." *Id*. at 401. In reaching that conclusion, the *Haverstick* court observed that "deface" has been defined as "to mar, injure, or spoil," and "mar" has been defined as "to detract from the perfection or wholeness of" or to deface. *Id*. (citing *Black's Law Dictionary* (5th ed. 1979) and *Webster's Ninth New Collegiate Dictionary* (1989)).

[11] To say that items were simply moved is a highly sanitized characterization of the evidence. Testimony revealed that everything that had been in the refrigerator or kitchen cabinets had been moved into the bathroom. Further, the refrigerator had been moved, and the only door for ingress or egress had been blocked. Additionally, baking soda, flour, and five pounds of coffee were found strewn about the house. Steed's bed had coffee and water on it. A countertop had been ripped off its cabinet casing. While Steed was not described as a fastidious homemaker, and various home repairs were in progress, even Steed described his house as "in shambles" when he returned to find Swenson inside and police officers trying to remove her. Tr. Vol. 2 at 115. Faced with this evidence, it was reasonable for the jury to infer that Steed's house was recklessly, knowingly, or intentionally damaged or defaced without his consent.

[12] We next turn to Swenson's challenge to the identity of the perpetrator who damaged or defaced the house. The jury heard evidence that police had been called to Steed's house earlier that day, that Swenson was there when police first observed damage, and that additional damage was committed thereafter. In addition, the jury heard that when Steed was called home later, he found that Swenson was in his house, his dog was inside barking, police were there, and his "place was trashed." *Id*. at 105. From this evidence, the jury could reasonably infer that Swenson was the individual who perpetrated the damage or defacement. Swenson insinuates that Steed's dog, Otis, might have damaged the house. However, Steed's testimony was that "food was in the freezer when [he] left or in the icebox" because Otis "would have been into anything if you

left it out." *Id*. at 134. From this testimony, the jury could have inferred that Steed knew not to leave edible items out and hence Otis was not the perpetrator. In sum, Swenson asks us to reweigh evidence and judge testimony, neither of which we may do. The State presented sufficient evidence to support Swenson's class B misdemeanor criminal mischief conviction.

Section 2 – The trial court did not abuse its discretion by finding Swenson indigent, not holding another indigency hearing, imposing a $35 fine during sentencing, and ordering that she shall not be imprisoned for failure to pay fines or costs.

[13] Swenson challenges the trial court's imposition of a $35 fine and the procedure by which the trial court dealt with the question of indigency. We review sentencing decisions, including the imposition of fines, for an abuse of discretion. *Berry v. State*, 950 N.E.2d 798, 799 (Ind. Ct. App. 2011). An abuse of discretion occurs when the decision is clearly against the logic and effect of the evidence before the court or the reasonable inferences to be drawn therefrom. *Clemons v. State*, 105 N.E.3d 1139, 1141 (Ind. Ct. App. 2018).

[14] A person who commits a class B misdemeanor may be fined not more than $1,000. Ind. Code § 35-50-3-3. The $35 fine imposed by the trial court here is well under the maximum fine statutorily permitted in sentencing a defendant convicted of criminal mischief. Given the variety of damage that Swenson caused to the home of an old friend who had previously allowed her inside as a

favor, we conclude that a $35 fine was not an abuse of the wide discretion afforded to sentencing decisions.

[15] We next turn to the question of indigency and how it is determined and addressed. While trial courts have the authority to assess fines against an indigent defendant, an indigent defendant "may not be imprisoned for failure to pay the fines" or costs. *Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002). Indiana Code Section 35-38-1-18 provides that whenever a trial court imposes a fine, it "shall conduct a hearing to determine whether the convicted person is indigent." *Cf.* Ind. Code § 33-37-2-3 ("when the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent"). Because the statute references convicted persons, an indigency hearing would typically occur after a judgment of conviction, but the statute does not otherwise dictate when the hearing should be held. *See Meunier-Short v. State*, 52 N.E.3d 927, 931 (Ind. Ct. App. 2016). Our supreme court has observed that "a defendant's financial resources are more appropriately determined not at the time of the initial sentencing but at the conclusion of incarceration, thus allowing consideration of whether the defendant may have accumulated assets through inheritance or otherwise." *Whedon*, 765 N.E.2d at 1279; *see also Burnett v. State*, 74 N.E.3d 1221, 1227 (Ind. Ct. App. 2017) (determining that inquiry into defendant's ability to pay might include questions concerning yearly income, assets or debts, or financial expenses).

[16] In this somewhat unusual scenario, Swenson's April 2023 sentencing for committing criminal mischief coincided with the conclusion of her

incarceration for that very conviction. Further, Swenson's sentencing hearing for her criminal mischief conviction occurred a scant three months after her initial hearing concerning the criminal mischief charge. At the January 2023 initial hearing, Swenson testified that she was homeless and had no assets besides her eyeglasses, hence, the trial court found her indigent and ordered that she receive the representation of appointed counsel. The trial court knew that Swenson was incarcerated during the three-month period between the date of her initial hearing (when she was homeless and had no assets) and the date of the sentencing/completion of her incarceration. Thus, at the sentencing hearing, the trial court obviously believed that Swenson remained indigent when it ordered the $35 fine, stated that it was continuing to make a finding of indigency, and stressed that there was no date by which the fine had to be paid. Swenson did not contradict the trial court's belief nor was there any indication that Swenson's dire financial circumstances had improved during the three months that she was incarcerated. Additionally, the trial court included in its written sentencing order the following unambiguous language: "The Defendant is an indigent and shall not be imprisoned for failure to pay fine or costs." Appealed Order at 1. In keeping with the indigency determination, when Swenson opted to appeal in late April 2023, the trial court appointed appellate counsel.

[17] In sum, at no point has there been any intimation that Swenson possessed significant funds, let alone any suggestion that she had money to hire private counsel or pay a large fine. Accordingly, although a full-blown indigency

hearing that might have explored Swenson's assets, debts, and expenses did not occur at her sentencing hearing, the purpose of the indigency hearing requirement was clearly met. Swenson was found indigent and assured that she would not be imprisoned for inability to pay any fine. As such, we do not find reversible error in the trial court's lack of another hearing to reiterate Swenson's meager belongings. *Cf. Wooden v. State*, 757 N.E.2d 212, 217-18 (Ind. Ct. App. 2001) (concluding that trial court did not commit reversible error by not holding statutorily required indigency hearing before imposing costs and fees; reasoning that trial court recognized defendant was indigent by appointing pauper counsel *and* explicitly stating that defendant could not be imprisoned for failure to pay), *trans. denied* (2002).[2]

[18] In reaching our conclusion in Swenson's case, we do not disturb Indiana Code Section 35-38-1-18's requirement of an indigency hearing. Rather, we conclude that in the unique circumstances presented here, to remand for a full-blown hearing regarding indigency would constitute a redundant exercise with no meaning or benefit to Swenson. *Cf. Henderson v. State*, 44 N.E.3d 811, 814-15 (Ind. Ct. App. 2015) (remanding for indigency hearing where conflicting evidence of defendant's financial status existed in the record and trial court had ordered him to pay two $5,000 fines without determining his ability to pay); *see*

[2] *Wooden* considered Indiana Code Section 33-19-2-3(a) (now Indiana Code Section 33-37-2-3(a)), which governs imposition of court costs. Here, we consider Indiana Code Section 35-38-1-18(a), which addresses imposition of fines. Both statutes, however, contain identical language regarding the necessity of holding an indigency hearing before imposing costs or fines.

also Briscoe v. State, 783 N.E.2d 790, 792-93 (Ind. Ct. App. 2003) (remanding where fee was ordered following guilty plea, no finding of indigency was made though counsel had been appointed, no indigency hearing was held, and no language was included that explicitly prohibited imprisonment for failure to pay).

[19] Affirmed.

Pyle, J., and Tavitas, J., concur.