MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Carl W. Lowe,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2023

Court of Appeals Case No. 22A-CR-3018

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Judge

Trial Court Cause No. 49D21-2103-F4-8957

Memorandum Decision by Judge Brown
Judges Crone and Felix concur.

Brown, Judge.

[1] Carl W. Lowe claims the evidence is insufficient to sustain his conviction for arson as a level 4 felony. We affirm.

Facts and Procedural History

[2] Lowe lived with Angela Pierpont until their relationship ended in January 2021, and Pierpont changed her locks that month. On March 23, 2021, Emily Phelps, Pierpont's neighbor, saw Lowe walk "diagonal wise from the church yard" toward her apartment building, noticed "he was kind of looking over his shoulders, all paranoid," and observed that he had a McDonald's cup. Transcript Volume II at 65. Phelps heard a "boom, boom," and she and her boyfriend Michael Ladd heard a person yell "I'm going to kill you, b----." *Id*. at 65, 78. Ladd opened their front door, "saw fire all over the hallway," on Pierpont's front door, and on the ceiling above her door, and yelled "the apartment's on fire." *Id*. at 68, 75. Phelps called 911.

[3] Pierpont was sleeping in her apartment and awoke to the banging sound. She went to her sliding-glass patio door, opened the blinds, and made eye contact with Lowe, who was "trying to bash a chair through the window." *Id*. at 54. She ran into the laundry room, locked the door, and called 911. The 911 operator told Pierpont that her "house was on fire and to get out." *Id*. at 56. Pierpont was scared and stayed in the building.

[4] Ladd went to his kitchen for water and saw Lowe run past his back door, away from Pierpont's apartment, and toward the church. Ladd "grabbed as much water as [he] could," "put it on the fire," and was able to extinguish the fire. *Id*.

at 76. Ladd then ran after Lowe, drew his firearm, and ordered Lowe to the ground. Lowe reached inside his coat pocket, Ladd fired two shots into the ground, Lowe ran behind a building, and the police arrived and apprehended Lowe.

[5] Meanwhile, when Pierpont saw firefighters, she "crawled around on [her] knees looking out the window," looked for fire and for Lowe, and smelled smoke. *Id.* at 56. She was unable to open her front door because it was sealed shut from the heat of the fire, and firefighters broke open the door. When she exited the building, Pierpont observed "there had been a fire started at [her] front door and [her] back door," which were the only doors to her apartment, and there "was melted plastic from the chair" on the patio. *Id.* at 57.

[6] Indianapolis Fire Captain Chris Schenk investigated the fire and, with respect to Pierpont's front door, found "fire patterns" which "showed that the fire started . . . near the floor of the entryway and then it burned upward and outward." *Id.* at 113. He observed a "really strong" smell of an ignitable fluid at the front door. *Id.* at 114. He saw a "vinyl camp chair [] with metal legs . . . that was burned" a few feet from the back patio door. *Id.* He also found the McDonald's cup within four or five feet of Pierpont's patio and smelled an ignitable liquid in the cup. Indianapolis Police Detective James Albin observed "extensive fire damage to the front" of Pierpont's apartment and "less fire damage, but noticeable fire damage along the back, sliding door of the same apartment." *Id.* at 105.

[7] The State charged Lowe with Count I, arson as a level 4 felony, and Count II, arson as a level 4 felony. Count I referred to Ind. Code § 35-43-1-1(a)(2) and alleged Lowe "did by means of fire or explosion knowingly damage the property of Angela Pierpont, to-wit: her apartment in such circumstances so as to endanger human life, to-wit: blocked exits from the apartment." Appellant's Appendix Volume II at 26. Count II referred to Ind. Code § 35-43-1-1(a)(1) and alleged that he "did by means of fire knowingly damage the dwelling of Angela Pierpont." *Id*.

[8] The court held a bench trial at which it heard testimony from Pierpont, Phelps, Ladd, Detective Albin, and Captain Schenk. The parties stipulated that a lighter and a pack of cigarettes were taken from Lowe's pocket and that the McDonald's cup was collected in the grass near the rear sliding door. Tammy Murphy, a forensic scientist, testified that DNA found on the cup matched Lowe's DNA profile. When asked "[w]hat was significant about there being two fire locations," Detective Albin testified "in fire origin and cause [] investigations and determination, [] when we find two areas of origin that we, what we refer to as uncommunicated, meaning there's no connection between those two areas of origin, [] sometimes that is indicative of an incendiary or an intentionally set fire." Transcript Volume II at 105. When asked if he was able to determine the origins of the fires, Captain Schenk testified: "Yes, [] I found two separate areas of origin and they were not connected together. One was . . . by the . . entry door on the east side of the [] structure, and then the other one was . . . by the back patio door, which was on the south [] side of the structure."

Id. at 116. When asked "what do you mean by not connected," he testified "sometimes you might have a fire that can jump from one area to the other, [] this was totally separated and there's no way that one fire could have started the other fire." *Id*. at 116-117. When asked "[i]s it your opinion that here . . . there were multiple fires that were set," he answered: "Yeah, there were two. Yes." *Id*. at 117. When asked on cross-examination "on the back patio there was a camping chair . . . made out of metal and nylon, and that had been set on fire," he replied affirmatively, and when asked "so where all was there fire damage on the back patio," he answered "[i]t was [] just a few feet from the back patio door." *Id*. at 120-121.

[9] Lowe testified that he went to Pierpont's apartment, saw that the front door was on fire and tried to kick the door open, went to the back patio door, and used a chair which was there to attempt to break the glass in the patio door. He stated "the back trim of the patio was actually on fire, so I decided to grab that chair and actually smother the fire out . . . along the . . . siding of the glass patio door," "I was successful in doing it," and "the chair actually caught fire in the process, . . . so I ended up basically, stomping that out on the concrete ground afterwards." *Id*. at 127-128. He stated that he saw Ladd with a gun in his hand, "at that point, I . . . said what . . . in the world did I walk into," and he feared for his life and ran away. *Id*. at 128. He stated he had the McDonald's cup in his possession and it had contained iced tea.

[10] The court stated that it found the testimony of Pierpont, Phelps, and Ladd to be credible and that it was convinced beyond a reasonable doubt that Lowe started

the fires, was threatening Pierpont, and placed her life in danger. The court found Lowe guilty on Counts I and II and later vacated Count II due to double jeopardy concerns. The court sentenced Lowe to ten years with two years suspended to probation.

Discussion

[11] Lowe asserts the evidence is insufficient to sustain his conviction for arson as a level 4 felony. He "acknowledges Pierpoint's testimony that she was unable to exit her apartment by the front door, without assistance from the fire department to break it open, was sufficient to establish fire damage to the front door prevented it from being operable." Appellant's Brief at 20. He states: "However, despite a significant amount of fire occurring near the back patio sliding door, neither of the investigators testified the fire caused that door to be inoperable. Nor did Pierpoint testify that she had attempted to leave her apartment through the patio door but had been unable to do so." *Id*. at 21.

[12] The State maintains the evidence is sufficient to show Lowe committed arson under circumstances which endangered human life. It argues "there were two different origins, indicative of an intentional fire," an accelerant was used to start the fires, Lowe stated his intention to kill Pierpont, and "the fires were set in front of the only ways of getting in and out of [her] apartment." Appellee's Brief at 10. It argues Lowe "knew Pierpont was home as he made direct eye contact with her" and the McDonald's cup "smelled of an accelerant." *Id*. at 11. It also argues "the State never charged that the exits were inoperable, merely that they were blocked." *Id*. at 12-13.

[13] When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence and consider conflicting evidence most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

[14] Ind. Code § 35-43-1-1(a) provides "[a] person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages: . . . (2) property of any person under circumstances that endanger human life . . . commits arson, a Level 4 felony." "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

[15] The evidence most favorable to the trial court's ruling is that Lowe walked quickly to Pierpont's apartment with a McDonald's cup, yelled "I'm going to kill you, b----," attempted to break the glass of her back patio door using a chair, and started fires outside her front and back patio doors. Transcript Volume II at 65. Ladd saw that Pierpont's front door was on fire and observed Lowe run away from the apartment. Pierpont was unable to exit her apartment through the front door because it was sealed shut from the heat of the fire. The State presented evidence that investigators determined that two separate fires had been started, one at Pierpont's front door and the other at or near her back patio door. It presented testimony regarding the extent of damage to the doors and the chair on the patio and where the McDonald's cup with Lowe's DNA which

smelled of ignitable fluid was found. Further, Lowe stated that he saw the front door on fire and that "the back trim of the patio was actually on fire." *Id*. at 127. Evidence of probative value was presented from which the trial court as the trier of fact could have found beyond a reasonable doubt that Lowe, by means of fire, knowingly damaged property of a person under circumstances that endangered human life and committed the crime of arson as a level 4 felony.[1]

[16] For the foregoing reasons, we affirm Lowe's conviction.

[17] Affirmed.

Crone, J., and Felix, J., concur.

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[1] To the extent Lowe asserts there was a variance between the charging information and the evidence, he acknowledges that he did not object on that basis. Waiver notwithstanding, reversal is not required. Because the charging information advises a defendant of the accusations against him, the allegations in the pleading and the evidence used at trial must be consistent with one another. *Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014). A variance is an essential difference between the two. *Id.* Not all variances, however, are fatal. *Id.* Relief is required only if the variance (1) misled the defendant in preparing a defense, resulting in prejudice, or (2) leaves the defendant vulnerable to future prosecution under the same evidence. *Id*. "Allegations not essential which can be entirely omitted without affecting the sufficiency of the charge against the defendant, are considered as mere surplusage and may be disregarded. Unnecessary descriptive material in a charge is surplusage." *Mitchem v. State*, 685 N.E.2d 671, 676 (Ind. 1997) (citation and internal quotations and ellipses omitted). Count I alleged that Lowe knowingly damaged Pierpont's apartment "in such circumstances so as to endanger human life, to-wit: blocked exits from the apartment." Appellant's Appendix Volume II at 26. Whether Lowe "blocked exits from the apartment," or whether he blocked all of the exits including the patio door, was not essential to proving the charge of arson as a level 4 felony. Even if the language was not mere surplusage, the trier of fact could reasonably conclude from the evidence that Lowe did knowingly block the exits from Pierpont's apartment including the patio door. Under the circumstances, we conclude Lowe was aware of the alleged criminal conduct of which he was accused, and we cannot say that any variance was material or prejudiced him.