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**IN THE
COURT OF APPEALS OF INDIANA**

CAROLYN PRECHT,

Appellant-Defendant,

vs.

FRANKLIN COUNTY FARMERS
MUTUAL INSURANCE COMPANY,

Appellee-Plaintiff.

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No. 21A01-0610-CV-469

APPEAL FROM THE FAYETTE CIRCUIT COURT

The Honorable Daniel Lee Pflum, Judge

Cause No. 21C01-0504-PL-212

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a bench trial, Carolyn Precht appeals the trial court's judgment against her and in favor of Franklin County Farmers Mutual Insurance Company ("Farmers") in the amount of \$30,110.62, plus interest and attorney fees, based on the trial court's finding that Carolyn was responsible for the fire that damaged the house of her former husband, Harris Precht Jr. Carolyn raises the sole issue of whether the evidence supported the trial court's judgment. Concluding that sufficient evidence exists to support the trial court's judgment, we affirm.

Facts and Procedural History

On July 21, 2004, an arsonist started a fire by using an accelerant on lumber stacked in the garage of a house that the Prechts were building in Fayette County, Indiana.¹ The home was unoccupied at the time of the fire. A couple who lived near the home saw the fire around 4:00 a.m., and informed Harris's brother, John Precht, who lived next door to the house the Prechts were building. John, his wife, Brenda, and their grandson called the fire department and put out the fire using buckets of water and garden hoses. The fire caused significant damage to the garage, but did not spread to the rest of the residence.

Harris was in North Carolina at the time of the fire, and Carolyn was at the couple's other home in Harrison, Ohio. John telephoned Carolyn, and she arrived on the scene several hours later along with her daughter, Tina. Brenda testified that Carolyn's first comment when she arrived was "that she didn't do it." Transcript at 73. Carolyn testified that she did not make this comment immediately upon arriving, but admitted that she might have made

this comment at some point. Tina testified that “everybody” there was making similar comments. Id. at 123.

Warren Freeman, the Assistant Chief in charge of the fire department’s investigations, testified that while Carolyn was signing a form allowing investigators to enter the property, she stated that “it looked like electrical started this fire,” and that she did not seem excited or concerned about the fire. Id. at 137. On cross-examination, he clarified that she said, “[i]t was probably an electrical problem.” Id. at 138. Investigation revealed that the person who started the fire had likely used a propane torch to melt the breaker panel in an attempt to make the fire appear to be the result of an electrical malfunction.

James Skaggs, of the State Fire Marshall’s Office, was assigned to investigate the cause of the fire, and after determining that it was a result of arson, investigated possible suspects. Skaggs’s investigation determined that “the fire was set behind locked doors,” indicating that the arsonist likely had access to the residence. Id. at 15. Four people had keys to the residence: Harris, Carolyn, Gina Reeves, Harris’s daughter, and Valerie Precht, Harris’s daughter-in-law. Skaggs determined that Harris, Gina, and Valerie did not have a motive to start the fire, but that Carolyn “did not want to move to that house, [and instead] wanted to stay in Ohio.” Id. at 15. Skaggs also learned that a fire had occurred at the Precht’s Ohio home roughly a month before the Indiana fire. In regard to these two fires, Skaggs testified:

And it was strange. Uh, I don’t think I’ve ever had anything quite like this in 35 years. . . . How close they were and similarities both involved stacks of

¹ The parties have stipulated that the fire was the result of arson.

lumber and they were both set by an accelerant poured on top of them, and the same, for want of a better term, same family having the two fires.

Id. at 21. Based on these similarities and Carolyn's apparent motive, Skaggs concluded that Carolyn was involved with starting the fire. Skaggs also commented that everyone he investigated fully cooperated, with the exception of Carolyn's son, Ted White, who did not show up for a requested interview.

Harris also testified that at some point he became convinced that Carolyn had been involved in the fire. He testified:

Well, as time went on I begin to suspect that she might know more about [the fire] than what she told me. . . . [W]hen I was discussing that with Carolyn and different times uh, I know about neighbors catching the fire, she seemed more concerned about that whoever set the fire almost got caught than the actual fire destroying the house.

Id. at 41-42. Carolyn testified that she had nothing to do with the fire, and had no idea who had started it.

Farmers paid Harris \$30,110.62 for the damage caused by the fire. Sometime after the fire and before trial, Carolyn and Harris were divorced. Farmers then filed this complaint against Carolyn, seeking reimbursement for its payment made to Harris, interest, and the costs associated with this litigation.

Following the trial, the trial court entered the following relevant findings of fact:

(1) "[t]he evidence is clear that the house was locked prior to the time the fire was intentionally set," only four people had keys, and Harris, Gina, and Valerie had no motive to start the fire ;

(2) Carolyn’s desire not to move to Indiana “would serve as a motive for setting the fire or having someone set it for her”;

(3) Carolyn’s comments made the morning of the fire that she did not start the fire and that it was likely the result of an electrical problem were “inappropriate under the circumstances,” and were “consistent with the acts of the person that intentionally set the fire”; and

(4) all possible suspects except for Carolyn’s son had cooperated with investigators.

Appellant’s Appendix at 22-23.

In its conclusions of law, the trial court found that Farmers had demonstrated by a preponderance of the evidence that Carolyn had either set fire to the residence or directed someone to do so, and that “an agency relationship [was] created between [Carolyn] and her son, Ted White, and/or the person who set the fire.” *Id.* at 23. The trial court then quoted case law regarding the liability of a principal for the acts of her agent, and determined that Carolyn was liable for the damage caused to the home. Carolyn now appeals.

Discussion and Decision

I. Standard of Review

The trial court, sua sponte, entered findings of fact and conclusions of law. In these situations, we use a two-tiered standard of review.² *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 212 (Ind. Ct. App. 2006). First, we determine whether the evidence supports the trial court’s findings. *Id.* We will conclude that the evidence does not support a finding only

² We note that, unlike in some arson cases where the insured sues the insurance company for payment, e.g. *Dean v. Ins. Co. of N. Amer.*, 453 N.E.2d 1187 (Ind. Ct. App. 1983), here the insurance company bore the burden of proof at trial. Therefore, Carolyn does not appeal from a negative judgment.

when the finding is not supported by any facts or reasonable inferences from the facts in the record. Id. We consider only the evidence favorable to the judgment, make all reasonable inferences in favor of the judgment, and do not reweigh evidence or judge witness credibility. Id. On the other hand, we give no deference to a trial court's conclusions of law, and review such conclusions de novo. Id.

II. Evidence Supporting the Trial Court's Judgment

In order to support the trial court's finding that Carolyn directed someone to start the fire, the record must contain direct or circumstantial evidence, or a reasonable inference arising from the evidence, that she did so. Cincinnati Ins. Co. v. Compton, 569 N.E.2d 728, 729 (Ind. Ct. App. 1991), trans. denied. "Mere opportunity or suspicion" will not suffice. Id. However, we recognize that "arson is almost always subject to proof by circumstantial evidence," and we will defer to the trial court's determination that Carolyn directed someone to start the fire if evidence exists to support this determination. Belser v. State, 727 N.E.2d 457, 464 (Ind. Ct. App. 2000), trans. denied. We also wish to emphasize that this case is civil and not criminal, and "[w]hile it is routinely said in criminal cases that guilt may not be proven by inference upon inference . . . the practice in civil cases is to evaluate the probative value of every inference on its own merits." Dean v. Ins. Co. of N. America, 453 N.E.2d 1187, 1195 (Ind. Ct. App. 1983) (quoting Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482 (5th Cir. 1980)). Therefore, the trial court's findings and judgment may be supported by inferences, as long as "the inferences are not so remote and all circumstances, including the inferences, are of sufficient force to bring minds of ordinary intelligence to a persuasion . . .

See Boetsma v. Boetsma, 768 N.E.2d 1016, 1019 (Ind. Ct. App. 2002), trans. denied.

by a fair preponderance of the evidence.” Id. at 1194 (quoting Appleman on Insurance 2d §12682 at pp. 89-90).

We recognize that, unlike a typical arson case, Farmers does not claim that Carolyn started the fire herself, but instead relies on a theory that she directed someone to do so. It is a well-established principle that “[t]o render a person guilty of a tort, it is not necessary that he should actually commit it. If he command, hire, or in any way procure it to be committed, he is guilty of and liable for it.” Crawfordsville & W.R. Co. v. Wright, 5 Ind. 252, 1854 WL 3319 at *1 (1854); see also Cincinnati, C., C. & St. L. Ry. Co., v. Simpson, 182 Ind. 693, 104 N.E. 301, 306 (1914) (“It is well settled law that he who counsels, advises, abets, or assists another to commit a tort, or joins in its commission, is responsible for all the injury done.”); Eisel v. Hayes, 141 Ind. 41, 40 N.E. 119, 119 (1895) (“The law will not permit [one] to do indirectly, or through [others], what [one] could not do directly, by [oneself].”); cf. Ind. Code § 35-43-1-1(a), (b) (indicating that those who hire others to commit arson are equally liable under the criminal code as those who commit arson themselves). Further, just as direct evidence is not necessary to prove arson, direct evidence is not necessary to support a finding that Carolyn directed someone to start the fire. Cf. Mullen v. Cogdell, 643 N.E.2d 390, 398 (Ind. Ct. App. 1994), trans. denied (“An agency may arise by implication and may be shown by circumstantial evidence.”); Sutton v. State, 495 N.E.2d 253, 257 (Ind. Ct. App. 1986), trans. denied (to satisfy the agreement element of a conspiracy, a formal agreement need not be proven, and the agreement may be shown solely by circumstantial evidence).

We also note that although the trial court’s findings imply that it believed Carolyn’s son may have been the arsonist, it never explicitly found so. We think it immaterial that

Farmers did not demonstrate who actually started the fire; that is, liability may attach to someone who directs another to commit a tort even when the person who commits the act remains unidentified. Cf. Ind. Code § 35-41-2-4 (under criminal code, “[a] person who . . . induces . . . another person to commit an offense commits that offense, even if the other person . . . has not been prosecuted . . . [or] convicted . . . or has been acquitted”); Combs v. State, 260 Ind. 294, 301, 295 N.E.2d 366, 370 (1973) (“[A]n accessory may be tried and convicted . . . even when the identity of the principal is never disclosed.”). The fact that the principal arsonist escaped detection does not excuse the conduct of one who encouraged or aided the arsonist.

The trial court found that Carolyn did not want to move to Indiana, and therefore had a motive to start the fire. Although Carolyn introduced evidence that she was not opposed to the move, it is the trial court’s province to weigh evidence and judge witness credibility. We recognize that Carolyn’s apparent desire to remain in Ohio is not as clear or direct a motive as the typical arson motives of financial gain, see Lummis v. State Farm Fire & Cas. Co., 469 F.3d 1098, 1100 (7th Cir. 2006) (arsonist would have benefited pursuant to insurance policy); Cincinnati Ins. Co., 569 N.E.2d at 729 (home owner had tried unsuccessfully to sell home), or harm to a structure’s occupant or owner, see Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998) (evidence demonstrated “a deliberate scheme to commit arson and trap [the defendant’s] son in the bedroom); Noe v. State, 92 Ind. 92, 1883 WL 5739 at *1-2 (1883) (evidence of defendant’s ill will towards owner of burned building constituted relevant circumstantial evidence of defendant’s guilt). However, again emphasizing our standard of review, we cannot conclude that the trial court’s conclusion that Carolyn had a motive to

direct someone to start the fire is clearly erroneous. Such a finding lends support to the trial court's judgment, as evidence of motive, although not sufficient standing alone, may contribute to a finding that one committed arson. See Talley v. State, 400 N.E.2d 1167, 1171 (Ind. Ct. App. 1980).

The trial court also made findings regarding Carolyn's behavior upon arriving on the scene of the fire, specifically noting that her comments were "inappropriate," and that her comment regarding the probable cause of the fire displayed knowledge that someone uninvolved with the fire would not have. Behavior inconsistent with what would typically be expected following a fire is relevant and can support an inference that that person was involved in causing the fire. See Belser, 727 N.E.2d at 465; cf. Lummis, 469 F.3d at 1100 (appellant's "nonchalant and cavalier" attitude when reporting the fire to his insurance company supported insurance company's decision to not honor the claim). Although we observe that Freeman testified that electrical problems are common causes of accidental fires, and that it would not be unusual for someone to think that the cause of a fire was electrical, this observation goes to the weight of the evidence, and we do not reweigh evidence on appeal.

Evidence also showed that the residence was locked prior to the start of the fire, and that there was no evidence of forced entry. Such circumstances may support an inference that someone with a key started the fire. See Bunch, 697 N.E.2d at 1258; Sizemore v. State, 181 Ind. App. 409, 412, 391 N.E.2d 1179, 1181 (1979). Carolyn was one of only four people with keys to the house and the trial court found that the other three key-holders had no motive to start the fire. This evidence also supports the trial court's finding that Carolyn was

involved in the fire.

We recognize that the evidence indicating that Carolyn directed someone to start the fire is not overwhelming. However, Farmers did introduce evidence—namely motive, opportunity (as she was one of four people in possession of a key), and behavior after the fire— supporting the trial court’s factual finding that Carolyn directed someone to start the fire. Without reweighing the evidence, we must conclude that this finding is not clearly erroneous. Cf. Belser, 727 N.E.2d at 465 (evidence of defendant’s “presence at the scene, conduct before and after the fire, proof that the fire was intentionally set, and motive,” was sufficient to support conviction for arson); Cincinnati Ins. Co., 569 N.E.2d at 729-30 (evidence of motive and opportunity, along with no other suspects, provided sufficient support for insurance company’s arson defense); Dean, 453 N.E.2d at 1195 (evidence of couple’s motive, opportunity, and presence on the scene was sufficient to support finding that couple started fire). In turn, this finding supports the trial court’s judgment holding Carolyn liable for the damage cause by the fire and therefore we cannot say that the trial court’s judgment was clearly erroneous.

Conclusion

We conclude that the evidence supports the trial court’s findings, and that these findings support the judgment.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.