IN THE COURT OF APPEALS OF IOWA

No. 7-405 / 96-954

000431

STATE OF IOWA,

Plaintiff-Appellee,

FILED
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vs.

CHRISTINE ANN HAGER,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Defendant appeals from judgment and sentence entered on her conviction for first-degree arson. **AFFIRMED.**

Michael Stowers of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, P.J., Huitink, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

CADY, P.J.

Christine Hager appeals the judgment and sentence for her conviction of first degree arson. Hager claims insufficient evidence existed to support her conviction, the trial court erred in denying her motion for a new trial, and her trial counsel was ineffective. We affirm.

The State charged Hager and David Westerholm with first degree arson following a fire at a mobile home they occupied with Hager's son. They were tried jointly. After two mistrials, a jury found Hager guilty in a third trial.

The evidence at trial revealed Hager purchased insurance for her mobile home after the manager of the mobile home lot where Hager lived canceled her lease. Although Hager had not carried insurance for approximately five years and the trade-in value of her home was only $2500, Hager obtained coverage in the amount of $8000 for the home and $15,000 for its contents. Later, Hager called her insurance agent to inquire about the consequences of a total loss due to fire.

Hager and Westerholm testified they were in bed sleeping when they heard noises and the sound of breaking glass. By the time they opened the bedroom door, enough smoke appeared to fill the entire bedroom. Westerholm, Hager, and Hager's son escaped to safety by climbing out of their respective bedroom windows.

Two expert witnesses testified concerning the cause of the fire. The State's expert, a fire department captain, believed one of the occupants of the mobile home started the fire because the time required for the hallway to fill with smoke could not

000433

be reconciled with the testimony of Westerholm and Hager. This opinion was supported by the absence of smoke damage in the bedroom, which would have been evident if the bedroom had filled with smoke when the door was opened.

In contrast, Hager's expert witness, an engineering consultant, believed it could not be determined whether the fire was started by someone inside or outside the home. His opinion relied on the presence of clean, mechanically fractured glass on the outside of the home which could have resulted from someone breaking the window from either inside or outside

Westerholm and Hager were found guilty of first-degree arson following jury deliberations at the close of the third trial. Hager filed post trial motions asserting the trial court erred by inadvertently providing the jury with a magnifying glass and by asking the jury if a verdict could be reached if additional time was given to deliberate The court denied the motion and sentenced Hager to an indeterminate twenty-five year term.

Hager appeals. She claims insufficient evidence existed to support her conviction, the trial court erred in denying her motion for a new trial, and her trial counsel was ineffective.

I. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We view the evidence under such a claim in a light most favorable to the State. *State v. Jordan*, 409 N.W.2d 184, 184 (Iowa 1987). We are bound by the jury's verdict

000434

when it is supported by substantial evidence. Iowa R. App. P. 14(f)(1). Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993).

Arson is committed when any person having the intent to destroy or damage property, causes a fire in or near the property. Iowa Code § 712.1 Hager maintains insufficient evidence exists to support a finding she caused the fire or intended to damage property

The State asserts evidence existed from which jurors could conclude Hager set the fire intending to destroy or damage the mobile home, or alternatively sufficient evidence existed to show Hager aided and abetted Westerholm in the act.

In examining the evidence, we give the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *Conyers*, 506 N.W.2d at 444. Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crime. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992).

We find substantial evidence from which the jurors could conclude Hager set fire to the mobile home. It was the jury's function to determine whether the evidence was credible. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984). The jury could have rationally concluded the window of the mobile home had been broken from the

inside. The jury could have also rationally inferred Hager's intent from her excessive insurance purchase. Moreover, evidence existed from which the juror's could conclude Hager's and Westerholm's version of events were not true.

II. Juror Inquiry

Hager argues she was entitled to a new trial because the trial judge inquired into the status of the deliberations after the jury foreman reported the jury "deadlocked." She claims the district court improperly influenced the jury when it ordered further deliberations after one of the jurors indicated in response to a question by the court that further deliberations would not help in reaching a verdict. Hager asserts the court's polling singled out the one juror who did not believe further deliberations to be useful and the language used by the judge indicated to the jury they must reach a verdict by 4:30 p.m.

We employ the "totality of the circumstances" standard to determine whether inquiry into the division of a jury was coercive of a guilty verdict. *State v. Cornell*, 266 N.W.2d 15, 19 (Iowa 1978). In *Lowenfield v. Phelps*, the United States Supreme Court held it was not coercive to ask the jury if they could reach a verdict if given additional time. *Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S. Ct. 546, 552, 98 L Ed. 568, 579 (1988). In reaching its decision, the Court stated no reason existed why those in the minority would conclude further deliberations would not be helpful, or that those in the majority would conclude otherwise. *Id.* Similarly, the Iowa Supreme Court held the trial court may, after a jury has been deliberating for some time,

inquire into the likelihood of a verdict being reached. *State v. McConnell*, 178 N.W.2d 386, 390 (Iowa 1970).

We find no evidence to support Hager's contention that ordering further deliberations was coercive. Simply because a single juror raised his hand in response to the court's inquiry as to whether any juror believed a verdict could not be reached given additional time does not establish the numerical division of the jurors regarding the defendant's guilt. *Lowenfield*, 484 U.S. at 240, 108 S. Ct. at 552, 98 L. Ed.2d at 579. In fact, the trial court in this case did not inquire into the numerical division of the jurors, a procedure which has been found coercive. *See Brasfield v. United States*, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926).

In this case the judge merely asked the jury if additional deliberation time would help reach a verdict. A verdict urging instruction was not given. Further, by assuring the jury they could leave by 4:30, the judge was not telling the jury they had to return a verdict by this time. He was merely informing the jury of when they could expect to leave. Nothing in the judge's language tied the time to leave with a command that the jury reach a verdict by that same time. We conclude, after considering all of the circumstances, the district court's inquiry was proper, and deny Hager's motion for a mistrial.

III. Ineffective Assistance of Counsel

Hager claims she was denied effective assistance of counsel when counsel failed to introduce evidence at trial implicating her ex-husband in the crime. The

record on this issue is insufficient for us to address this issue on direct appeal. Hager must present this claim in an application for postconviction relief to permit a full development of the record and give Hager's counsel an opportunity to explain his decisions. We preserve the claim for postconviction relief proceedings.

AFFIRMED.