UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1311

September Term, 2014

IN RE: ANTHONY C.

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: December 4, 2015

On June 12, 2014, the Circuit Court for Prince George's County, sitting as a juvenile court, found beyond a reasonable doubt that appellant, Anthony C., had been involved in six acts which would constitute criminal offenses if committed by an adult: (1) first-degree arson (Md. Code Ann. (2002, 2012 Repl.) § 6-102 of the Criminal Law Article ("CL")); (2) first-degree malicious burning of personal property (CL § 6-104); (3) second-degree malicious burning of personal property (CL § 6-105); (4) burglary in the third degree (CL § 6-204); (5) burglary in the fourth degree (CL § 6-205); and (6) malicious destruction of property (CL § 6-301). The juvenile court merged these findings into three: first-degree arson, third-degree burglary, and malicious destruction of property. At the disposition hearing on July 23, 2014, the court ordered appellant committed to the Department of Juvenile Services.

In his appeal to this Court, appellant presents the following questions, which we have re-worded:

1. Did the juvenile court have jurisdiction to enter a judgment as to the offense of malicious destruction of property valued over $500?

2. Is the evidence sufficient to support the juvenile court's findings that appellant's acts would have constituted arson in the first degree, malicious burning in the first degree and malicious destruction of property if they had been committed by an adult?

3. Did the juvenile court err in allowing Lieutenant Murray testify as an expert witness?

We conclude that there was not legally sufficient evidence before the court for it to have found that appellant's acts would have constituted arson and first-degree

malicious burning of personal property if engaged in by an adult. We will affirm the judgment in part, reverse it in part and remand this case for a new disposition hearing.

Background

On the afternoon of May 22, 2014, a fire occurred at a residence located on Allentown Road in Fort Washington, Maryland. Four witnesses testified about the fire at appellant's adjudication hearing.

David McCoy testified that, while standing in the yard of another house on Allentown Road, he "looked up and I saw the house across the field burning." According to Mr. McCoy, there was a "big blaze of smoke" from the rear area of the house. Just as he first noticed the burning house, Mr. McCoy observed a young man, whom he identified as appellant, walk across the yard of the house, pass within a hundred feet of his own location, and then walk away on a path. Mr. McCoy later rode through the neighborhood with a fire marshal and saw the young man, whom he identified for the fire marshal. During trial, Mr. McCoy again identified appellant.

Lieutenant William Murray of the Prince George's County Fire Department was the fire inspector who investigated the fire. Lt. Murray testified that, after inspecting the premises, that he determined that "the kitchen door had been forced open," and then somebody had piled a "great deal of debris" atop both the sofa and love-seat in the living room. Lt. Murray described the damage caused by the fire as follows:

> [LT. MURRAY]: Initially when I went inside I observed some fire damage to the living room. There was smoke damage that—from the ceiling down, it was approximately three feet down from the ceiling. And most of the furniture in there was damaged by fire. And that damage consisted mostly of heat damage to the top of the furniture and the bottom sides of the furniture had the least amount of damage to them.
> . . . .
> [STATE'S COUNSEL]: What else did you observe?
>
> [LT. MURRAY]: That room had all of the smoke and fire damage.
>
> [STATE'S COUNSEL]: Are there any other rooms in the house that had smoke and fire damage?
>
> [LT. MURRAY]: Yes. But as you got out of that room, there was less smoke damage and less heat damage.

Based upon his observations and his expert knowledge in the field of fire investigations, Lt. Murray concluded that the starting point for the fire was the sofa, where the fire had been intentionally set by someone using a match or a lighter, not by an accidentally dropped cigarette or a malfunctioning electric appliance. He believed that the fire had burned between 15 to 45 minutes, and he detected no evidence of any chemical or liquid accelerant. In the words of Lt. Murray: "My expert opinion was that it was deliberately set by human hand using an unknown open flame device to ordinary combustibles." Lt. Murray corroborated Mr. McCoy's testimony regarding his identification of appellant and also identified appellant in court.

M. T., appellant's father, testified that on May 22, 2014, after completing a parent/teacher conference at about 11:30 a.m., he returned home where he spoke with his

son regarding punishment for "being out of school." After their conversation, appellant left the home, then returned home later in the afternoon, after the fire at the home on Allentown Road had been put out.

M.T. and appellant then had another conversation, during which appellant told him that "I did something you might don't like." Appellant told his father that he "went to somebody's house into the attic as I hit the cord coming down the steps. And a light when it fell and it set the house on fire[,]" which "had not been done intentionally." According to M.T., his son appeared scared and worried. Appellant then asked if he could come inside to change his clothes, as well as whether his father would cut his hair for him. Appellant was fifteen years old when these events occurred.

Andre Pearson testified that he was the owner of the Allentown Road house at the time the fire occurred. Mr. Pearson had not granted appellant permission to be in the home. When asked how much damage had been done to the house, Mr. Pearson testified that he had not yet received the estimate for repairs. He was not certain of the property's present value, but stated that he had purchased the house and its three acres of land in 2005 for $350,000, although it was clearly "not worth that now."

Based on this evidence and after hearing arguments by counsel, the juvenile court found that the State had proven beyond a reasonable doubt that appellant was involved in all six of the charged offenses. After merging the malicious burning offenses into arson,

and the two burglary offenses into one, the court found appellant to be involved in three offenses: arson, burglary, and malicious destruction of property. The court also ordered that value of the property damage to Mr. Pearson's house be included as part of the Predisposition Investigation.

At the disposition hearing on July 11, 2014, the State advised that there would be no restitution because all damages were covered by a homeowner's insurance policy. The juvenile court reviewed several photographs of the damaged home, as well as a report by the Maryland's Department of Juvenile Services regarding appellant. In the report was a multi-disciplinary staffing team psychological assessment as well as an assessment regarding appellant's previous experience within the juvenile court system. The court granted the State's request that appellant be committed to the custody of the Department. This appeal followed.

Analysis

I. The Adequacy of the Delinquency Petition

Appellant's first argument is that "the juvenile court lacked jurisdiction over the non-existent crime of malicious destruction of property valued over $500." His argument hinges on a 2013 amendment to CL § 6-301 that changed the punishment guidelines for the crime of malicious destruction of property. Prior to 2013, CL § 6-301 contained separate penalties for property damage that amounted to less than $500 and damage that

was valued at $500 or more. Now, the threshold for the divergent penalties is $1,000. *See* CL § 6-301(b) and (c). Appellant argues that the crime he was charged with no longer exists. We disagree.

The State's juvenile petition regarding the acts committed by appellant described the sixth offense as follows:

> [Appellant did] willfully and maliciously injure the property of Andre Pearson to wit: residential property and all contents therein, value of the damage being above $500 in violation of Criminal Law Article 6-301 of the Annotated Code of Maryland against the peace, government, and dignity of the State.

The crime with which appellant was charged in this count, malicious destruction of property, is described in CL § 6-301(a):

> *Prohibited.* – A person may not willfully and maliciously destroy, injure, or deface the real or personal property of another.

Subsections (b) and (c) contain the penalties for the crime:

> (b) *Penalty. – Property damage of at least $1,000.* – A person who, in violation of this section, causes damage of at least $1,000 to the property is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $2,500 or both.
>
> (c) *Penalty. – Property damage of less than $1,000.* – A person who, in violation of this section, causes damage of less than $1,000 to the property is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding $500 or both.

CL § 6-301.

Lastly, subsection (f) specifically states that value of property damage plays is not a substantive element of the crime:

> (f) *Value of damages.* – (1) The value of damage is not a substantive element of a crime under this section and need not be stated in the charging document.
>
> (2) The value of damage shall be based on the evidence and that value shall be applied for the purpose of imposing the penalties established in this section.
>
> (3) If it cannot be determined from the evidence whether the value of the damage is more or less than $1,000, the value is deemed to be less than $1,000.

CL § 6-301.

The statutory language makes clear that the value of the property damage is not a relevant consideration when determining whether the crime itself has been committed. Furthermore, because appellant was not tried as an adult, the penalty provisions of CL § 6-301 are irrelevant. We conclude that the petition adequately set out the elements of existing crime of malicious destruction of property.

II. Sufficiency of the Evidence

Appellant complains that the evidence did not support the trial court's finding of involvement in arson, malicious burning, and malicious destruction of property. We agree with appellant as to the court's findings as to arson and first-degree malicious burning of personal property.

A. Standard of Review

When reviewing the sufficiency of evidence in a juvenile delinquency appeal, we apply the same standard of review as in criminal appeals. *In re Timothy F.,* 343 Md. 371, 380 (1996). "In such cases, the delinquent act, like the criminal act, must be proven beyond a reasonable doubt." *Id.,* C.J. § 3-8A-19. When reviewing a criminal case, the appropriate inquiry is not whether we "believe that the evidence established guilt beyond a reasonable doubt, but rather, 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia,* 443 U.S. 307, 318 (1979) (emphasis in original)). We will not disturb the juvenile court's findings of fact unless they are clearly erroneous. *In re Anthony W.*, 388 Md. 251, 261 (2005).

A. Arson

Appellant first contends that there was insufficient evidence of arson because there was no proof that any portion of the structure itself was ignited. He argues that an actual burning of the structure is one of the elements of arson and that evidence of "mere smoke or heat damage is insufficient." He asserts that no evidence of actual burning was presented at trial. The State contends that appellant's argument is both legally and factually flawed. As to the former, it argues that "[appellant's] exegesis on the law is

outdated and incorrect[,]" and that all that is required for arson is that the fire be the source of the damage caused. Furthermore, the State argues that the record contains evidence that the structure was actually combusted by fire. The State's contentions are unpersuasive.

Arson in the first degree is prohibited by CL § 6-102 (a):

> A person may not willfully and maliciously set fire to or burn:
> (1) a dwelling; or
> (2) a structure in or on which an individual who is not a participant is present.

Arson was formerly a common law crime, for which "the State had to establish four elements: (1) that the building burned was a dwelling or outbuilding . . .; (2) that the building burned was occupied by another; (3) that the building was actually burned, as mere scorching would not suffice; and (4) that the accused's *mens rea* willful and malicious." *Holbrook v. State,* 364 Md. 354, 367 (2001). The State argues that the third element—that the building be actually burned—is obsolete. It relies on *Borza v. State*, 25 Md. App. 391 (1975) in support of this contention.

Borza involved a criminal conviction of burning with intent to defraud, codified in CL § 6-106.[1] The statute prohibits "set[ting] fire to or burn[ing] property of any kind

[1]At the time *Borza* was published, CL § 6-106 was codified as Article 27, Section 9 (repealed 2002).

with the intent to defraud another."[2] CL § 6-106(a). In *Borza*, the appellant argued that the evidence was insufficient to convict him of the crime because there was only evidence of damage caused by "smudged from smoke and heat' and 'water damage.'" *Borza*, 25 Md. App. at 396. This Court concluded that the damage caused by the smoke, heat, and water constituted sufficient evidence that the appellant had violated the statute. We based this conclusion on the purpose served by CL § 6-106:

> [T]he gravamen of the offense is defrauding the insurance company by damaging goods through the agency of fire. That the literal damage comes from the heat of the fire, from the smoke of the fire, or from the water of the firemen's hoses, rather than through the chemical process of combustion, is not controlling. To hold otherwise is to make an absurdity of the law.

Id. at 396–97.

Although CL §§ 6-106 and § 6-102 share some statutory language, they address very different forms of criminal behavior. The gravamen of the offense of burning with

[2]The language of the statute when it was codified as Art. 27, Sec. 9 differed from CL § 6-106, but the act prohibited is substantively the same:

> Any person who wilfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, or of the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire; shall upon conviction thereof, be sentenced to the penitentiary for not more than five (5) years.

See Borza, 25 Md. App. at 396 (quoting Art. 27, Sec. 9).

intent to defraud is an intent to defraud. The fire may be set to a dwelling, a commercial building, a motor vehicle or other forms of personal property. The fire may be set in a dwelling or elsewhere. In contrast, at common law, arson stood on a different plane:

> [Arson] is an offence of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offence against that right, of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attends it; and, lastly, because in simple theft the thing stolen only changes [its] master, but still remains in esse for the benefit of the public, whereas by burning the very substance is absolutely destroyed.

Richmond v. State, 326 Md. 257, 264 (1992) (quoting 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 220). In light of the historically grievous nature of arson, our caselaw has consistently held that the common law definition for arson—including its four common law elements—still controls. *See Holbrook*, 364 Md. at 368 ("While retaining the common law definition of arson in [CL § 6-102] , other sections of [Title 6] have been added by the Legislature to cover burning of buildings not specified in [§ 6-102], burning of personal property of another, burning goods with the intent to defraud an insurer, attempted arson, and other criminal burnings."). We conclude that our departure from the common law meaning of "set fire to or burn" in the context of CL § 6-106 did not abrogate the common law meaning of the terms as they are used in CL § 6-102.[3]

[3]A modern reader might wonder why our English predecessors imposed a (continued...)

As such, we turn to the State's second contention that there was sufficient evidence in the record that the structure of the house was actually ignited. In support of this contention they note that, in describing the damage to the home, Lt. Murray distinguished between the terms "smoke damage" and "fire damage"—implying that the two were not interchangeable, or, at the very least, that a reasonable fact-finder could have found that the term "fire damage" meant there was an actual burning of the structure. We disagree.

During his testimony, Lt. Murray described the damage to the home in terms of "smoke damage," "heat damage," and "fire damage." None of these terms indicate that any part of the structure itself was actually ignited rather than merely "scorch[ed], blacken[ed] by smoke, or discolor[ed] by heat." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 278 (3d ed. 1982). Furthermore, Lt. Murray specifically discussed the damage to the structure of the home once during his testimony, where he described it as: "smoke damage that—from the ceiling down, it was approximately three feet down from the ceiling." This evidence was simply not sufficient to support the

[3](...continued)
requirement of proof of actual damage to the structure of the dwelling as an element of the crime of arson. The reason lies in the draconian punishments meted out by English courts. At common law, arson was a felony, all felonies were capital crimes, and English law did not treat juveniles differently than adults. In other words, a fifteen year old who was convicted of arson in eighteenth century London would have been hanged. What now appears to be a quibbling distinction derived from a tradition of judicial mercy.

court's finding that the element of an actual burning was proved beyond a reasonable doubt.[4]

B. Malicious Burning and Malicious Destruction of Personal Property

Appellant argues that there was neither sufficient evidence of malicious burning of personal property in the first degree nor sufficient evidence of malicious destruction of personal property because the State did not present evidence of the dollar value of the items damaged in the fire. The State argues that the crime of malicious burning of personal property and malicious destruction are similar crimes, and that, for both crimes, the value of the property damaged is not a substantive element and thus need not be established in a juvenile proceeding. Secondly, it argues that there was sufficient evidence in the record that the property damage exceeded $1,000. We will discuss each offense separately.

In Part I, we concluded that the dollar value of the property damage was not a substantive element of the crime of malicious destruction of property because CL § 6-301(a) describes the crime as: "willfully and maliciously destroy[ing], injur[ing], or defac[ing] the real or personal property of another." While CL § 6-301(b) and (c) delineate divergent penalties depending upon the value of the damaged property,

[4]We are aware that photographs showing the nature [or quality or extent] of the damage were presented to the juvenile court at the disposition hearing. But these photos are not in the record and were not before the court at the adjudicatory hearing.

subsection (f)(1) specifically states that "[t]he value of damage is not a substantive element of a crime under this section[.]" CL § 6-301. We conclude that there was sufficient evidence that appellant committed the act of malicious destruction of personal property despite a lack of evidence of the value of the property damaged.

We now turn to the offense of malicious burning of property. The State acknowledges that the statutory structure for the two crimes differ in that malicious destruction is codified under as one statute—CL § 6-301—while malicious burning is broken into two: CL § 6-301 (first-degree malicious burning) and CL § 6-105 (second degree malicious burning). That notwithstanding, the State contends malicious burning is a "single crime" because the "dollar value pled and proved only affects the maximum sentence an adult may face if convicted." In furtherance of its argument, the State notes that, prior to 2002, the crime of malicious burning was codified under a single statute and that statute contained subsections delineating different penalties depending on the value of the property damage.

We agree with the State that the crimes of malicious burning and malicious destruction share many similarities. Had appellant committed these acts prior to 2002, we might have agreed with the State's analysis. But it is indisputable that, in 2002, the Legislature divided malicious burning into two separate offenses. Unlike CL § 6-301 (malicious destruction), which specifically states that the value of the property damage is

not a substantive element of the crime, the malicious burning statutes contain no such language. In fact, both CL §§ 6-104 and 6-105 state that the scope of the statute is restricted to those violations where the property damage is of $1,000 or more, or less than $1,000, respectively.

"If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Jones v. State*, 336 Md. 255, 261 (1994). The statutory language of CL §§ 6-104 and 6-105 make it clear that the Legislature intended to create two separate offenses based on the value of the property damaged. Thus, unlike the crime of malicious destruction, malicious burning of personal property in the first and second degree are separate offenses and the value of the property damaged is a substantive element that must be proved by the State.

The State's fallback contention is that there was sufficient evidence of the value of the property damaged by the fire for the juvenile court to have concluded that the value of the damaged property exceeded $1,000. The State concedes that there was no direct testimony as to value. It asserts, however, that photographs and testimony in the record provided sufficient evidence that could lead a reasonable fact-finder to conclude that the value of the property damage was over $1,000. This argument is unpersuasive for several reasons.

First, as we discussed in ftn. 4, the photographs that are one of the bases of the State's argument are not in the record transmitted to us and were not were entered into evidence at the adjudicatory hearing. Thus, the juvenile court could not have relied on them in assessing the value of the property damage. Second, Lt. Murray's testimony describing the property damage did not at any point touch on the value of the items damaged. There was no way for the fact-finder to judge how much each item was actually worth. In sum, there was no evidence as to the monetary amount of the property damage and certainly none that the damage was at least $1,000.

We conclude that appellant's actions did not satisfy the elements for malicious burning of personal property in the first degree, and that his actions only amounted to malicious burning of personal property in the second degree.

III. The Testimony of the Expert Witness

Appellant's final argument is that the "juvenile court erred in permitting Lt. Murray to testify as an expert witness at the delinquency hearing," because the State did not identify him as an expert witness, nor did it furnish any written report or statement made by the expert during pre-trial discovery, as required by Md. Rule 11-109(a)(3)(c) and (a)(3)(f). He acknowledges that the State had listed Lt. Murray as a witness, but contends that its disclosure "conspicuously does not provide any notice that Lt. Murray would be tendered as an expert witness." He further acknowledges that the State

provided him with the written Incident Report prepared by Lt. Murray during his investigation as Fire Marshal, but contends that it was clear from Lt. Murray's testimony that he "had formed a plethora of opinions prior to the hearing which were not within the incident report[.]" The State maintains that the juvenile court "properly allowed expert testimony from a witness whose identity and reports to the defense in advance of the hearing." We do not agree with appellant's interpretation of the rules.

Maryland Rule 11-109 governs discovery in juvenile proceedings. It differs in some respects from its counterpart in criminal cases, Md. Rule 4-263, as it pertains to expert witnesses.[5] Specifically, the juvenile discovery rule requires the disclosure of "the name and address of each person whom the State intends to call as a witness at any hearing to prove its case in chief. . . ." Md. Rule 11-109(a)(3)(c). The Rule further provides that the following must be disclosed, without request, in juvenile delinquency matters:

> (f) any written report or statement made in connection with the particular case by each expert consulted by the State, if the State intends to offer the testimony of the expert or the report at any hearing, including the written

[5]In criminal circuit court, the rule requires the State to identify each "witness the State's Attorney intends to call to prove the State's case in chief or rebut alibi [.]" Md. Rule 4-263(d)(3). As to expert witnesses, it must disclose: "(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion; (B) the opportunity to inspect and copy all written reports or statements made in connection with the action of the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and (C) the substance of any oral report and conclusion by the expert." Md. Rule 4-263(d)(8).

> substance of any oral report and conclusion made in connection with the particular case by each expert consulted by the State and the results of any physical or mental examination, scientific test, experiment or comparison[.]

Md. Rule 11-109(a)(3)(f). In short, the rules require the State to (1) disclose its witnesses and (2) provide any reports prepared by an expert witness whom the State intends to call. The Rule does not require the State to identify which of its witnesses are experts. In contrast, Md. Rule 4-263(d)(8) explicitly requires such a disclosure. Appellant's contention that Rule 11-109 required the State to identify Lt. Murray as an expert is not correct. We turn to appellant's second assertion, namely, that the State failed to turn over to him all of Lt. Murray's reports.

It is undisputed that the State disclosed Lt. Murray as a witness and that it provided appellant with a copy of the "Incident Report" that Lt. Murray had prepared.[6] Appellant argues that production of the written report was insufficient because Rule 11-109(a)(3)(f) also required the State to disclose the substance any oral report and conclusion made by Lt. Murray prior to the adjudication hearing. Furthermore, he asserts that the breadth of Lt. Murray's expert testimony exceeded that which was detailed in the Incident Report. We do not agree.

The State's discovery obligations extend only to items in its possession, and do not impose a duty to create new evidence for the defense. *Derr v. State,* 434 Md. 88, 124

[6]The Incident Report is not part of the record before this Court.

(2013). On both direct and on cross examination, Lt. Murray testified that the Incident Report was the only one he had prepared. As a result, the State had no statement made by him which it neglected to disclose, and it was not obligated to prepare any such statement. Because the State properly disclosed Lt. Murray as a witness, the juvenile court did not abuse its discretion in permitting him to testify as an expert regarding his observations of the fire damage to the house.

Appellate Remedy

The State failed to meet its burden of proof with regard to the allegations of first degree arson and first degree burning. The State implies that these conclusions are irrelevant to the disposition ordered by the juvenile court. The State may well be correct on this score but appellant has the right to argue for a different course of guidance, treatment and rehabilitation in light of the acts actually proven by the State. We remand this matter to the juvenile court for that purpose.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, (SITTING AS JUVENILE COURT), IS AFFIRMED IN PART AND REVERSED IN PART AND THE CASE IS REMANDED TO THAT COURT FOR A NEW DISPOSITION HEARING CONSISTENT WITH THIS OPINION.

COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.