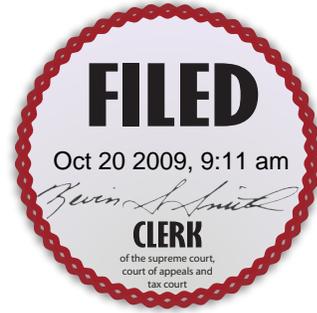


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY E. FARNER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 08A05-0902-CR-107

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause Nos. 08C01-0809-FB-9; 08C01-0304-FC-6

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Larry Farner appeals his conviction, after a jury trial, of one count of arson, as a class B felony; the revocation of his probation; and his sentence.

We affirm.

ISSUES

1. Whether the State presented insufficient evidence to support Farner's conviction.
2. Whether the trial court erred in finding that Farner violated his probation by committing a criminal offense while on probation.
3. Whether the trial court erred when it ordered Farner to pay restitution as a term of his probation.
4. Whether the sentence imposed by the trial court is inappropriate.

FACTS

On April 21, 2003, the State charged Farner with eleven counts in Cause Number 08C01-0304-FC-6 ("FC-6"). On January 2, 2004, pursuant to a plea agreement, Farner pleaded guilty to one count of battery by means of a deadly weapon, a class C felony, and five counts of criminal recklessness, as class C misdemeanors. On February 4, 2004, he was sentenced to four years for the battery offense; and one year each on the five misdemeanor offenses, with the misdemeanor sentences served concurrently with one another but consecutive to the battery sentence. The trial court then suspended to probation all of the sentence except 180 days, which was ordered to be served on in-home detention.

In Delphi, the Wabash and Erie Canal Association had raised funds and developed an area by the canal that included an interpretive center. In front of the center, in early 2008, volunteers began building a wooden 70-foot by 14-foot replica canal boat playground structure; it was completed on August 25, 2008. On the night of August 30-31, 2008, the area was used for Hispanic wedding festivities; the association president was present until the premises cleared, and then he left -- at approximately 2:00 a.m.

In the meantime, at approximately 7:00 p.m. on August 30th, Farner had been in a tavern in Delphi, “[t]elling people he was going . . . to go burn the boat down.” (Tr. 253, 255). Farner “said that when he was younger he used to play on that canal and now the kids that play on it are nigger and spic children.” (Tr. 269). An hour or so later, Farner came back, brandishing a propane torch, and asking the bartender for “rubber gloves and fingernail polish, or . . . flammable kind of stuff.” (Tr. 255). Farner left, with his torch, at approximately 11:00 p.m.

At approximately 11:20 p.m., Farner stopped at a local convenience mart. He bought 1.36 gallons of gas and some oil, and told the cashier that he was “going to go f*** this town up.” (Tr. 361, 378).

Between 2:00 a.m. and 3:00 a.m., Farner visited the tavern for a third time. He “stunk,” reeking of “really strong gas.” (Tr. 256). Farner told the bartender he “needed Dawn soap, something that would cut grease.” (Tr. 256). The bartender told Farner to wash his hands and leave. Farner “told [her] that [she] didn’t see him,” and “[i]f anybody asked, [she] didn’t see [him].” (Tr. 257).

At approximately 2:52 a.m., after observing Farner's pick-up truck traveling without its "lights on" and its "license plate light . . . out," Officer Kent of the Delphi Police Department executed a traffic stop. (Tr. 343). Officer Wilson arrived at the scene and determined that Farner's truck was not properly registered. The officers advised Farner that the truck would be towed and impounded. Wilson offered to give Farner a ride home; Farner asked to take with him a blue kerosene container and a cooler from the truck; Wilson retrieved the "half full" blue kerosene container and the cooler for him. (Tr. 18). When they arrived at Farner's residence, at approximately 3:30 a.m., Wilson "gave him his blue kerosene container and his cooler, and he set them in the grass right in front of his residence." *Id.*

Between 3:30 a.m. and 4:00 a.m., Don Alderman arrived at the scene of Farner's pick-up truck to tow the vehicle to impound. Approximately ten minutes later, Farner appeared – driving a sedan, and asked to retrieve his cigarettes. Alderman "got up in the truck and got his cigarettes out for him," and saw "a propane torch laying [sic] in the seat." (Tr. 278, 279). Farner was agitated, complained of police "harassing him," and said that "they didn't know who they were messing with," and that he "burnt that canal boat to the ground. He said, see what they think about that." *Id.* Later, returning from another tow job, at approximately 5:00 a.m., Alderman saw Farner driving the sedan near the canal.

At approximately 4:53 a.m., Farner had appeared at the convenience mart again, purchased a cup of coffee, and sat in a back room drinking it. At approximately 5:20 a.m., he went to a nearby restaurant and drank a cup of coffee there. After about five

minutes, when a friend asked if he had taken his medication that morning, he said he had not and that he would get it. Farner went to the convenience mart, retrieved his medication, bought a lottery ticket at approximately 5:58 a.m., and returned to the restaurant.

At approximately 6:00 a.m., a correctional officer on his way to work reported that the replica canal boat was on fire. Officers Wilson and Kent located Farner at the restaurant at approximately 6:30 a.m. Farner initially was “argumentative and hostile,” but then “cooperative,” and he “allowed [them] to follow him to his residence and showed” them the “blue gas can.” (Tr. 350, 351). It had been moved to “the very far back” of Farner’s garage and was nearly empty. (Tr. 21). Farner stated that he had poured the contents on “some fire logs out back.” (Tr. 22). Wilson picked up a log and smelled “a flammable liquid,” but he noted that the logs “weren’t overly wet.” (Tr. 23).

Officers executed a search warrant of Farner’s residence and recovered various forms of ignitable liquids, a blue kerosene container, a red gas can, and a propane torch. Dennis Randle, a fire investigator, had arrived when “the whole back half of the boat [was] full in fire.” (Tr. 82). After the fire had been extinguished, Randle examined the scene extensively. In the boat remains, Randle found irregular burn patterns and fluid stains with the odor of a “kerosene and gasoline mixture.” (Tr. 139). Randle concluded, as did Deputy State Fire Marshall Robert Dean, that the fire was intentionally set and that there had been multiple points of origin. In addition, based on their observations and the similar patterns produced in a test performed by Randle, they believed the fire had been set with a flammable liquid and an incendiary device. Randle opined that the canal boat fire had burned for at least an hour, but cautioned that it was “really, really hard to

estimate burn time.” (Tr. 178). Dean also concluded that the fire had burned “for quite awhile” and stated, “You can’t really tell what time a fire starts unless you were there and watched” it. (Tr. 242).

On September 2, 2008, the State charged Farner with arson, as a class B felony, and with being an habitual offender. On September 8th, 15th, and 16th, and on October 23rd, the State filed petitions to revoke Farner’s probation in FC-6, alleging *inter alia*, that he had violated his probation by committing another criminal offense.

Farner was tried by a jury on December 8 – 10, 2008. The above evidence concerning the boat fire was presented. In addition, the president of the Canal Association testified that materials costing \$11,090.19 were used in the 1,395 hours of volunteer labor for initial construction of the replica boat; and that rebuilding it required 417 hours of volunteer labor and materials costing \$5,484.27. An Indiana State Police forensic scientist testified that liquid from Farner’s blue kerosene can was a mixture of “gasoline and a heavy petroleum” product, such as kerosene; and that various samples of material from the burned boat showed the presence of “gasoline and a heavy petroleum” product. (Tr. 210, 199, 201). The jury found Farner guilty of arson, as a class B felony.

On December 15, 2008, Farner was tried to the bench on the habitual offender allegation. On December 18, 2008, the trial court found him to be an habitual offender. On December 18th, the trial court also issued an order finding that Farner “violated his probation . . . by committing a criminal offense while on probation.” (App. 57).

On January 30, 2009, the sentencing hearing was held. A witness for the Canal Association testified that in addition to the \$5,484.27 in materials expense already noted

for rebuilding, there had been a \$35.00 expense to repair a special bench on the boat. Before imposing sentence, the trial court proposed “certain terms and conditions of probation,” including that as “a term of probation,” Farmer would be required “to make restitution” to the Canal Association in the amount of \$5,519.27, with “payments . . . of not less than \$300 per month while on probation.” (Sent. Tr. 27.) When asked whether Farmer “would not be able to abide by” any of the conditions, Farmer answered, “No.” *Id.*

The trial court then stated as follows:

Now, Mr. Farner, as the Court weighs the various factors involved in your case, the Court’s going to note first in mitigation that you have a history of mental illness. The Court will also note your age as a mitigating factor. The Court’s going to note, however, that you have an extensive criminal record and that that extensive criminal record and the fact that you were on probation at the time of this offense are aggravating factors that outweigh the mitigating factors, and therefore, the Court is going to sentence you for the Arson to a term of fourteen years. For the Habitual Felon or the Habitual Offender statute the Court’s sentencing you to an additional term of ten years, and the Court is sentencing you on the dispositional count for the probation revocation for a period of one year. On that case, sir, I’m now terminating any further probation, so you’ve got one year executed to serve and that Court’s revoking and then terminating that case. You have ten years which will be fully executed for being a Habitual Felon and of the fourteen years for the Arson, the Court is going to suspend five years, leaving a balance of nine years to be executed, so you have nine years plus ten plus one. Those are all consecutive for a total of twenty years. That will be executed followed by five years of probation.

(Sent. Tr. 28-29).

DECISION

1. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence

to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Further, circumstantial evidence is sufficient for a conviction if inferences may reasonably be drawn that allowed the jury to find the defendant guilty beyond a reasonable doubt. *Pelley v. State*, 901 N.E.2d 494, 500 (Ind. 2009).

Farner's first argument begins by directing us to testimony of Randle that the "fire had been burning for at least 45 minutes to an hour or more," which he suggests must establish that fire was "set not later than 5:00 to 5:15" – when his whereabouts were known. Farner's Br. at 26. This argument must fail, as both fire investigators – Randle and Dean – testified that when the fire was set could not be established.

He further urges that it "is conceivably possible" that he "could have set the fire" between 2:00 a.m. (when the boat was intact) and his arrival at the tavern at approximately 2:30 a.m., but "this is far outside the time suggested by" Randle and would require the boat to have "been burning for over three hours." *Id.* at 27. For the same reason, to wit: there was no definitive time established by the testimony as to when the fire was set, this argument also fails.

Farner asserts that between approximately 4:00 a.m., when Alderman testified that Farner departed the site of the truck tow, until approximately 5:00 a.m., when Alderman

testified to seeing Farner driving his sedan near the canal, was “sufficient” time for the fire to have been set; but in that case, someone “in the vicinity . . . would have seen” the boat on fire. *Id.* at 28. There was no evidence that the canal area was populated at that hour, and Randle testified that “[y]ou actually cannot see the boat from the roadway” when “driving by the road.” (Tr. 81).

Farner reminds us that a witness had testified to his “artificial leg,” (Tr. 301), suggesting that such “would make it . . . difficult to move quickly.” Farner’s Br. at 29. However, there was no evidence presented that indicated Farner’s mobility was impaired or limited.

Farner further argues the lack of “physical evidence to connect [him] to the crime.” Farner’s Br. at 30. However, circumstantial evidence may support a conviction if inferences may reasonably be drawn therefrom to support the jury’s finding of guilt. *Pelley*, 901 N.E.2d at 500.

All of Farner’s arguments essentially ask that we reweigh the evidence or assess witness credibility. This we do not do. *See Drane*, 867 N.E.2d at 146-47.

To sustain his conviction for the offense of arson, as a class B felony, the State was required to establish that Farner knowingly or intentionally, by means of fire, damaged the property of another, without the other’s consent and resulting in pecuniary loss of at least \$5,000.00. *See Ind. Code* § 35-43-1-1(a). The jury heard evidence that Farner expressed his intent to burn the canal boat several times on the night the fire was set; that he had indicated his reason for desiring to burn it; and that he admitted having burned it. Further, evidence of Farner’s whereabouts at various times between 2:00 a.m.

and 6:00 a.m. established that there were several periods of time in which he could have set the fire. In addition, evidence established that he possessed ignitable liquids, including kerosene and gasoline, in portable containers; and incendiary devices, including two propane torches, a cigarette lighter, and a cigarette tucked in a pack of matches. Also, at one point during the night, he smelled of “really strong gas” and sought soap that “would cut grease.” (Tr. 266). At that time, he also told the bartender “that [she] didn’t see him,” and “[i]f anybody asked, [she] didn’t see [him].” (Tr. 257). The jury heard sufficient evidence to reasonably conclude beyond a reasonable doubt that Farner committed the offense of arson, as a class B felony.

2. Probation Revocation

The violation of probation is a matter established by the preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). In reviewing the trial court’s decision to revoke probation, we consider only the evidence most favorable to the judgment – “without reweighing the evidence or judging the credibility of witnesses.” *Id.* “If there is substantial evidence of probative value to support the trial court’s conclusion that a defendant has violated any terms of probation, we will affirm” the trial court’s decision to revoke probation. *Id.*

As noted above, on December 18, 2006, after a jury had found Farner guilty of having committed the offense of arson, the trial court found that Farner had violated his probation in FC-6 “by committing another criminal offense while on probation.” (App. 57). Farner argues that because “the State presented insufficient evidence to prove that [he] committed arson, which was the basis upon which the court revoked [his]

probation,” the State failed to “show by a preponderance of the evidence that he violated his probation.” Farner’s Br. at 34, 35. Inasmuch as we have already held that the jury heard sufficient evidence to reasonably conclude beyond a reasonable doubt that Farner committed the arson offense, Farner’s argument necessarily fails.

3. Restitution Order

The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victims caused by his offense. *Wittl v. State*, 876 N.E.2d 1136, 1138 (Ind. Ct. App. 2007), *trans. denied*. An order of restitution is a matter within the sound discretion of the trial court, and we will only reverse upon a showing of an abuse of that discretion. *Id.*

Farner argues that the trial court abused its discretion by ordering him to pay restitution as a term of his probation “without inquiring into his ability to pay.” Farner’s Br. at 15. According to Farner, who acknowledges that he “fail[ed] to object” to the imposition of such a term at his sentencing hearing, such was “fundamental error,” and requires that we remand “to the trial court with instructions that a hearing be held to determine whether, and if so, how much restitution [he] will be able to pay.” Farner’s Br. at 18, 20.

Clearly, the trial court provided Farner the opportunity to indicate that he would be unable to comply with a probation term that he pay \$300 monthly for restitution. Farner replied that he would not be unable to “abide by” this term. (Sent. Tr. 27). Waiver notwithstanding, Farner has not persuaded us that remand is required in this matter.

Indiana Code section 35-38-2-2.3(a)(5) provides: “When restitution . . . is a condition of probation, the court shall fix the amount, which may not exceed the amount the person can or will be able to pay, and shall fix the manner of performance.” The statute is cited as requiring that “[w]hen the trial court enters an order of restitution as a condition of probation, it must inquire into the defendant’s ability to pay.” *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008). The purpose of such inquiry is “to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant’s failure to pay restitution.” *Id.*

It is true that there was not an on-the-record “inquiry” as to Farner’s ability to pay \$300 monthly during the probationary period. However, we have noted that the “statute is not specific as to the form the court must follow in determining a defendant’s financial status” for imposing a restitution order as a term of probation. *Mitchell v. State*, 559 N.E.2d 313, 315 (Ind. Ct. App. 1990), *trans. denied*. In *Mitchell*, we found that financial information provided to the trial court in a pre-sentence investigation report (“PSI”) “was adequate to allow the trial court to make an informed and fair decision as to the amount of restitution to be paid and the manner” of the payment plan. *Id.* Here, the PSI indicated that Farner received disability payments of \$1,387.43 monthly, and his wife had monthly income of \$2508.

We also note that Farner did state on the record that he and his wife held “about \$50,000” in equity in their home, and that he personally owned three vehicles – which he estimated to have a value of “about \$6,000” if sold. (Sent. Tr. 31, 32). Hence, the record

is not without any evidence indicating that it was possible for Farner to pay the restitution amount ordered.

Farner posits that “when he leaves prison and is on probation” he might not be able to pay restitution as ordered. Farner’s Br. at 18. However, the law is clear that during his probationary term, Farner may not be imprisoned for not paying a restitution amount that exceeds his ability to pay. *Pearson*, 883 N.E.2d at 772, 773. After he has served his executed term and is released to probation, if Farner is charged with violating probation for failing to pay the restitution as ordered, it would be necessary for the trial court to determine that he was able to do so before he would be in actual jeopardy of having his probationary status revoked. Therefore, we do not find that the trial court abused its discretion when it ordered restitution.

4. Inappropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 482, 491 (Ind. 2007), *clarified on reh’g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Id.* (quoting Ind. Appellate Rule 7(B)). “The burden is on the defendant to persuade” the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

By statute, the advisory sentence for a class B felony is ten years, with a possible range of six to twenty years; *see* I.C. § 35-50-2-5. Farner was sentenced to fourteen on the class B felony offense. For being an habitual offender, the trial court enhanced his sentence by ten years – the minimum for a class B felony. *See* I.C. 35-50-2-8(h). In addition, Farner was ordered to serve one year of his previously suspended sentence in FC-6. Thus, Farner was ordered to serve twenty-five years (of which five years were suspended).

Farner argues that his sentence “is inappropriately severe, given the nature of the offense and of [his] character.” Farner’s Br. at 22. We are not persuaded.

As to the nature of the offense, Farner’s single assertion is that “no one suffered any physical injury as a result of the crime.” *Id.* The record established, however, that Farner virtually destroyed¹ a community-created playground structure for the enjoyment of children. Further, his express motivation was based on personal animus against the ethnicity of the children enjoying the playground structure.

As to his character, he reminds us of his bipolar disorder, his “problem with alcohol,” and his prosthetic leg. *Id.* at 23. Such a narrow perspective fails to include the reflection of his character shown by his criminal history – his seven operating-while-intoxicated convictions, two public intoxication convictions; convictions for battery resulting in bodily injury and criminal mischief; and his conviction for battery with a deadly weapon. Moreover, he was on probation at the time he committed the instant

¹ The structure was not totally demolished, so that reconstruction took less time and materials than the original; however, photographs of the remains establish that after the fire, it could not be used by children as playground equipment.

offense. In addition, the record established that at the time of sentencing, he faced pending charges of criminal confinement, sexual battery, intimidation, and invasion of privacy, and that he had committed numerous disciplinary incidents while incarcerated awaiting trial. In sum, Farner's character is demonstrated by a record of disregard for civil society and continued, escalating criminal behavior.

Farner has not met his burden of persuading us that the sentence imposed by the trial court is inappropriate.

Affirmed.

ROBB, J., and MATHIAS, J., concur.