

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD FRANKLIN LEWIS,

Defendant-Appellant.

UNPUBLISHED

August 12, 1997

No. 191202

Antrim Circuit Court

LC No. 94-002878

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his conviction after a trial by jury of arson of a dwelling house, MCL 750.72; MSA 28.267, and breaking and entering an occupied dwelling with the intent to commit arson, MCL 750.110; MSA 28.305. The conviction stemmed from charges that on April 19, 1992, defendant broke and entered into a house occupied by James Robert Wenzel and Debbie Jo Light-Higgins, poured transmission fluid in several areas of the house, and started several separate and distinct fires in the house. Defendant was sentenced to concurrent prison terms of 80 to 240 months for the arson conviction and 80 to 120 months for the breaking and entering conviction. We affirm.

Defendant contends that there was insufficient evidence that he was the perpetrator of the crimes. We disagree. Viewing the evidence in the light most favorable to the prosecution, the evidence linking defendant to the crime was sufficient for a rational trier of fact to conclude that defendant committed arson and breaking and entering. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1980). It is undisputed that defendant was in the vicinity of the fire when it started, that he observed the fire, called the fire department and, with Wenzel and his friend Ross Furslund, attempted to extinguish the fire. However, defendant gave accounts of the events surrounding his discovery of the fire that were inconsistent with each other and with the testimony of Wenzel and Furslund. Furthermore, an investigator testified that in over one thousand fire investigations, he had never seen any involving the use of transmission fluid as an accelerant. However, before the fire, defendant once recommended using transmission fluid to start a fire in the fireplace at Wenzel's house, located a container of transmission fluid in the basement of the house and showed Higgins how to use it. In addition, the evidence suggests that Higgins' possessions were targeted in the fire, and the relationship between

Higgins and defendant provided a motive for him to act against her. Higgins testified that she and defendant were very good friends who considered becoming romantically involved but never did. Higgins also testified that defendant wanted a relationship with her that was closer than the one that she wanted with him, that he was possessive of her, that he brought up the subject of marriage. A jury could infer that defendant was angry because Higgins did not reciprocate his feelings for her. In summary, from the evidence presented at trial, a rational finder of fact could conclude that defendant was in fact the perpetrator of the breaking and entering and arson of Wenzel's house.

Defendant also argues that the trial court erred in scoring offense variables 18 and 19 of the sentencing guidelines. Specifically, defendant claims that because there was no injury or threat to life, OV 18 should have been scored five, rather than fifteen. Defendant also argues that transmission fluid cannot be considered an "incendiary device" with respect to the scoring of OV 19. However, "a guidelines error does not violate the law" and "the claim of a miscalculated variable is not in itself a claim of legal error." *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997). As in *Mitchell*, "[t]he challenge here asserted is directed not to the factual basis for the sentence, but, rather to the judge's calculation of the sentencing variables on the basis of his discretionary interpretation of the unchallenged facts. The challenge does not state a cognizable claim for relief." *Id.* at 176. Accordingly, further consideration of defendant's challenges to the scoring of the guidelines is unnecessary.

Finally, defendant contends that his sentence was disproportionate. We disagree. Defendant's sentence was within the recommended range of the sentencing guidelines as scored by the trial court and was presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not overcome that presumption, and we are not persuaded that the sentence was an abuse of discretion. Finally, contrary to defendant's contentions, the sentencing court was allowed to consider the facts underlying other suspicious fires with which defendant was connected. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Harold Hood
/s/ William B. Murphy