STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD PERRY ROTH,

Defendant-Appellant.

UNPUBLISHED
January 13, 1998

No. 194253
Midland Circuit Court
LC No. 95-007756-FH

Before: Michael J. Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of arson of a building, MCL 750.73; MSA 28.268. The conviction stemmed from a fire at a furniture store in Midland, Michigan. Defendant was sentenced to four and one-half to ten years' imprisonment, and ordered to pay restitution in the amount of $1,426,493.51, as well as $3,947 for costs the Midland Fire Department incurred in servicing the fire. Defendant appeals his conviction as of right. We affirm.

Defendant first argues on appeal that the prosecutor failed to submit sufficient evidence to obtain his conviction of burning a building. We disagree.

When reviewing an issue challenging the sufficiency of evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient from which a rational trier of fact could determine that the prosecutor proved the elements of the offense beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997). To obtain a conviction of the crime of burning a building, the prosecutor was required to prove that defendant maliciously and wilfully burned a building, here a store called "The Grainery." MCL 750.73; MSA 28.268; see also *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). Because arson is usually committed surreptitiously, proofs of this crime are normally circumstantial. *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1971); see also *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of an offense. *Reeves, supra*.

In this case, there is no question that someone maliciously and wilfully set fire to The Grainery on the evening of September 18, 1994, at approximately 11:30 p.m. Evidence showed that this person or persons had poured a liquid accelerant at approximately three spots inside the business and then set this substance afire. Because there were no signs of forced entry, police concluded that the fire had been set by someone who had access to the store's key. Indeed, defendant acknowledges in his brief on appeal that the fire was the product of arson, and that the person who started the fire did not enter The Grainery forcibly.

The prosecutor submitted evidence to establish that defendant had both the motive and the opportunity to set the blaze. See *Lindsey*, *supra* (evidence of motive and opportunity can be sufficient to support arson conviction). The night before the fire, defendant had stolen a blank check from the store's checkbook, forged the business owner's signature, and cashed the forged document for $1,000. Defendant subsequently pleaded guilty to this offense. The prosecutor theorized that defendant set the fire to eradicate evidence of his crime, or at least to buy himself some time so that he could avoid arrest. Consistent with this theory, the arsonist made a special effort to burn the desk in which the owner of The Grainery usually kept the business' financial papers and checkbook.

The prosecution further established that defendant had an opportunity to set the fire, because he was one of five people that possessed keys to The Grainery at the time of the arson and other evidence explained the whereabouts of the other four keyholders. Further evidence, when viewed in a light most favorable to the prosecution, showed that defendant returned to his home sometime between 10:30 p.m. and 11:00 p.m., which would have given defendant enough time to set the blaze and return five miles to his home, in time to watch the television programs he and his wife claimed to have viewed together on the night in question. Defendant also made at least three different statements regarding his whereabouts and his activities on the night of the fire, which cast suspicion of defendant's guilty knowledge and further strengthened the inferences of guilt arising from the evidence:

> "All . . . attempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of consciousness of guilt. They do not prove it, but the jury are [sic] entitled to consider and weigh them in connection with the more direct evidence." [*People v Dandron*, 70 Mich App 439, 443-444; 245 NW2d 782 (quoting *People v Arnold*, 43 Mich 303, 305; 5 NW 385 (1880)); see also *People v Wackerle*, 156 Mich App 717, 720-721; 402 NW2d 81 (1986).[1]]

Additionally, bolstering the prosecution's evidence of guilt, defendant made a statement to a witness that he had access to a pickup truck on the date the fire was started. At approximately 11:00 p.m. on the night of the fire, a witness saw a man standing by a pickup truck that had been parked in the parking lot located behind The Grainery. The man had a towel in his hand, and was wiping his hair and arms like he was drying himself off. Although the witness was unable to identify the man as defendant, viewing all the evidence in a light most favorable to the prosecution, the jury could have reasonably believed this person to be defendant and further believed that he was attempting to clean himself of the

liquid accelerant that was used to start the fire. Defendant also stated to another witness that "they will never get me or my friend" and that "[t]hey don't have sh*t on me, they are just fishing." Viewing this statement in a light most favorable to the prosecution, and noting the absence of a denial of guilt, we conclude that the jury could have reasonably interpreted this as an admission that defendant started the fire at The Grainery, but that he believed the police lacked enough evidence to obtain his conviction. In sum, viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecutor submitted sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of the crime of burning a building.[2]

Defendant next argues that he was denied effective assistance of counsel at trial. In order to establish this claim, defendant must prove (1) that the performance of his counsel fell below an objective standard of reasonableness using prevailing professional norms; (2) that a reasonable probability exists that the result of the trial would have been different had the error not occurred; and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674, 693 (1984); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Since defendant did not move to create an evidentiary record in support of his claim, our review is limited to the facts in the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

Defendant's argument is based on the assertion that his trial counsel failed to object to the testimony of a prosecution witness regarding a conversation between the witness and defendant while the two men were incarcerated in the Midland County Jail. Defendant has not demonstrated, however, that the court would have sustained an objection to this witness' testimony. The testimony was relevant to the credibility of defendant's alibi defense, as well as relevant to the prosecutor's attempt to place defendant at the scene of the crime. An objection on the basis of hearsay would not have resulted in the exclusion of this evidence because defendant's statements constituted admissions of a party opponent. MRE 801(d)(2)(a). Therefore, we conclude that defense counsel's actions were not deficient. Counsel is not required to raise meritless objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant has also failed to demonstrate that he was unfairly prejudiced by admission of the witness' testimony. The witness spoke to defendant when they were both in jail, and the witness volunteered the fact that he spoke with defendant "[i]n the maintenance office of the jail." We acknowledge that, in a previous case, this Court found unfair prejudice where a witness stated that he met the defendant in jail. See *People v Wallen*, 47 Mich App 612, 613-614; 209 NW2d 608 (1973); see also *People v Steiner*, 136 Mich App 187, 197; 355 NW2d 884 (1984). However, in *Wallen, supra*, this Court emphasized that "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice," and based its finding of prejudice on the fact that the prosecutor "deliberate[ly] and repeated[ly]" referred to the fact that the witness was acquainted with the defendant because they were jail-mates. Here, the witness volunteered such information. The prosecutor did not engage in deliberate or repeated use of this information to impress upon the jury that defendant had committed other crimes. Moreover, evidence of defendant's prior criminal activity, i.e., his forgery of the check, was already properly placed before the jury, because it was relevant to the

prosecutor's attempt to establish defendant's motive. See MCL 768.27; MSA 28.1050; *People v Chism*, 390 Mich 104, 119; 211 NW2d 193 (1973); *People v Jones*, 119 Mich App 164, 168; 326 NW2d 411 (1982). We find that defendant was not reversibly prejudiced by his attorney's failure to object to the witness' isolated statement, and further determine that, evidence of defendant's prior offense being properly before the jury anyway, counsel's failure to object did not likely affect the outcome of defendant's trial.

Lastly, defendant argues that his sentence violated the principle of proportionality.[3] It is presumed that sentences falling within the guidelines are proportionate. *People v Harrington*, 194 Mich App 424, 431; 487 NW2d 479 (1992). However, courts are not bound to adhere to the minimum sentence suggested by the guidelines. See *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997). Deviations from the guidelines are permissible if unique facts exist, or if the range is disproportionate to the severity of the crime and to the defendant's prior record. MCR 6.425(D)(1); see also *People v Harris*, 190 Mich App 652, 668-669; 476 NW2d 767 (1991) (directing courts to determine if unique facts exist that are not already reflected in guidelines, and to determine why such factors justify departure). The sentencing court must state its reasons for departing from the guidelines on the sentencing information, as well as on the record at sentencing. MCR 6.425(D)(1); *People v Johnson*, 187 Mich App 621, 630; 468 NW2d 307 (1991).

Here, defendant's recommended minimum sentence was 0 to 12 months in jail. The trial court concluded that this case presented unique circumstances for which the guidelines did not already account, and sentenced defendant to four and one-half to ten years' imprisonment. The court explained its reasons for the sentence imposed, noting that the need for deterrence, punishment, and protection of the community outweighed the possibility of defendant's reformation. The court also determined, we believe correctly, that the applicable offense variables did not adequately account for all of the factors in the case. The court stated that Offense Variable (OV) 17 does not account for crimes resulting in over a million dollars in damages,[4] and that OV 18 does not account for the particular magnitude of threat that defendant's actions posed.[5] Given the court's extensive analysis, the magnitude of the financial loss in this case, and the significant threat to human life that defendant caused by setting a fire in a strip mall at which at least one business was still open, we conclude that the trial court's decision to sentence defendant to a four and one-half to ten year sentence was warranted. The sentence was not disproportionate.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] These cases concern exculpatory statements that were proven to be false. In this case, defendant's statements were inconsistent. On the day after the crime, defendant told the owner of The Grainery that

he was at home on the night of the fire watching the television program "Coach" with his wife. Approximately one year later, when he was in jail, defendant told a jail-mate that he was at home on the night of the fire, and he and his wife were trying to decide whether to watch the televisions programs "Cheers" or "Hard Copy" at the approximate time of the fire. However, shortly after the fire, defendant told the police that he was at home watching his children on the night in question while she was at work, and later left the house to play poker at the casino. Logically, one of these accounts is untrue. Although defendant called witnesses to give testimony to corroborate his account that he was at home watching television with his wife on the night of the fire, these witnesses testimony was rife with inconsistencies, and thus of questionable credibility. Issues of credibility are appropriate matters for the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

[2] We acknowledge the difficulty of proving a case of arson without evidence, circumstantial or direct, of a defendant's presence at or near the scene of the crime. The instant matter is most closely analogous to *People v Horowitz, supra*. In that case, the prosecutor submitted evidence to show that the defendants, the business owners, had both opportunity and motive to set a fire at their place of business, but also presented additional evidence to place the defendants at the scene shortly before the fire began:

> As evidence bearing upon the opportunity and motive of defendants to set the blaze, the prosecutor submitted the following facts: that the building was secured from the outside and there was no evidence of a breaking-in; that defendants were on the premises not long before the conflagration began; that it would have been easy for defendants to set the fire, although not physically present, by means of a timing device; that defendant owed three months rent; that they were indebted to the Michigan Department of Revenue for sales tax; that defendants owed $650 to the gas company; and that defendants carried $40,000 in fire insurance. [37 Mich App 157.]

Here, we believe that evidence of defendant's inconsistent alibi statements, his jail admissions, and the strength of his motive, not to mention the prosecutor's ability to account for the whereabouts of other potential suspects on the night of the fire, amply cured whatever weakness arose from the prosecutor's inability to place defendant directly at the scene of the crime shortly before the fire.

[3] Defendant has supported his argument with reference to an unpublished decision of this Court. Unpublished decisions lack precedential authority. MCR 7.215(C)(1); *People v Polus*, 197 Mich App 197, 203; 495 NW2d 402.

[4] OV 17 is scored highest when the aggregate value of the property damaged is more than $5,000.

[5] OV 18 is given the second lowest score of five when a defendant's acts caused a threat to human life.