STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL E. TAYLOR,

Defendant-Appellant.

UNPUBLISHED
March 6, 1998

No. 190802
Oakland Circuit Court
LC No. 94-136410 FH

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of burning insured property, MCL 750.75; MSA 28.270, and pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to one year in jail and five years' probation. Defendant appeals as of right. We affirm.

In April, 1994, defendant and his family left defendant's residence early one evening intending to go "up north." Shortly thereafter, the residence was on fire. The fire was put out and defendant was notified. Defendant and his family returned to the residence the next morning and spent parts of the day in and around the residence. Shortly after defendant and his family left the residence that evening for the purpose of going to a motel, the residence was again on fire. The origin of the second fire was determined to be different from and unrelated to the origin of the first fire. Defendant's conviction arises out of the second fire.

Defendant argues that he was effectively denied his right to appeal because the videotape of the fourth day of trial (the day that four of defendant's witnesses testified and certain evidentiary rulings were made) was inadvertently lost. Defendant contends that he is therefore entitled to a new trial.

The Michigan Constitution guarantees the right to appeal a criminal conviction. 1963 Const, Art 1, § 20. This Court must determine whether the unavailability of those portions of the trial so impedes the enjoyment of defendant's constitutional right to an appeal that a new trial must be ordered. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). The failure of the state to provide a transcript when, after good faith effort, it cannot physically do so,

does not automatically entitle a defendant to a new trial. *People v Iacopelli*, 141 Mich App 566, 568; 367 NW2d 837 (1985); *People v Carson*, 19 Mich App 1, 7-8; 172 NW2d 211 (1969). Rather, the applicable law was explained as follows in *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987):

> A defendant's constitutional right to appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues. [*Audison*, *supra* at 835.] Whether the record is sufficient depends upon the question asked of it. *People v Federico*, 146 Mich App 776, 799-800; 381 NW2d 819 (1985). Where the record is insufficient, we have remanded cases for the construction of a new record to allow review of the issue on appeal. See e.g., *People v Dunn*, 50 Mich App 529; 213 NW2d 832 (1973), and *People v Drew*, 26 Mich App 337; 182 NW2d 566 (1970). When, after remand, it is clear that no settlement of the facts is possible, then the grant of a new trial is permissible to preserve a defendant's right to appeal. *People v Horton* (*After Remand*), 105 Mich App 329, 331; 306 NW2d 500 (1981).

At the time defendant initially filed his claim of appeal, he had not submitted a proposed statement of facts in accord with MCR 7.210(B)(2). Rather, defendant made a generalized argument that his right to appeal was foreclosed due to the missing transcripts. However, after defendant's claim of appeal and pursuant to this Court's remand order, defendant submitted an order adopting a settled statement of facts.

Defendant claims that he could not submit an accurate and complete summary of his testimony or the testimony of his expert. However, the order adopting the settled statement of facts explicitly states that the settled statement of facts was approved by all counsel and was adopted as the statement of facts to be submitted in this case. The settled statement of facts is relevant on appeal to a resolution of defendant's claim that the verdict was against the great weight of the evidence as well as defendant's evidentiary challenges. With respect to defendant's claim that the verdict was against the great weight of the evidence, there is no indication that the settled statement of facts is insufficient in detail to inform this Court of the nature of the controversy and the proceedings in the trial court concerning this matter The settled statement of facts appears to contain the summary of defendant's testimony and the testimony of defendant's expert that defendant believes weighs against the prosecution's evidence that defendant committed the offense of burning insured property. Therefore, defendant was not denied his right to appeal this matter and he is not entitled to a new trial.

We next address whether defendant was effectively denied his right to appeal his evidentiary claim. Defendant argues that the trial court abused its discretion by not allowing him to introduce thirty-three photographs of the burned house, two videos that provided contradictory evidence concerning the use of an accelerant as the source of the fire, and one video of a burning experiment conducted by defendant's expert, which depicted how certain debris located at the fire's alleged point of origin could have left marks that could be misinterpreted as a burn pattern indicative of the use of an accelerant.

We cannot review this issue because there is nothing in the record explaining the bases for defendant's desire to admit the evidence or the trial court's reasons in refusing admission. There is no

indication how many photographs defendant sought to admit, aside from the thirty-three photographs that he claims were improperly excluded. Nor is there an indication of which photographs were or were not admitted. Defendant does not explain why he did not include a summary of the evidence he sought to admit and the reasons for the trial court's denial in the settled statement of facts. Although defendant claims that he cannot recall the numerous procedural issues that occurred on the fourth day of trial, he had an opportunity to attempt to summarize the reasons for the court's refusal to admit the photographs and video tape. Because defendant chose not to do so, we do not believe that defendant was deprived of his right to appeal, and he is not entitled to a new trial.

Defendant next argues that the trial court erred in denying his motion for a directed verdict on the charge of burning a dwelling house, MCL 750.72; MSA 28.267, because the premises in question did not constitute a dwelling at the time of the fire.

In reviewing a trial court's decision on a motion for directed verdict, this Court views the evidence presented up to the time the motion was made in a light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

MCL 750.72; MSA 28.267 provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

The term "dwelling house" as been defined as follows:

> "The term 'dwelling house' has a broader meaning than a house that is actually occupied as such. It means any house intended to be occupied as a residence, and would include any such residence, even though not occupied by the complaining witness at the time of the burning." [*People v Reeves*, 448 Mich 1, 17; 528 NW2d 160 (1995) (quoting *People v Losinger*, 331 Mich 490, 502; 50 NW2d 137 [1951]).]

If the structure is unoccupied but in a condition in which it could be dwelt in, the structure is a "dwelling house" for purposes of the statute. However, if the structure is unoccupied and dilapidated to the extent that it is deemed abandoned, then the structure is no longer a "dwelling house." *Reeves*, *supra* at 19.

In this case, the evidence indicated that as a result of the first fire and the efforts to extinguish it the residence's roof contained a hole, the ceiling was removed, the utilities were shut off, and the windows and broken doors were boarded over. Despite the damage to the attic, there was also testimony that the first floor was untouched by any fire damage, and that the only true damage was water damage. After the first fire, defendant and his family returned to and remained at the residence periodically throughout the day. Although defendant and his family left the residence to go to a motel

before the second fire, there was no indication that defendant had abandoned any intent to inhabit the residence in the future. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that the residence was unoccupied at the time of the second fire but not abandoned and that, therefore, the residence was a dwelling house. *Id*. Accordingly, the trial court properly denied defendant's motion for a directed verdict on the charge of burning a dwelling house.

Finally, defendant argues that the trial court abused its discretion in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. Defendant claims that the verdict was against the great weight of the evidence because the case against him was entirely circumstantial and there was no direct evidence that the fire was intentionally set or started with accelerants.

However, circumstantial evidence and the inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). After reviewing the entire record in this case, we conclude that despite the testimony of defendant's expert witness, the verdict was not against the great weight of the evidence. The trial court did not abuse its discretion in so ruling. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993); *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989).

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski