STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL WILLIAM NOWACK,

Defendant-Appellant.

UNPUBLISHED
October 9, 1998

No. 196655
Ingham Circuit Court
LC No. 95-069719 FC

Before: Griffin, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Defendant appeals by right from a jury trial conviction of one count of arson of a dwelling house, MCL 750.72; MSA 28.267, and two counts of first-degree felony murder, MCL 750.316; MSA 28.548. On January 15, 1995, an explosion occurred in the ten-unit apartment complex in which defendant resided. Two people, a sixty-seven year old woman and a ten year old boy, were killed by the explosion and resulting fire. Investigators established that the explosion originated within defendant's apartment when a large quantity of natural gas was ignited. Defendant was sentenced to serve two concurrent terms of life in prison without parole on the first-degree felony murder convictions, and ten to twenty years' imprisonment on the arson of a dwelling house conviction. Defendant's sentence for arson of a dwelling house was subsequently vacated by the trial court. We reverse and remand.

I

Defendant argues that the trial court committed error requiring reversal by failing to properly instruct the jury that accident is a defense to the specific intent crime of arson of a dwelling house. We disagree. This Court reviews "jury instructions in their entirety to determine if there is error requiring reversal." *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). "'The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights.'" *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997), quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

In the case at bar, the trial court first instructed the jury that the prosecutor had to prove all elements of the charged offenses beyond a reasonable doubt. The trial court then twice described the elements required to establish an arson conviction—once for the arson charge itself, and once as an element of the first-degree felony murder charges. The trial court instructed the jury that in order to establish that defendant was guilty of the crime of arson of a dwelling house, the prosecution had to prove beyond a reasonable doubt "that when the Defendant burned the dwelling or any of its contents, he intended to set a fire, knowing that this would cause injury or damage to another person or to property." Later, the trial court instructed the jury that "[t]he crime of arson requires the specific intent to do a burning, to start a fire." Finally, after noting that defendant claimed that the fire was accidental, the trial court instructed the jury that "[w]hen there is a fire, the law assumes that it had natural or accidental causes. The Prosecutor must overcome this assumption and prove beyond a reasonable doubt that the fire was intentionally set."[1] We conclude that, taken in their entirety, these instructions fairly and accurately apprised the jury that in order to convict defendant of arson and felony murder, the jury had to find that defendant intended to set fire to his apartment, not merely that defendant accidentally ignited the gas that filled his apartment.[2] That the trial court did not read CJI2d 7.3a[3] as it indicated it would, is of no consequence, given that the totality of the jury instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Daniel*, *supra* at 53.

II

Defendant also contends that the trial court improperly permitted the prosecutor to introduce evidence of defendant's prior suicide attempts. We disagree. We review a trial court's decision whether to admit evidence under an abuse of discretion standard. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). "There is no policy of general exclusion relating to other acts evidence . . . . Relevant other acts evidence does not violate [Michigan] Rule [of Evidence] 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). When considering the admissibility of other acts evidence, a court must determined if the evidence satisfies the following criteria:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request provide a limiting instruction to the jury. [*Id.* at 55.]

MRE 404(b)(1) states that "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as . . . *absence of mistake or accident when the same is material*." (Emphasis added.) In the case at bar, the prosecutor offered evidence of defendant's prior suicide attempts to counter defendant's theory that the fire was an accident. Accordingly, the evidence was offered for a proper purpose.[4] Further, because testimony that defendant attempted suicide on several occasions in the previous five years tended to make defendant's accident defense less probable than it would have been without the testimony, the testimony was logically relevant, MRE 401, and thus generally admissible, MRE 402. Additionally, we disagree with defendant's assertion that the

prejudicial effect of the evidence substantially outweighs its probative value. The prosecutor had no direct evidence to show that defendant intentionally filled his apartment with gas and ignited the gas. Considering the prosecutor's lack of other significant evidence to rebut defendant's claim of accident, the evidence was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. Finally, we note that the trial court did instruct the jury that evidence of defendant's past suicide attempts and suicidal thoughts could only be used by the jury for certain limited purposes, including whether it tended to show that defendant "acted purposefully, that is not by accident or mistake or because he misjudged the situation." Therefore, we conclude that the trial court did not abuse its discretion by allowing the prosecutor to introduce evidence regarding defendant's prior suicide attempts.

III

Additionally, defendant claims that the trial court violated defendant's clergy-penitent privilege, MCL 600.2156; MSA 27A.2156, by admitting testimony regarding a statement defendant made to his minister. One week before the explosion and fire, defendant's minister contacted the Lansing Police Department, who dispatched an officer to check on defendant. After arriving at defendant's apartment and finding that defendant was unharmed, the responding officer told defendant he wanted to contact defendant's minister. Defendant then provided the officer with the minister's telephone number. During the course of the subsequent telephone call, the officer testified that the minister "said that he was told that [defendant] . . . wanted to end it all and put a bullet in his head." Defendant objected to the introduction of this testimony on two grounds: (1) that it violated the clergy-penitent privilege recognized in MCL 600.2156; MSA 27A.2156; and (2) that it was inadmissible hearsay. The trial court ruled that the testimony was admissible because: (1) defendant had waived his privilege by telling the officer he could call the minister; and (2) it was admissible under the "catch-all" exception to the hearsay rule found at MRE 803(24).

MCL 600.2156; MSA 27A.2156 states: "No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." Initially, we note that it is unclear whether defendant's threatened suicide was communicated directly from defendant to the minister. The officer testified that the minister "said that he was told" about the threat. This seems to imply that the threat was relayed to a third party who in turn passed it on to the minister. In such a situation, the clergy-penitent privilege would not apply. Further, it is not clear from the record whether the minister in question was a member of the laity or the ordained clergy of defendant's church. If the minister was a member of the laity, then arguably the statutory privilege would not apply. Most importantly, however, we note that Michigan's statutory privilege is narrowly drawn to cover only those confessions made "in the course of discipline enjoined by the rules or practice of such denomination." *Id*. Thus, all confidential communications between a person and the clergy are not covered by the statutory exception. See generally McCormick, Evidence (4th ed: abridgment), § 76.2, p 109. There is nothing to indicate that the communication at issue was made under the doctrines of defendant's church. For these reasons, we believe that the trial court correctly concluded that the clergy-penitent privilege was inapplicable, albeit

for the wrong reason. See *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993) ("Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal."). We also disagree with defendant that the trial court erred when allowing the testimony into evidence under the catch-all exception to the hearsay rule found at MRE 803(24).[5]

IV

Defendant also argues that the prosecution failed to present sufficient evidence for the jury to find that he possessed the specific intent required to be guilty of arson of a dwelling house. Consequently, defendant asserts that there was insufficient evidence to support his first-degree felony murder convictions. We agree. "In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution [to] . . . determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The jury may infer a person's specific intent from circumstantial evidence and the reasonable inferences drawn therefrom. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "Given the difficulty in proving the actor's state of mind, minimal circumstantial evidence illustrating that defendant" had the requisite specific intent is considered sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

After carefully reviewing the record, we are convinced that a jury could not have rationally concluded that defendant had specifically intended to burn the apartment building by setting a fire. While there was sufficient evidence to establish that defendant had purposefully filled his apartment with natural gas, there was insufficient evidence that defendant had intentionally ignited the gas. Indeed, Jack Sanderson, a fire investigator who testified on behalf of the prosecution, repeatedly stated that although it was his opinion that the fire had started in defendant's apartment, he had no way of determining how the gas was ignited. Sanderson testified that given the blast pattern, he did not believe that the gas had been ignited by the pilot light of either defendant's furnace or hot water heater. He also opined that neither defendant's refrigerator or stove was the ignition source. However, Sanderson conceded that the gas could have been ignited by something as innocuous as defendant's turning off a light switch. According to Sanderson, the arc created by turning off a light switch could potentially serve as the ignition source if there was a crack in the switch casing. Sanderson also acknowledged that the discharge of static electricity created when a person walks over to and touches a light switch could theoretically have ignited the gas. Even an action as simple as brushing your fingers through your hair and then touching a grounded item could create a static discharge sufficient to ignite the gas, according to Sanderson.

Sanderson's opinions concerning static electricity were echoed by Douglas Leahey, an explosives specialist employed by the United States Department of Treasury's Bureau of Alcohol, Tobacco and Firearms. Testifying on behalf of the prosecution, Leahey opined that under the right conditions a discharge of static electricity could ignite natural gas. As for the theory that the gas was ignited by an arc occurring inside a wall light switch, Leahey concluded that while possible, such an occurrence was unlikely. Ultimately, like Sanderson, Leahey was not able to offer an opinion on the

likely source of ignition. Then there was the evidence of Melvin Ott, a Lansing electrical inspector, who testified that he "could find no evidence that there was any ground fault occurrence that would cause any kind of arcing . . . which would cause ignition of combustibles." Ott conceded, however, that his investigation would not have uncovered whether a small arc in a light switch had occurred inside defendant's apartment before the fire.

Viewed in a light most favorable to the prosecution, the testimony of these expert witnesses establishes: (1) that defendant purposefully filled his apartment with natural gas; (2) that the explosion and fire were caused by the ignition of this gas build-up; and (3) that the explosion originated in defendant's apartment. What is missing is sufficient evidence to establish that the ignition of the gas was the result of an intentional act on defendant's part. In fact, much of the evidence offered by the prosecution supports the theory that a completely inadvertent act could have ignited the gas.[6] The prosecution argues that the conclusion that defendant specifically intended to cause the fire is evidenced by the fact that defendant remained in a gas filled apartment and failed to take any steps to repair the gas leak. This argument is a non sequitur. Even when viewed in a light most favorable to the prosecution, it does not follow that simply because defendant had to be aware of the presence of the gas and took no steps to correct the leak, that defendant must have intended to ignite that gas in order start a fire. It is just as reasonable to conclude that the reason he took no steps to correct the leak was because he was attempting to asphyxiate himself. As for the evidence concerning defendant's past suicide threats and attempts, while it tends to show that he intended to commit suicide when he filled his apartment with the gas, it does not establish the method that he would employ in such an attempt. In other words, this evidence does not establish that defendant was intending to die in a fire caused by the ignition of the accumulated natural gas as opposed to just trying to asphyxiate himself.

Therefore, we conclude that there was insufficient evidence to support defendant's arson of a dwelling house conviction. Without the arson conviction, defendant necessarily could not be found guilty of first-degree felony murder. Accordingly, we vacate defendant's first-degree felony murder conviction. We do, however, believe that there was sufficient evidence to support a conviction for involuntary manslaughter. Hence, we remand this case to the trial court for entry of an involuntary manslaughter conviction and sentencing thereon.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] This instruction tracks the language of CJI2d 31.1: "When there is a fire, the law assumes that it had natural or accidental causes. The prosecutor must overcome this assumption and prove beyond a reasonable doubt that the fire was intentionally set."

[2] Defendant notes that the trial court rejected defendant's request to have CJI2d 7.2 read. As the usage note to the instruction observes, however, CJI2d 7.2 is meant to be used when accident is raised

as a defense to a murder charge. Accordingly, the trial court's refusal to use it in the context of instructing the jury on the charge of arson was proper. Furthermore, when instructing the jury on the charges of first and second-degree murder, the trial court did give a hybrid instruction combining elements of CJI2d 7.1 and 7.2.

[3] CJI2d 7.3a reads:

> The defendant says that [he / she] is not guilty of [*state crime*] because [he / she] did not intend to [*state specific intent required*]. The defendant says that [his / her] conduct was accidental. If the defendant did not intend to [*state specific intent required*], [he / she] is not guilty. The prosecutor must prove beyond a reasonable doubt that defendant intended to [*state specific intent required*].

[4] As the *VanderVliet* Court observed: "The question is not whether the evidence falls within an exception, . . . but rather whether the 'evidence [is] in any way relevant to a fact in issue' other than by showing mere propensity." *VanderVliet, supra*, 444 Mich at 64 (quoting Stone, *The rule of exclusion of similar fact evidence: America*, 51 Harv L R 988, 1004 [1938]).

[5] The trial court's analysis of the issue did not address the fact that the testimony arguably involves multiple hearsay. However, we find this oversight harmless. The original statement by defendant to either the minister or to the person who relayed it to the minister is non-hearsay. MRE 801(d)(2). We are satisfied that the subsequent telling of the statement—be it once to the officer by the minister, or twice from the unidentified person to the minister and then to the officer—meet the criteria for admission set forth in MRE 803(24).

[6] For example, the testimony supports the proposition that someone who purposefully turns off a light because he is worried that the burning light might ignite a gas leak, could quite unintentionally cause an explosion (i.e., the very eventuality he was attempting to avoid).