STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL WILLIAM NOWACK,

Defendant-Appellant.

UNPUBLISHED

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

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

GRIFFIN, P.J. (dissenting).

At the conclusion of a 2 1/2 week jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of arson of a dwelling house, MCL 750.72; MSA 28.267. Defendant was sentenced to serve two concurrent terms of life in prison without parole for the first-degree murder convictions. I respectfully dissent from the decision to reverse defendant's arson and first-degree felony murder convictions.

After plaintiff's case in chief, defendant moved for a directed verdict arguing that the prosecution failed to present sufficient evidence of defendant's intent to commit arson. In support of defendant's motion for a directed verdict, defense counsel argued:

> The only proof offered by the people to suggest that the ignition was purposeful was evidence of prior suicidal ideation three years back, and evidence introduced today of a suicidal ideation approximately one week before the explosion. Suicidal ideations could be just as easily consistent with asphyxia as with any kind of intentional ignition. But in this regard, given the people's evidence, including the stipulated-to note and the facts as presented that the pipes and everything were turned off, I don't know that the court could reasonably draw a conclusion that rather than asphyxia, that the defendant actually intended to ignite a blaze. In that regard, given our position there was no intent to burn, the arson charge should fail. Given that the arson charge should fail, the charges of felony murder should automatically fail.

Ingham Circuit Judge Peter D. Houk denied defendant's motions for a directed verdict "for the reasons expressed in [the court's March 15, 1996, opinion denying defendant's motion to quash]." In his March 15 opinion affirming the probable cause determination made at the preliminary examination, Judge Houk addressed defendant's theory of attempted asphyxiation as follows:

> Counsel for the defendant urges that the ignition could have accidentally resulted from static electricity, and that the gas could have been present through an innocent leak or an attempted asphyxiation. As previously noted sufficient evidence exists upon which a reasoning mind could rule out the innocent leak theory. The people urge that since adequate evidence exists to infer that defendant intentionally released the gas that the resultant explosion is a natural and intended consequence thereof.
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> * * *
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> . . . One could logically infer that a person who loosens gas pipes and releases a large quantity of natural gas in a room intends the natural results thereof, an explosion or fire.

I agree with Judge Houk's ruling. In my view, the majority has usurped the role of the jury by substituting its judgment for that of the trier of fact. On this record, there exists sufficient circumstantial evidence and reasonable inferences arising therefrom for a reasonable juror to conclude beyond a reasonable doubt that defendant intentionally ignited the gas. Defendant's alternative theory of an intent to asphyxiate was argued to and rejected by the trier of fact.

The majority reverses defendant's arson and felony-murder convictions by finding insufficient evidence on the basis that "[i]t is just as reasonable to conclude that the reason he [defendant] took no steps to correct the leak was because he was attempting to asphyxiate himself." (Majority slip op at p 5.) Further, "[i]n fact much of the evidence offered by the prosecution supports the theory that a completely inadvertent act could have ignited the gas." (*Id.)* Contrary to the majority's reasoning, "it is unnecessary for the prosecution to negate every reasonable theory consistent with defendant's innocence." *People v Carlson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

In *People v Wolford*, 189 Mich App 478, 479-480; 473 NW2d 767 (1991), we accurately summarized our standard of review:

> When reviewing an issue of the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980). The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *People v Daniels*, 163 Mich App 703, 707; 415 NW2d 282 (1987), and cases cited therein. The prosecutor is not required to present direct evidence linking the defendant to the crime. Circumstantial evidence and

> reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988); *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984). Intent may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987).

See also *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994), and *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Porter*, 269 Mich 284, 292; 257 NW 705 (1934); *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1971).

In the present case, although the defense offered a theory that defendant may have intended only to asphyxiate himself and that the fire and explosion might have occurred as a result of an inadvertent act, the prosecution presented sufficient circumstantial evidence to prove beyond a reasonable doubt that defendant intended to kill himself by purposefully causing the ignition of the natural gas. The evidence viewed in a light most favorable to the prosecution established that (1) defendant deliberately filled his apartment with natural gas by loosening the gas pipe at its union, (2) the fire and explosion were caused by the ignition of the gas buildup, (3) defendant, as a former employee of an appliance store, was knowledgeable of the functioning of gas appliances, (4) defendant had a history of suicide attempts and expressed his intent to kill himself less than a week before the explosion, vowing that "nobody would catch him this time," (5) *defendant's lack of "blast-related injuries" indicated that defendant was located at or near the origin of the ignition*, (6) accidental ignition from static electricity (in a nonindustrial setting) or from an arc caused by a light switch or an appliance was very unlikely, and (7) defendant's note on his front door warning his girlfriend revealed defendant's knowledge of the danger and potential for the explosion that ultimately occurred (negating defendant's claim of accident or mistake).

I find defendant's lack of blast-related injuries to be particularly significant. Despite the massive nature of the natural gas explosion, defendant sustained only burns and minor injuries. At trial, ATF expert Douglas Leahey testified that in all likelihood defendant was located at the origin of the ignition:

> *A.* . . . If someone's at the point of ignition, they would probably be burned by a fireball, shaken up severely, but we hear about people all the time who survive natural gas explosions that are hurt very little.
>
> *Q. (prosecutor)* For what reason?
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> *A.* That suggests to us that they were where the ignition took place and therefore, since the most impact takes place as it goes away from the point of ignition, they're going to be less hurt.

As explained by Mr. Leahey, the force of the explosion increases outward from the point of ignition:

> *A.* . . . If that mixture is proper, . . . you're going to have an explosion. . .

. . . it actually takes place from the point of ignition and it goes away from the point of ignition. There's what we call a propagation wave or a blast wave. It actually starts here and it has to start some place at that point of ignition and go through that explosive mixture, and we found that if it goes away from that point of ignition, it actually gets stronger. It gathers speed as it goes away from where it starts, . . .

Further, Mr. Leahey testified that defendant's accidental theories of ignition were improbable:

Q. (defense counsel) And there are different types of things that can be utilized to ignite gas clouds or gas vapors or this kind of a mixture that you're talking about, is that correct?

A. That's right.

Q. And one of those things simply would be a match. Is that right?

A. That would work.

Q. A cigarette lighter?[1]

A. That would work.

Q. Turning on or turning off an electrical switch?

A. You mean a wall switch?

Q. Yes.

A. That would be a little bit remote because, in a case of a match or cigarette lighter, it would be held in mid air amidst this vapor that would explode. An electrical light switch I don't think would work very well because you have a wall unit where you have a cover over the mechanism and just the switch coming out. It's not quite airtight but pretty close. It would take quite awhile I believe for the mixture – the same homogenous mixture within these limits has to be aware where that ignition source or spark is at.

So, if that's inside the wall, that gas within that parameter would have to be right inside that switch box.

Q. So you don't feel it would be a likely source of ignition. Is that right?

A. No.

Q. But it's a possible source of ignition?

A. Within the realm of possibilities, I can't totally exclude it.

In testifying that he could not totally exclude the possibility of static electricity as a possible source of ignition, Leahey conceded that he only had "some limited knowledge of electricity." However, fire expert Jack Lee Sanderson testified that the ignition from static electricity normally occurs in an industrial, not a home setting:

> *Q. (prosecution)* In terms of your own experience and research, Mr. Sanderson, are most of the static causes for these kinds of events in a home setting or an industrial setting?
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> *A.* Most are in an industrial setting where we have machinery that's operating. We have belts and so forth that are moving and they may generate a static charge. A vehicle moving down a road can generate a static charge. All those things tend to relate to movement, and so it is movement that is the thing that generates the static charge. We don't have things like that, other than people usually, that are in a structure that produces a static charge.
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> *Q.* In terms of your conclusions, Mr. Sanderson, is it fair to say that you could not locate any accidental or incidental source that could explain the gas buildup in apartment number 5?
>
> *A.* That's correct.

Finally, defendant's warning to his girlfriend is strong evidence rebutting defendant's accident defense. Defendant's handwritten note reads: "I would suggest that you don't turn on any type of switch." In view of defendant's knowledge of the danger, it is implausible to suggest that defendant's alleged act of touching or activating an electrical switch was accidental.

The function of the jury is to resolve disputed issues of fact such as defendant's intent. Viewing the evidence in a light most favorable to the prosecution, I would hold that sufficient circumstantial evidence and reasonable inferences therefrom were presented from which a reasonable juror could conclude beyond a reasonable doubt that defendant intentionally committed the fire and explosion.

As to the other issues, I concur and join in sections one and two of the majority's opinion. However, in regard to section three, I agree with the result but not the rationale. First, defendant's statement to his minister was not hearsay for the reason that it was a statement made by a party opponent. MRE 801(D)(2). Second, although the clergy-penitent privilege, MCL 600.2156; MSA 27A.2156, appears to be applicable, I agree with the trial court that defendant waived his claim of privilege by inviting the police officers to talk to his minister. Whether defendant's conduct is termed "waiver," "relinquishment," or "estoppel," see, generally, *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969), defendant was barred from asserting his privilege after he consented to the police officers interviewing his minister regarding the substance of his statements.

Finally, I agree with the prosecutor that in light of the testimony regarding defendant's functional capabilities at the time defendant invited the officers to talk to his minister, defendant presented insufficient evidence of his alleged intoxication to establish that his consent was involuntary.

I would affirm.

/s/ Richard Allen Griffin

[1] It was the prosecutor's theory that defendant ignited the gas with a lighter. The people unsuccessfully sought to admit into evidence a February 7, 1995, statement that defendant allegedly made to Debra L. Woods, LPN, in which defendant admitted that he had "used a lighter." Defendant's motion to suppress was granted by the trial court on the basis that the statement was "inherently unreliable" in light of the medication defendant was taking while in the hospital. No appeal of the suppression order was taken.