STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2000
v	No. 215825 Wayne Circuit Court
JAMES MOSS, Defendant-Appellant.	LC No. 98-002920

Before: Neff, P.J., and Talbot and J. B. Sullivan,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for the arson of a dwelling house, MCL 750.72; MSA 28.267. Defendant was sentenced to three to twenty years' imprisonment. We affirm.

According to trial testimony, on the evening of February 19, 1998, and early morning of February 20, 1998, defendant appeared three times at the complainants'[1] home, wishing to speak with one of the complainants, with whom he had formerly lived. She refused to see him, and the visits became confrontational. Defendant threatened the complainants, stating, "I'll be back," and "I'm going to fix you." Defendant returned at approximately 1:30 a.m., poured kerosene on the complainants' home and ignited it, burning the home. The trial court found defendant guilty of arson.

On appeal, defendant contends that there was insufficient evidence of the requisite specific intent for a conviction of arson. We disagree. In reviewing the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[1] "Complainants" is used to refer to the two women residents of the home involved in the arson.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

"To obtain a conviction [for arson], it is necessary to show that a dwelling house was burned by … the defendant and that the fire was wilfully or maliciously set." *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). There is ample evidence that defendant burned the complainants' dwelling. The only issue in dispute on appeal is whether defendant formed the specific intent necessary for conviction under the arson statute.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant was aware of his actions when he set fire to the complainants' home, and that he acted wilfully and maliciously with the purpose of burning the complainants' dwelling. First, defendant appeared at the complainants' home not once, but three times. He was there purposely. Second, defendant had no reported difficulty safely traveling to and from the complainants' home that night. Third, defendant threatened the complainants that he would return to harm them. Fourth, defendant followed through with these threats when, later that night, he purchased kerosene, transported it to the complainants' home, poured it onto the porch and into the mail slot, and set fire to the home. Fifth, defendant testified at trial that he was sober on the night in question.

Despite this evidence, defendant disputes a finding that he was capable of forming the specific intent on the night in question. Defendant alleges that he was too intoxicated to have acted wilfully or with malice. When a defendant commits a crime while under the influence of alcohol, "the question is … whether there was evidence presented at trial that defendant was so intoxicated as to be incapable of entertaining the intent to commit [the crime] at the time of his participation. …" *People v Rockwell*, 461 Mich 1002; 608 NW2d 811 (2000) (Markman, J., concurring), citing *People v Mills*, 450 Mich 61, 82-83; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

It is possible that the trier of fact could have found that defendant was intoxicated to some degree on the night in question. The complainants testified that defendant seemed intoxicated that evening, and defendant's written police statement includes an admission that he was drunk that night. In addition, the arresting officer, Lt. Mink testified that, after arresting defendant, he postponed questioning defendant because defendant appeared intoxicated.

Even if the trier of fact found that defendant was intoxicated, however, there is still sufficient evidence to support the finding that defendant remained capable of making intentional decisions and clear judgments regarding his actions. In order to hold that a defendant was so intoxicated that he was incapable of forming the specific intent element of a crime, evidence of actual intoxication, or intoxication to the point of being incapable of forming intent, is required. *Mills*, *supra* at 82-83. Mere testimony that defendant was behaving drunk or appeared intoxicated is insufficient. *Id*.

In the instant case, although the complainants testified that defendant appeared drunk while at their home, this testimony included no evidence that defendant was actually intoxicated. There was no testimony that anyone observed defendant consuming alcohol around the time of the fire.

Lt. Mink testified that he delayed questioning defendant because he "appeared intoxicated" at the time of arrest, and Lt. Mink believed it was "in [defendant's] best interest" to question him later. However, this testimony does not indicate that defendant's abilities or judgment were impaired during the commission of the crime. In fact, the arrest occurred around midnight on February 20, 1998, approximately twenty-two hours after the fire. Even if defendant was drunk when arrested, this bears no relation to defendant's state at the time of the fire. As discussed above, defendant's actions on the night of the fire illustrate that, even if he was intoxicated, he remained fully capable of entertaining the necessary specific intent.

Accordingly, the prosecution introduced sufficient evidence for a rational trier of fact to conclude that defendant acted wilfully and maliciously on that night, regardless whether defendant was intoxicated to some degree when he set fire to the complainants' home.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan