

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD S. SWESTYN,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2000

No. 212188

Oakland Circuit Court

LC No. 97-155822-FH

Before: Wilder, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of an incendiary device with intent to use it unlawfully against the person or property of another, MCL 750.211a; MSA 28.408(1). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 183 days in jail. He appeals as of right. We affirm.

Defendant first contends that reversal is required because the trial court failed to instruct the jury, in accordance with MRE 302(b), that it may, but need not, infer an unlawful intent from the possession of an incendiary device. Because defendant did not object to the trial court's jury instructions, we review this issue to determine whether there was plain, i.e., clear or obvious, error that affected defendant's substantial rights, i.e., affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). If such an error is established, then a "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra*.

Although the trial court plainly failed to instruct the jury that it "need not" infer that defendant intended to use the device unlawfully against another person or the property of another, there is no indication that the instruction shifted the burden of persuasion to defendant with regard to the elements of the crime. On the contrary, the trial court instructed the jury that "the prosecutor must prove each of the . . . elements beyond a reasonable doubt." As in *People v Freedland*, 178 Mich App 761; 444 NW2d 250 (1989), where this Court found no manifest injustice warranting reversal, "a reasonable juror would not have interpreted the instructions as shifting the burden of persuasion to defendant." *Id.* at 770. Thus, the error did not affect the outcome of the proceedings and, therefore, reversal is not warranted.

Defendant also claims that there was insufficient evidence to support his conviction. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). 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). In this case, expert testimony indicated that the device in question (a jar containing gasoline covered with a foam insulating sealant) was a highly incendiary device because, if heat were applied to it and it were thrown against something causing it to break, the gasoline would ignite. See *People v Dorris*, 95 Mich App 760; 291 NW2d 196 (1980). Further, there was testimony supporting an inference that defendant intended to use the device against a neighbor. Viewed most favorably to the prosecution, the evidence was sufficient to support defendant's conviction.

Finally, there is no merit to defendant's claim that he was denied a fair trial because of the cumulative effect of several individual errors. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Donald E. Holbrook, Jr.  
/s/ Gary R. McDonald