# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 21, 2002 |
| v | No. 231382<br>Oakland Circuit Court |
| BRUCE DOUGLAS HAUSER,<br><br>Defendant-Appellant. | LC No. 99-169668-FH |

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of arson of a dwelling house, MCL 750.72. Defendant was sentenced to six to forty years' imprisonment as a third habitual offender, MCL 769.11. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying his motion for a mistrial. We disagree. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant moved for a mistrial based upon Officer Goodman's comment in front of the jury that defendant had previously been involved with another fire. The use of a defendant's prior bad acts as character evidence, except as allowed by MRE 404(b),[1] is improper because of

[1] MRE 404(b) is an inclusionary rule that is not violated unless evidence is offered solely to establish the criminal propensity of an individual to show that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). Therefore, "[e]vidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is '(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh danger of unfair prejudice, MRE 403.'" *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001), quoting *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998).

the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW 2d 673 (1998). However, the fire that defendant had allegedly been involved with previously had been ruled accidental. Thus, the trial court had Officer Goodman, in front of the jury, stress the fact that the previous fire had been ruled an accident. Therefore, this statement was not admitted into evidence as a prior bad act committed by defendant.

Additionally, Officer Goodman's answer directly responded to the prosecution's question regarding any information that Officer Goodman used to formulate an opinion that defendant set the fire intentionally. Further, defense counsel stated during the motion for mistrial, "[j]udge, I think the question was harmless. I don't think it was intentionally brought out." Moreover, Officer Brown testified that before the fire, he had received a tip that defendant was going to ignite his house for insurance money and that defendant had done this previously. Having Officer Goodman stress that the previous fire had been ruled accidental may have helped defendant rather than prejudicing him; therefore, we agree with the trial court's conclusion that Officer Goodman's testimony did not prejudice defendant and had minimal impact, if any. Because defendant received a fair trial, the trial court did not abuse its discretion in denying the mistrial.

Defendant's second issue on appeal is that the prosecution presented insufficient evidence to support defendant's conviction of arson of a dwelling house. We disagree. "This Court reviews sufficiency of the evidence claims by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt." *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999).

The offense of arson of a dwelling house requires (1) that defendant set fire to a building, (2) that building was a dwelling house, and (3) that the burning resulted from a malicious and voluntary or wilful act. MCL 750.72; *People v Nowack*, 462 Mich 392, 402-403; 614 NW2d 78 (2000); *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982). "To establish that a defendant acted wilfully or maliciously and voluntarily, the prosecution must prove one of the following: (1) that the defendant intended to do the physical act constituting the actus reus of arson, i.e., starting a fire or doing an act that results in the starting of a fire (intentional arson); or (2) that the defendant intentionally committed an act that created a very high risk of burning a dwelling house, and that, while committing the act, the defendant knew of the risk and disregarded it (wanton arson)." *Nowack, supra* at 409. Moreover, statements made before the crime was committed "may be used to establish the corpus delicti of the crime." *Williams, supra.*

Sufficient evidence was presented to determine that defendant wilfully committed arson upon his dwelling house. Gillespie testified that defendant told her numerous times in May 1999 that he wanted to set his house on fire. Gillespie informed the police of defendant's intention to wilfully burn his house before the fire on June 20, 1999. When Officer Brown asked defendant whether he knew how the fire started, defendant replied that it may have started at the water heater or near the water heater. Upon investigation by Officer Goodman and Anderson, it was determined that the fire did in fact start adjacent to the water heater. Gasoline vapors in an open container next to the water heater were ignited by the open flame of the water heater's pilot light. Moreover, Officer Goodman and Anderson found what they believed to be the cap to the

gasoline container about two feet away from the container. Additionally, Smith testified that before June 20, 1999, defendant repeatedly told her that he needed money and that he was going to ignite his back room so that he could claim the insurance on the home. Further, Smith testified that defendant planned to burn the back room one day while she was visiting by putting an open gasoline can and a can of lighter fluid next to his hot water tank, but Smith talked defendant out of it. Lastly, Smith testified that she saw defendant after June 20, 1999, and he expressed to her his disappointment regarding how little damage the fire had done to his house.

Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of arson. *Nowack, supra* at 402-403. Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Therefore, this evidence, when viewed in a light most favorable to the prosecution, was sufficient to convict defendant of arson of a dwelling house. *DeKorte, supra.*

Defendant's third issue on appeal is that the trial court abused its discretion in failing to depart from the statutory minimum guidelines range. We disagree. Under the statutory sentencing guidelines, a sentence imposed within the statutory minimum guidelines range must be affirmed absent a scoring error or reliance on inaccurate information in sentencing a defendant. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Defendant was convicted of arson of a dwelling house and sentenced as a third habitual offender, MCL 769.11. For crimes committed before January 1, 1999, the sentencing guidelines did not apply to habitual offenders. See MCL 769.34; *Babcock, supra* at 72. However, with the enactment of the new sentencing guidelines, the Legislature developed legislative guidelines for habitual offender sentences.

Under the new sentencing guidelines, arson of a dwelling house is a class B offense. MCL 777.16c. Further, a third habitual offender that committed arson of a dwelling house as scored under the guidelines with a PRV level F, and an OV level I, provides for a statutory minimum sentence guidelines range of 72 to 180 months' imprisonment.[2] MCL 777.63; MCL 777.21(3)(b). The trial court sentenced defendant within the minimum sentencing guidelines range to a minimum sentence of six years (seventy-two) months.

Under the statutory sentencing guidelines, a sentence imposed within the statutory minimum guidelines range must be affirmed. MCL 769.34(10); *Babcock, supra* at 73. MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on

[2] Defendant's prior record variables totaled 105, which gave him a PRV level of F. Defendant's offense variables totaled five, giving him an offense variable level of I. Thus, when viewing the grid for class B offenses, third habitual offender, defendant's statutory minimum sentence guidelines range is 72 to 180 months' imprisonment.

> appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Therefore, because defendant's minimum sentence was within the appropriate sentence guidelines range, and defendant, during sentencing, did not challenge either the accuracy of information relied on in sentencing defendant or the scoring of the sentencing guidelines, defendant's sentence must be affirmed on appeal.

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra