STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY R. FALCONELLO,

Defendant-Appellant.

UNPUBLISHED
October 22, 2002

No. 233765
Wayne Circuit Court
LC No. 99-011687-01

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

After a bench trial, defendant was convicted on two counts of burning personal property valued between $200 and $1,000, MCL 750.74(1)(b)(i), and one count of burning a dwelling house, MCL 750.72. The trial court sentenced defendant to a term of two months to ninety-three days' imprisonment for each of the burning of personal property counts, as well as a concurrent term of three to twenty years' imprisonment for the burning of a dwelling count, with credit for 327 days served. Defendant appeals as of right. We affirm.

This case arises from the burning of two vehicles during the early morning hours of October 14, 1999. One of the vehicles was parked in the driveway of the complainants' home, only a few feet from the corner of the dwelling. The other vehicle was parked some distance away, but still within the yard of the home. The evidence indicated that fires were started separately in the two vehicles. The fire started in the vehicle that was parked in the driveway spread to the corner of the dwelling, charring and melting the siding.

The prosecution based its case on three pieces of evidence. First, complainant Betty Scott testified that defendant called her home several hours before the fires were set, stating that "something is going to burn." Second, Betty testified that she saw defendant's car at the scene, at the time of the fire. Third, Martin Sorlein and Tony Scott testified that defendant subsequently admitted setting the fires. Defendant's trial counsel presented an alibi defense, based on the testimony of defendant's girlfriend, Rebecca Lisiecki. She testified that defendant was with her from 5:00 p.m. on October 13, through 7:00 a.m. on October 14. Thus, Rebecca provided defendant with a complete alibi for the time-frame during which the fires could have been set. The trial court found defendant guilty of setting the fires, commenting that it found Betty Scott's identification testimony extremely credible, while it did not believe Rebecca's alibi testimony.

I. Ineffective Assistance

Defendant first argues that his trial counsel rendered ineffective assistance by failing to bolster the alibi defense with additional evidence. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

At trial, complainants Betty and Tony Scott testified that the fire was burning at 5:30 or 5:45 a.m., when they were awakened by a neighbor. According to their testimony, the Fire Department arrived shortly after they exited the home. Thus, complainants placed the Fire Department on the scene around 6:00 a.m. Betty Scott also testified that, the moment she exited the home, she noticed defendant's purple car parked across the street from her house. She claimed that the vehicle was noticeable because its rear windshield was broken out and covered by plastic. Further, she claimed that the vehicle drove away as fire and police officials arrived on the scene.

As set forth above, defendant's trial counsel presented Rebecca's testimony that defendant was with her on the night in question. According to Rebecca's testimony, defendant could not have started the fires and could not have been driving his vehicle when it was allegedly spotted at the crime scene by Betty Scott. In addition to Rebecca's testimony, trial counsel presented the testimony of Rebecca's neighbor, Robert Brewster. Brewster testified that he helped defendant work on his purple Camaro, in Rebecca's driveway, around 5:00 p.m. on October 13. Brewster testified that he helped defendant try to get the vehicle's fan motor working, but was unsuccessful. Together with Rebecca's testimony that she did not see the vehicle move on October 13, Brewster's testimony raised an inference that defendant's vehicle may not have been in working order. This provided another reason why defendant's vehicle could not have been at the crime scene when allegedly spotted by Betty Scott. Further, Brewster testified that he left for work at 6:40 a.m. on the morning of October 14, that he saw defendant's car in Rebecca's driveway at that time, and that he did not see defendant leave Rebecca's home during the night. Thus, Brewster's testimony bolstered Rebecca's alibi testimony.

After returning a guilty verdict, the trial court stated that it found Betty Scott's version of events to be credible, while it did not believe Rebecca's testimony. The trial court also found, due to the proximity of the complainants' home to Rebecca's home, it would have been possible for defendant to be present in his vehicle at the scene of the fire, and yet return the vehicle to Rebecca's driveway by 6:40 a.m., when Brewster saw it there. The trial court also stated that it believed defendant's car was driveable at the time, as defendant had clearly driven it to Rebecca's house on October 13.

Defendant's subsequent counsel filed a motion for a new trial, arguing that trial counsel had rendered ineffective assistance. Defendant argued that his trial counsel failed to introduce key evidence that the Fire Department received the emergency call at 6:38 a.m. Thus, fire

officials could not have been on the scene around 6:00 a.m., as the complainants testified. Defendant argued that this evidence would have impeached the complainants' version of events, while also strengthening his alibi defense. Defendant argued that it would have been physically impossible for Betty Scott to see his vehicle at the scene, pulling away as the Fire Department arrived, because fire officials could not have arrived before 6:40 a.m., when defendant's vehicle was spotted in Rebecca's driveway.

In support of his motion for a new trial, defendant also attempted to introduce an affidavit from Robert Brewster, containing additional information that was not elicited at defendant's trial. According to the affidavit, defendant's vehicle was "extremely noisy," and had awakened Brewster on other occasions, when defendant left Rebecca's home late at night. Brewster further attested that he did not hear defendant's vehicle driven on the night of October 13-14, and he was "certain that he would have heard the car driven any time after he got up to get ready for work."

The trial court denied the motion for a new trial, ruling that the additional evidence would not have changed the guilty verdict. The court noted that the fires were already well under way when fire officials arrived at the scene. Therefore, the court believed that defendant could have set the fires and returned to Rebecca's driveway, only a short distance from the fire scene, by 6:40 a.m.

We conclude that defendant's trial counsel did not render ineffective assistance. Counsel proffered Rebecca's testimony which, if believed, would have provided defendant with a complete alibi for the time-frame when the fires could have been set. Given Rebecca's testimony that defendant never left her side during the night in question, it was unnecessary for defense counsel to establish the precise time that the fire started, or the precise time that the Fire Department received the emergency call. Further, the alibi defense made it unnecessary to provide corroborating testimony that defendant's car did not leave Rebecca's driveway on the night in question. A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel's tactics constituted sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Further, defendant's trial counsel did introduce evidence that tended to impeach the complainants' testimony. Counsel elicited testimony that the rear windshield of defendant's car was not broken until two months *after* the fire, when Tony Scott stole the vehicle and caused the damage. Counsel also elicited Betty Scott's admission that she did not see very well at night. These two components cast substantial doubt on Betty's identification of defendant's car at the scene. Counsel presented testimony that challenged Betty's claim that defendant made a threatening telephone call to her house just hours before the fire. Counsel presented testimony that challenged the claim that defendant confessed to the crime. Counsel also presented testimony that Tony Scott had a substantial motive to frame defendant for the arson. We cannot conclude that counsel's performance was deficient.

Furthermore, even if trial counsel's performance could be considered deficient, defendant cannot demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Poole*, *supra* at 718. The finder of fact in this case, the

trial court, expressly found that the additional evidence would not have affected its verdict. Defendant is not entitled to relief on this basis.

II. Double Jeopardy

Defendant next argues that his convictions violate double jeopardy protections. "A double jeopardy issue constitutes a question of law that this Court reviews de novo." *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000). Because we conclude that defendant's convictions do not violate the double jeopardy protection against multiple punishments for the "same offense," we affirm.

As our Supreme Court explained in *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996), the Michigan and federal constitutions protect a person from being twice placed in jeopardy for the "same offense." US Const, Am V; Const 1963, art 1, § 15. The double jeopardy clauses protect against a second prosecution for the same offense after acquittal or conviction, and also protect against multiple punishments for the same offense. *Torres*, *supra* at 64. This case involves the multiple punishment prong of double jeopardy.

In *Squires*, *supra* at 456-457, this Court explained the double jeopardy doctrine, in the multiple punishment context:

> The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. The constitutional protection against multiple punishments for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature . . . [but] is not a limitation on the Legislature's power to establish punishment.
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> Although the Double Jeopardy Clause restricts courts from imposing more punishment than that intended by the Legislature, the Legislature may authorize cumulative punishment of the same conduct under two different statutes. Whether the Legislature intended multiple punishments at a single trial for persons who commit the offenses in question is the determining factor under the Double Jeopardy Clause. Determination of legislative intent involves traditional considerations of the subject, language, and history of the statutes. Factors to consider include whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent. [Citations omitted.]

Here, defendant was convicted on two counts of burning personal property valued between $200 and $1,000, MCL 750.74(1)(b)(i), and one count of burning a dwelling house, MCL 750.72. Defendant argues that one of his convictions for burning personal property must be vacated. Although defendant does not expressly say which misdemeanor conviction must be vacated, he apparently refers to the conviction for burning the car parked in the driveway of the

complainants' home. It was the fire in that vehicle which spread to the corner of the dwelling house.

Defendant argues that a single fire caused the damage to both the personal property and the dwelling house. Defendant argues that he cannot be convicted of two offenses, arising out of the same fire. Therefore, the issue this Court must decide is whether the Legislature intended multiple punishments at a single trial for persons who burn a motor vehicle parked in the driveway of a home, when the fire spreads from the vehicle to the dwelling house. We conclude that the Legislature did intend to impose multiple punishments in this situation.

As our Supreme Court explained in *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984):

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statues prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments.
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> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statues often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions.

Here, defendant was convicted of violating MCL 750.72 and MCL 750.74(1)(b)(i). The first statute, MCL 750.72 provides:

> Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by the imprisonment in the state prison for not more than 20 years.

The second statute, MCL 750.74, provides in pertinent part:

> (1) A person who willfully and maliciously burns any personal property, other than personal property specified in section 72 or 73,[1] owned by himself or another person is guilty of a crime as follows:
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> * * *
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> (b) If any of the following apply, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00 or 3 times the value of the personal property burned or intended to be burned, whichever is greater, or both imprisonment and a fine:
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> (i) The value of the personal property burned or intended to be burned is $200.00 or more but less than $1,000.00.

Defendant argues that both statutes are concerned with the danger created by fire. While that is true in a very broad sense, we agree with the prosecutor that the two statutes protect different social norms and impose different types of punishment. MCL 750.72, which prohibits the burning of a dwelling house or its contents, is designed to protect persons while in their homes. "The focus of the statute proscribing arson of a dwelling is on preventing the burning of dwellings. This offense has been characterized as one against habitation. . . . The arson statute is apparently aimed at protecting persons who may be endangered by fires in dwelling houses." *People v Ayers*, 213 Mich App 708, 720; 540 NW2d 791 (1995). MCL 750.74, which prohibits the burning of personal property, is not focused on the danger to persons in their homes. Rather, "the burning of personal property statute protected anyone who may have been endangered by the defendant's use of fire to destroy the complainant's car." *People v Walker*, 234 Mich App 299, 313; 593 NW2d 673 (1999).

In addition to protecting different social norms, the statutes impose different types of punishment. The punishment imposed for the burning of personal property depends on the value of the property burned. MCL 750.74. In contrast, punishment for the burning of a dwelling house does not depend on the value of the house or its contents. MCL 750.72.

We conclude that defendant's convictions do not violate double jeopardy protections against multiple punishments for the "same offense."

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens

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[1] MCL 750.72 or MCL 750.73.