# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY BAXTER SORAH,

Defendant-Appellant.

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UNPUBLISHED
November 26, 2002

No. 226916
Macomb Circuit Court
LC No. 97-000225-FH

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of burning real property, MCL 750.73, and burning insured property, MCL 750.75. He was sentenced to five years' probation, and ordered to pay restitution of $222,961.84. We affirm defendant's convictions, but remand for further proceedings regarding restitution.

Defendant argues that the evidence does not support his convictions because there was insufficient evidence that he intentionally set the building on fire.

In determining whether there was sufficient evidence to support a conviction, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). The trier of fact may draw reasonable inferences from the evidence. *People v Reddick,* 187 Mich App 547, 551; 468 NW2d 278 (1991).

As used in the statutes proscribing the burning of real property, MCL 750.73, and the burning of insured property, MCL 750.75, the term "burn" means:

> setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading or procuring another to do such act or acts. [MCL 750.71.]

To convict defendant of burning real property, the prosecutor was required to prove that defendant burned the property "wilfully or maliciously." MCL 750.73. A conviction for burning insured property similarly required proof that defendant burned the property "wilfully." MCL 750.75.

At trial, witnesses testified that defendant left the burning building as though nothing was wrong, and that he seemed calm. Afterwards, defendant gave conflicting statements about what had happened. When first questioned by the police, defendant said that he had recently locked up the building and left and, when he was driving back, he noticed police cars and smoke. He stated that he didn't know what occurred at that time. Later that day, defendant told the police that he had returned from the bank and was doing some paperwork when a door suddenly blew open, and pop cans and papers went flying. Defendant said he left because the reception area became too hot to call 911. Later, after a preliminary finding of arson was made, defendant stated for the first time that he accidentally spilled some paint thinner.

Arson investigators determined that the damage to the building was excessive in relation to the duration of the fire. Additionally, there was evidence of three unconnected points of origin, including one inside a plastic garbage can. Some samples tested positive for an accelerant. No accidental source of ignition was identified. Further, contrary to defendant's accidental spill theory, there was no trail connecting the various burned areas to each other.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intentionally set the fire. Although defendant questions the weight and credibility of the evidence presented below, these matters were within the exclusive province of the trier of fact and we will not resolve them anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant also argues that the evidence failed to support his conviction of burning insured property, MCL 750.75, because there was insufficient evidence of an intent to defraud. We disagree.

To convict defendant of burning insured property, the prosecutor was required to prove that the property was burned "with intent to injure and defraud the insurer," regardless of whether defendant owned the property. MCL 750.75. Evidence that property is insured and that the defendant is in debt can support an inference of intent to defraud. See *People v Sanford*, 252 Mich 240, 254; 233 NW 192 (1930). Here, there was evidence that defendant was approximately $20,000 behind in his rent and that a $2,000 check that he recently wrote to his landlord was returned because of insufficient funds. Although defendant was not the beneficiary of an insurance policy that covered the building itself, he purchased insurance coverage of $150,000 for the contents of the building and $250,000 for business interruption. Additionally, there was testimony in the record from which a reasonable juror could conclude that he filed a claim for these coverages two days after the fire. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant acted with an intent to defraud his insurance company.

Next, defendant argues that his dual convictions for both burning real property and burning insured property, arising from the burning of a single building, violate the double jeopardy protections against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. We disagree. Whether double jeopardy applies is a question of law which is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

In *People v Ayers*, 213 Mich App 708, 716-721; 540 NW2d 791 (1995), this Court held that dual convictions for arson of a dwelling, MCL 750.72, and burning insured property, MCL

750.75, do not violate the double jeopardy protections against multiple punishments. Although this case involves a second conviction for burning real property, MCL 750.73, instead of arson of a dwelling house, the rationale of *Ayers* is equally applicable to dual convictions for burning real property and burning insured property. Accordingly, we conclude that defendant's two convictions do not violate the double jeopardy protections against multiple punishments.

Defendant next argues that he was denied the effective assistance of counsel. Because there was no *Ginther*[1] hearing, our review of this issue is limited to mistakes apparent on the record. *People v Bigelow*, 225 Mich App 806, 810; 571 NW2d 520 (1997), as reinstated by *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998). See also *Ginther*, *supra* at 442-444.

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. Every effort must be made to eliminate the distorting effects of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We disagree with defendant's claim that counsel was ineffective for stipulating to Detective Stayer's status as an expert. Under MRE 702, an expert may be qualified by virtue of his knowledge, skill, experience, training, or education. *Bouverette v Westinghouse Elec Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001). On appeal, defendant does not argue that Detective Stayer lacked appropriate education, training or experience. Rather, he argues that Detective Stayer's expert opinion that the fire was an arson fire was improperly based solely on his failure to find an accidental cause for the fire, which defendant maintains does not comport with generally accepted methodologies for investigating fires. Contrary to what defendant argues, this was not the sole basis for Detective Stayer's opinion. Further, "an opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility." *Id.* at 401. Thus, defendant's disagreement with Detective Stayer's opinions did not provide a basis for excluding his testimony under MRE 702.[2] Defendant has failed to show that defense counsel acted unreasonably in stipulating to Detective Stayer's expert qualifications.

Defendant also claims that counsel was ineffective for failing to call character witnesses who would have testified as to his reputation for veracity and charitable works, or to present evidence of his recent investments in the business, his profit and loss history, and his family's dependence on the business. However, "[c]ounsel's failure to call witnesses is presumed to be

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] In light of our resolution of this issue, we need not address the applicability of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 592; 113 S Ct 2786; 125 L Ed 2d 469 (1993). We nevertheless note that the focus of a court's evaluation of an expert's testimony "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

trial strategy." *People v Mitchall*, 454 Mich 145, 163; 560 NW2d 600 (1997). Similarly, counsel's cross-examination of Detective Stayer is presumed to be a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In light of the record, including Mr. Trenkle's testimony, defendant has failed to overcome the presumption of sound strategy, nor has he shown that counsel's alleged deficiencies in impeaching Detective Stayer affected the outcome by, for example, depriving defendant of a substantial defense. *Id.* at 737; see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant's remaining allegations of ineffective assistance involve matters of trial strategy, which we will not second-guess with the benefit of hindsight. See *LaVearn*, *supra* at 216.

Next, defendant argues that the prosecutor committed misconduct that deprived defendant a fair trial. Because defendant did not preserve this issue with an objection to any of the allegedly improper remarks at trial, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecutor did not improperly comment on defendant's silence by stating that "he can't tell a straight story" and that "[t]here is no reason an honest man wouldn't come forward with that." Rather, he was commenting on the veracity of defendant's conflicting statements by referring, in part, to the fact that defendant failed to immediately tell the police that he had spilled a drum of paint thinner. Considered in context, defendant has not shown that the remarks constituted plain error.

The prosecutor did not misstate the elements of the crime of burning real property, or lessen its burden of proof, by summarizing the crime as an intentional burning of a building. See MCL 750.73. Further, the trial court later instructed the jury concerning the elements of the crime, and jurors are presumed to follow the court's instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Accordingly, there was no plain error affecting defendant's substantial rights.

We are unable to consider defendant's claim that the prosecutor took his words out of context, because defendant has not provided a citation to the record where the allegedly improper remarks were made.

The prosecutor's comments concerning Mr. Trenkle's experiment, Mr. Trenkle's assessment of Detective Stayer's version of events, and the veracity of defendant's version of events were all proper comments on the evidence. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Lastly, we reject defendant's claim that the prosecutor improperly referred to facts not in evidence. When he asked Mr. Trenkle for an opinion concerning how toluene might have gotten inside the garbage can, Detective Stayer had already testified that, due to its burn and melt pattern, he believed that a fire had been set inside the garbage can.

In sum, defendant has not demonstrated plain error affecting his substantial rights based on the prosecutor's conduct.

Defendant also argues that the trial court misstated the elements of burning real property. Because defendant did not object to the court's jury instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. A review of the record reveals that the court instructed the jury that the burning had to be done without justification or excuse. See CJI2d 31.3. There was no plain error.

Defendant correctly notes that the trial court agreed to give a special instruction to inform the jury why Mr. Trenkle's report was not introduced into evidence, but failed to do so. However, given the evidence as a whole, defendant has failed to show that this alleged error "has resulted in a miscarriage of justice." MCL 769.26; see also MCR 2.613(A).

Finally, defendant challenges his sentences, arguing that the presentence investigation report ("PSIR") was inaccurate and that the court erred in ordering him to pay restitution of approximately $223,000. We disagree.

At sentencing, defendant failed to challenge the information in the PSIR concerning the amount of the loss sustained by the insurance company. Instead, he conceded that the PSIR was "accurate in all respects" except for his son's address and the amount that he owed on his home mortgage, both of which the court agreed to correct. Thus, to the extent that defendant now argues that the PSIR inaccurately reported the amount of the victim's loss, the issue has been waived. Because defendant never raised a factual question concerning the amount of the loss, the trial court was not required to hold an evidentiary hearing to determine the total amount of restitution. *People v Grant*, 455 Mich 221, 233-235, 243-244; 565 NW2d 389 (1997). Furthermore, defendant's ability to pay is not a relevant consideration in determining the restitution amount. MCL 780.767(1) and (2); *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001).

Defendant did object below to the amount of the monthly restitution payment ordered by the trial court, which the court set at $125 a month. The court agreed to reconsider the issue if defendant submitted more current financial information. When defendant attempted to raise this issue in a subsequent motion, he did not differentiate between the total amount due and the amount of the monthly payment. The court ruled that it did not have jurisdiction to consider the motion because the case was pending on appeal.

We agree that, unless defendant is in "willful default of the payment of restitution," he remains free to petition the sentencing court for an evidentiary hearing concerning the monthly amount of his restitution payments. See MCL 780.766(12). Accordingly, we affirm the restitution award, without prejudice to defendant filing an appropriate petition concerning the monthly amount of his restitution payments.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper