

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL VERNARD RUDOLPH,

Defendant-Appellant.

UNPUBLISHED

December 17, 2002

No. 236395

Wayne Circuit Court

LC No. 00-013595

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of burning of a dwelling house, MCL 750.72.¹ The trial court sentenced defendant to 4½ to 20 years' imprisonment. We affirm.

I. Basic Facts and Procedural History

On the night of the incident giving rise to defendant's conviction, Natalie Cummings heard a thump coming from the front of her house. Cummings looked out the front window and saw her neighbor, Keith Thomas, outside moving around underneath the front window. She went outside, and saw Thomas stomping out a fire that was burning a hedge underneath the window.

Thomas, who lives two doors down from Cummings', was returning from the store when he saw what he believed were leaves burning in Cummings' front yard. As he approached Cummings' house, he noticed that the front window was on fire. Thomas pulled in front of Cummings' house and saw defendant standing about five steps from the fire. He did not see defendant throw anything. Defendant saw Thomas and began to walk away, but not before saying to Thomas, "let it burn." Defendant did not appear to be hiding anything. Thomas then stomped out the fire with the help of another neighbor. Subsequently, it was determined that two Molotov cocktails² were used to ignite the fire.

¹ The jury found defendant guilty, but mentally ill.

² A "Molotov cocktail" is defined as "a crude incendiary device consisting usually of a corked bottle filled with gasoline and a piece of rag that serves as a wick and is ignited just before throwing." *Random House Webster's College Dictionary* (1992).

(continued...)

Defendant and Cummings, who were former neighbors, had a history. In 1998, defendant broke Cummings' kitchen window. Later that year, defendant also broke Cummings' front window resulting in his arrest. In November 1998, Cummings filed for and obtained a personal protection order (PPO) against defendant.

Defendant also has a long history of mental illness. He was diagnosed with schizophrenia that was treated with psychiatric medications, such as Haldol, Cogentin and Restoril. If not medicated, defendant hallucinates, hears voices and becomes agitated. At some point, defendant appears to have taken an inordinate interest in Cummings.

Based on a pretrial conversation with defense counsel and the prosecutor, the trial court understood that defendant would tender a plea of no contest to burning of a dwelling house for which the trial court would sentence defendant to one to twenty years' imprisonment, with psychiatric counseling and treatment while in prison. However, defense counsel expressed his and defendant's understanding that defendant would be sentenced to jail, not prison. The trial court stated that psychiatric treatment was not available in jail and refused to send defendant to jail rather than prison. Based on this conversation, defense counsel stated that a plea would not be tendered.

At trial, D. D. Starr, a clinical psychologist, testified in support of defendant's insanity claim. Defense counsel did not move to qualify Starr as an expert witness. As a result, the jury was not instructed that she was an expert. Starr testified that, in her opinion, defendant's mental state at the time of the offense was within the definition of legal insanity. In rebuttal, the prosecution presented Edith Montgomery, Ph.D. Montgomery, who was qualified as an expert witness in forensic psychology, testified that defendant was not legally insane at the time of the offense.

II. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992).

The elements of burning a dwelling house are (1) a dwelling house was burned, (2) by, or at the urging of, or with the assistance of the defendant, and (3) the fire was willfully or maliciously set. *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1992); *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Intent may be inferred from all the facts and circumstances. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). It is for the

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trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Here, trial testimony established that defendant had lived next door to Cummings for several years. Defendant developed a strange obsession with Cummings and the two had several encounters ultimately resulting in a PPO against defendant. Although defendant moved away in November 1998, less than ten months after moving, defendant was standing in Cummings' front yard, five steps away from the fire. As defendant walked away from the fire, he said to Cummings' neighbor, "let it burn." The damage consisted of a broken window, melted vinyl and burned hedges. Viewed in the light most favorable to the prosecution, we find sufficient evidence was presented for a rational trier of fact to conclude that the essential elements of burning of a dwelling house were proven beyond a reasonable doubt.

III. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel. We disagree. In the absence of an evidentiary hearing on this issue, our review is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *Barclay, supra*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Additionally, the defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Hampton*, 176 Mich App 383, 385; 439 NW2d 365 (1989).

A. Rejection of Plea Agreement

Defendant contends that defense counsel rejected a plea agreement without first consulting him. "The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision." MRPC 1.2(a); MRPC 1.4(b); *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995).

Before trial, the trial court indicated its understanding that defendant was willing to tender a plea of no contest to arson of a dwelling house. However, when the trial court informed defense counsel that psychiatric treatment was no longer available in jail and that it would sentence defendant to prison, defense counsel rejected the plea because he and defendant were under the impression that defendant would be sentenced to jail. Based on these facts, defendant has not shown that counsel failed to perform an essential duty and that the failure was prejudicial to defendant. Rather, the record indicates that defense counsel's rejection of the plea agreement was consistent with defendant's request. Therefore, defendant has failed to show that defense counsel's performance with respect to the plea agreement fell below an objective standard of reasonableness.

B. Starr's Testimony

Defendant also contends that defense counsel failed to adequately prepare Starr for trial. During cross-examination, the prosecutor elicited that Starr, a clinical psychologist, was not informed of the need to update her report with regard to the defense of diminished capacity.³ However, Starr indicated that the focus of her report was that impaired judgment or thoughts are symptoms of both legal insanity and diminished capacity. In addition, on redirect examination, defense counsel was able to clarify the definition of legal insanity, and Starr was able to confirm that, in her opinion, defendant met that standard of legal insanity at the time of the offense. We find that Starr was sufficiently prepared to respond intelligently to each of the prosecutor's questions and able to provide the jury with the substance of her proposed testimony. Defense counsel's failure to inform Starr of a recent ruling does not demonstrate a reasonable probability that the result of the proceedings would have been different.

Defendant also contends that the failure to qualify Starr as an expert witness denied defendant a fair trial because defendant was deprived of the benefit of an expert witness instruction. We find that the difference in jury instructions did not create a reasonable probability that the result of the proceedings would have been different. Essentially, the expert opinion jury instruction for Montgomery described her opinion as that of an expert in the field of forensic psychology, while Starr's jury instruction described her opinion as that of a clinical psychologist. At the conclusion of each instruction, the trial court charged the jury to "think about the [expert's or witness'] qualifications," and whether the opinion "makes sense when you think about the other evidence in the case." Moreover, each instruction cautioned the jury that it need not accept the opinion and to think carefully about the reasons and facts given for the opinion. The slight differences between the expert instruction and Starr's instruction do not establish a reasonable probability that the result of the proceedings would have been different.

C. Cumulative Error

Finally, defendant contends that the cumulative effect of defense counsel's alleged failure to prepare Starr as a witness and to qualify her as an expert witness prejudiced defendant to the extent that he was denied a fair trial. Because we have identified no cognizable errors that deprived defendant of a fair trial, there is no cumulative effect and reversal is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio

³ Our Supreme Court recently ruled that diminished capacity was no longer a valid defense in Michigan. See *People v Carpenter*, 464 Mich 223, 232-241; 627 NW2d 276 (2001).