

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK JEROME MORRIS,

Defendant-Appellant.

UNPUBLISHED

June 15, 2010

No. 291347

Wayne Circuit Court

LC No. 08-018642-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of burning a dwelling house, MCL 750.72. The trial court sentenced defendant to serve seven to 20 years' imprisonment.¹ Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

The prosecution's lead witness testified that he, defendant, and a third person entered a house in Detroit, Michigan to recover some property defendant claimed was his own. The witness reported that, earlier, while defendant was detained in jail, "the people where he set the house on fire, they broke in his house" and took some of defendant's property. According to the witness, before leaving the house he detected defendant's "pouring gas in the other room," by way of smelling the gasoline and hearing it "squish everywhere." The witness described a small

¹ In his brief on appeal, defendant points out that the trial court imposed a maximum sentence of 180 months (15 years) at the sentence hearing, but the Judgment of Sentence reflects a maximum sentence of 20 years. Defendant requests that the Judgment of Sentence be changed to reflect a 15-year maximum. Defendant failed to present this issue as one of the questions presented, cite case law, or otherwise brief the issue. Thus, the issue is considered abandoned. See *Attorney General v Mich Pub Service Comm*, 122 Mich App 777, 796; 333 NW2d 131 (1983); MCR 7.212(C)(5). In any event, a defendant's maximum sentence is set by law, see, e.g., MCL 769.8(1), 769.10(2), and 769.11, and because the Judgment of Sentence and Order of Conviction and Sentence accurately reflect the maximum sentence for the crime of arson under MCL 750.72, no remand for resentencing is required.

plastic container in which defendant kept the gasoline. The witness testified that defendant was the last person to leave the house, and that just before defendant did so, the house was set on fire. This witness admitted that he was testifying pursuant to an agreement whereby he would not be prosecuted in connection with illegally entering the house.

That witness's fiancée testified she saw some people from the neighborhood go into defendant's house and take some items, and that defendant was then released from jail, confronted those people on the telephone, "and they told him he could go over to their house to get his belongings." The fiancée testified that defendant described setting the fire, including how in the course of doing so he burned himself. She added that defendant threatened to burn down her house if she told the police. The fiancée stated that she initially kept this information to herself, but chose to talk to the police after defendant threw a brick through a window, striking her mother.

An arson investigator with the Detroit Fire Department opined that the fire had been started deliberately through use of an accelerant. The investigator also observed that the house had furniture inside, and appeared to have someone living in it.

On appeal, defendant challenges the sufficiency of the evidence and, alternatively, argues that his sentence constitutes constitutionally cruel or unusual punishment.

II. SUFFICIENCY OF THE EVIDENCE

The Due Process Clause of the United States Constitution allows a criminal conviction only upon proof beyond a reasonable doubt of each element of the crime. US Const, Am XIV, § 1; *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). See also Const 1963, art 1, § 17. When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Review is de novo. *Id.*

Defendant argues that the evidence in this case was legally insufficient to prove both that he was the person who set the fire, and that the house in question qualified as a dwelling.

Defendant attacks the credibility of the witnesses who identified him in court on the grounds that one was testifying under an immunity agreement, and the other admitted to having developed a personal animus toward him. Defendant also points to some discrepancies among the witnesses concerning precisely when the fire was started. "[I]t is well settled that this Court may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Credibility of a witness is relevant to the weight rather than the sufficiency of the evidence. *People v Sharbnaw*, 174 Mich App 94, 105; 435 NW2d 772 (1989). Moreover, in reviewing the sufficiency of the evidence, all evidentiary conflicts are resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). In this instance, defendant's attacks on the identifying witnesses were for the jury to entertain and resolve, which the jury did. We must

decline defendant's invitation to reassess the credibility of the witnesses. *Lemmon*, 456 Mich at 637, 642; *Gadomski*, 232 Mich App at 28.

Concerning whether the house in question constituted a dwelling, the arson statute prohibits the wilful or malicious burning of "any dwelling house, either occupied or unoccupied, or the contents thereof" MCL 750.72. In the context of arson, "[t]he term "dwelling house" has a broader meaning than a house that is actually occupied as such. It means any house intended to be occupied as a residence, and would include any such residence, even though not occupied by the complaining witness at the time of the burning." *People v Losigner*, 331 Mich 490, 502; 50 NW2d 137 (1951), quoting with approval 2 Gillespie, Michigan Criminal Law & Procedure, § 819. Conversely, a house that is unoccupied and in a dilapidated condition is not a dwelling house for purposes of the statute. See *People v Foster*, 103 Mich App 311, 315-318; 302 NW2d 862 (1981); *People v Reed*, 13 Mich App 75, 79; 163 NW2d 704 (1968). "Unless a structure is actually being dwelt in or lived in, it would seem that if it is unoccupied it would have to be a structure that could reasonably be presumed to be a place capable of being dwelt in or lived in to qualify as a dwelling house within the meaning of the statute." *Reed*, 13 Mich App at 79.

In this case, the arson investigator described the house in question as appearing to be lived in, with furniture inside, and both witnesses who identified defendant as the arsonist clearly connected the people who had allegedly taken some of defendant's property with living in that house. In contrast, there was no evidence that the house was abandoned or dilapidated.

For these reasons, defendant's challenge to the sufficiency of the evidence must fail.

III. CRUEL OR UNUSUAL PUNISHMENT

A trial court's scoring under the sentencing guidelines is reviewed on appeal for an abuse of discretion. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). A "scoring decision for which there is any evidence in support will be upheld." *Id.* (quotation marks and citation omitted). However, constitutional questions call for review de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

The United States Constitution prohibits cruel and unusual punishment, US Const, Am VIII, while the Michigan Constitution prohibits cruel or unusual punishment and is more broadly interpreted than the federal prohibition, Const 1963, art 1, § 16. See *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992).

In this case, defendant's minimum sentence fell within the recommended range under the sentencing guidelines. "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." MCL 769.34(10). "Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). However, sentences within the guidelines range are presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment. *Id.*

In raising this constitutional challenge to his seven-to-20 year sentence for arson, defendant cites cases that involved substantially greater sentences for decidedly lesser offenses. Otherwise, he simply protests generally about a 33-year-old man's having to serve at least seven year's imprisonment. But, given defendant's admitted history of five felonies and one misdemeanor, we cannot consider this sentence for the wanton destruction of a dwelling house by fire cruel or unusual.

Defendant additionally characterizes his conviction as one of "questionable reliability," and suggests that that unreliability should mitigate the punishment. However, having rejected defendant's challenge to the sufficiency of the evidence above, we reject defendant's casting of aspersions on the reliability of his conviction. Moreover, challenges to the evidentiary basis for a conviction are properly brought as challenges to the conviction itself. Defendant's attempt to revive his evidentiary argument in connection with his sentence must fail. See *Powell*, 278 Mich App at 323.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering