STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2010
v	No. 289564 St. Clair Circuit Court
ROBERT LEE HARRIS, Defendant-Appellant.	LC No. 08-001651-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of arson of a dwelling house, MCL 750.72, and conspiracy to commit arson of a dwelling house, MCL 750.157a and MCL 750.72. He was sentenced as a habitual offender, second offense, MCL 769.10, to 7 to 30 years' imprisonment on each conviction, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because a juror was not immediately dismissed for cause after she told the judge that she knew a witness. After the juror spoke up during the testimony of a prosecution witness and said she knew the family of the witness, the judge immediately asked her if that relationship would impact her decision in the case. The juror responded no, and she was present throughout the presentation of proofs. Ultimately, however, the juror was dismissed at the close of proofs on a blind draw, and did not participate in deliberations.

In *People v Miller*, 482 Mich 540, 560-561; 759 NW2d 850 (2008), the Michigan Supreme Court observed that even if a juror would have been excusable for cause, a new trial is not always required because the proper inquiry is whether defendant was denied his right to an impartial jury. *Id.* "[J]urors are presumed to be . . . impartial, until the contrary is shown. The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* at 550 (internal citation and quotation marks omitted). Defendant fails to meet this burden. The record does not indicate that the juror had a bias against a party or attorney. She said specifically that her knowledge of the witness and her family would not affect her decision in the case, and there is no evidence that she had formed an opinion on the case or its outcome. MCR 2.511(D); MCR 6.412(D)(1).

Even if excusable for cause, defendant has not shown that the juror's presence during the trial denied him of an impartial jury. Defendant has offered no evidence that he was actually

prejudiced by the juror during the course of the trial, and because she was dismissed before deliberations, she did not impact the outcome of trial. Defendant only alleges that it is possible that she influenced the case. A mere possibility is not enough to overcome the presumption that the jurors heeded the judge and did not discuss the trial before deliberations. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also claims that his trial counsel was ineffective for failing to request voir dire of the juror after she spoke. Generally, to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052, 2064-2065, 2068; 80 L Ed 2d 674, 693-694, 698 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Further, it must be shown that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel could have requested that the judge allow voir dire of the juror to ascertain whether she had a bias. However, after the juror told the court her impartiality would not be impacted, defense counsel may have reasonably concluded that it was unlikely that the juror would be dismissed, so the better strategy would be not to confront her and possibly antagonize her. Moreover, defendant has not shown that the outcome of the trial would have been different or that the trial was unfair. Thus, defendant has not met his heavy burden to overcome the presumption of effective assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant next argues that there was insufficient evidence to convict him of either conspiracy or the underlying crime. When determining whether sufficient evidence has been presented to sustain a conviction in a criminal case, we view the evidence de novo in a light most favorable to the prosecution and determine whether a rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Odom*, 276 Mich App at 418.

Regarding the underlying crime, there is no dispute that the trailer was burned, therefore, the questions remain whether defendant "willfully or maliciously" caused it to burn. "[T]he evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause." *People v Nowack*, 462 Mich 392, 402-403; 614 NW2d 78 (2000) (internal citation omitted). Further, a fact finder can infer intent from circumstantial evidence including the act, means, or manner employed to commit the offense. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Moreover, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence" is all that is needed to support a finding that a defendant acted with a specific intent in mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The testimony of Mark Wroblewski, Kelly Rae Smith, and Mike Venditti indicate that defendant willfully acted to set the trailer on fire. Wroblewski testified that the three men drove in defendant's car to the gas station, where they filled up the gas cans they were carrying; defendant paid for the gas. Upon arrival at the trailer park, Wroblewski spread the gasoline and,

although he lost sight of defendant, the gasoline was lit and Wroblewski did not light it himself. Venditti testified that Wroblewski and defendant told Venditti that they were going to burn down the trailer, and Venditti observed both of them spreading gasoline around the trailer, although he did not see who lit the fire. Defendant did deny any involvement. However, witness credibility is an issue for the fact finder at trial, and in recognition of this principle, this Court must make credibility choices in support of the verdict. *Nowack*, 462 Mich at 400; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Additionally, although proof of a motive is not essential, see *People v Rice* (*On Remand*), 235 Mich App 429, 440; 597 NW2d 843 (1999), there was evidence defendant's motive in setting the fire.

Defendant was also convicted of conspiracy. "[C]onspiracy is a crime separate and distinct from the substantive offense" the parties have conspired to achieve. *People v Hamp*, 110 Mich App 92, 102; 312 NW2d 175 (1981). Conspiracy requires the specific intent to combine with others and the specific intent to accomplish the illegal objective of the conspiracy. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). It is often stated in case law that "the gist" of the crime is the agreement between the conspirators to commit the substantive offense. See, e.g., *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Because it is the nature of a conspiracy to be covert, proof of the agreement can be drawn from inferences arising from the conduct of the individual conspirators. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997). Similarly, intent "may be proven directly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 482 NW2d 810 (1992) (citations omitted). As such, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Here, there is substantial circumstantial evidence that defendant formed an agreement with Wroblewski. Not only did Wroblewski testify that he and defendant had a plan to set the trailer on fire, Venditti testified that defendant and Wroblewski told Venditti that they were going to get back at Jake by setting the trailer on fire. Moreover, defendant's actions, as described by Wroblewski and Smith, show that defendant had foreknowledge of the plan, and that he was acting in furtherance of it. There was sufficient evidence to convict defendant of conspiracy to commit arson of a dwelling house.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald