

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LESTER STEVESON,

Defendant-Appellant.

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UNPUBLISHED

June 29, 2010

No. 290538

Hillsdale Circuit Court

LC No. 08-321713-FH

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for arson (preparation to burn property of \$20,000 or more), MCL 750.77(1)(d)(i). The trial court sentenced defendant to 12 months in jail with credit for 53 days. For the reasons set forth below, we affirm.

Defendant argues that his attorney was ineffective for failing to properly investigate and conduct an evidentiary hearing regarding whether he consented to the search of his business.<sup>1</sup> Based on this lack of investigation, defendant questions the admissibility of evidence of gas cans, defendant's clothing, and other items, as well as testimony that stemmed from the search. As a general matter, "official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment." *Michigan v Tyler*, 436 US 499, 508; 98 S Ct 1942; 56 L Ed 2d 486 (1978). However, "a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Id.* at 509. A burning building, for example, "clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'" *Id.* And, once in a building for this purpose, officials "may seize evidence of arson that is in plain view." *Id.* at 509-510.

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<sup>1</sup> To establish ineffective assistance of counsel during trial, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Here, Officer Franklin Young and Sergeants Kenneth Hersha and Gordon Bigelow arrived on the scene shortly after defendant placed a call to 911 to report someone breaking and entering his building. Officer Young arrived first, saw smoke, spoke with defendant, and entered the building. Officer Young saw several incriminating items in plain view, he determined the location of the fire, and he notified the fire department. Sergeants Hersha and Bigelow arrived shortly thereafter to investigate the fire. Pursuant to *Tyler*, 436 US at 510, these officials could remain in the building without a warrant for a reasonable period of time in order to investigate the cause of the fire. Accordingly, the warrantless seizure of evidence that was in plain view while inspecting the premises for this purpose was not unconstitutional. *Id.* Under these circumstances, any attempt by trial counsel to object to the admission of this evidence would have been futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). We further note that, though consent was not an issue at trial, Sergeants Hersha and Bigelow provided testimony about facts that suggest that defendant consented to the search of his business and evidence showed that he voluntarily provided the police with his shoes. Because the officials had the authority to seize evidence and also apparently had defendant's consent, defendant cannot show that counsel's failure to investigate the legality of the search and seizure fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

With regard to evidence obtained by Jack Sanderson, who investigated the building several days after the fire, the record does not reflect whether his search was the result of consent or a search warrant. But, because defendant did not move for a new trial or seek an evidentiary hearing in the trial court regarding the ineffective assistance of counsel claim, review in this case is limited to errors apparent on the record. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007). Were we to hold that counsel should have raised this issue, defendant has not shown a reasonable probability that, but for counsel's conduct, the results of the trial would have been different and the record does not show that the proceedings were fundamentally unfair or unreliable. *Toma*, 462 Mich at 302-303; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Even absent the disputed evidence, there was significant evidence from which a reasonable jury could find defendant guilty of arson. Accelerant was poured throughout defendant's business and the fire was started by igniting documents that defendant likely would want to destroy, including his expired chiropractor's license and a past due tax notice. Defendant's own testimony established that his business was failing financially and he was significantly in debt and late on various payments. A reasonable fact-finder could conclude that defendant set fire to his business in order to collect on his insurance policy. Evidence also showed that defendant showed no shock or agitation immediately after he reported the fire, even though he claimed to have discovered his business on fire and a red substance poured all over the inside of his offices. There was no evidence of forced entry into the building and the record also contained a surveillance video from Wal-Mart that showed defendant buying gas cans and paint thinner similar to the items found in the building after the fire. Thus, were we to hold that defense counsel should have moved to exclude Sanderson's evidence about pour patterns and pry

marks, there was overwhelming evidence of defendant's guilt. Accordingly, defendant has not established prejudice.<sup>2</sup>

Affirmed.

/s/ Christopher M. Murray

/s/ Henry William Saad

/s/ Michael J. Kelly

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<sup>2</sup> We reject defendant's request for a remand for an evidentiary hearing as untimely and not properly supported. MCR 7.211(C)(1).