

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 24, 2012

v

FREDERICK JAMES MARDLIN,
Defendant-Appellant.

No. 279699
St. Clair Circuit Court
LC No. 07-000240-FH

ON REMAND

Before: ZAHRA, P.J.,¹ and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

This case returns to us after our remand to the trial court for a *Ginther*² hearing to determine whether defendant's trial counsel was ineffective for failure to renew a motion for appointment of an electrical engineering expert (unpublished order of the Court of Appeals, issued February 14, 2011). In addition, our Supreme Court has ordered us to consider the arguments defendant raised in his original appeal. See *People v Mardlin*, 487 Mich 609, 630; 790 NW2d 607 (2010) (*Mardlin I*, reversing our original decision and remanding for consideration of defendant's remaining arguments). Having examined the briefs, motions, and transcripts from the trial, as well as from the first remand and the second remand, we conclude that cumulative errors occurred regarding the electrical engineering expert. The combined effect of these errors prejudiced defendant. Accordingly, we reverse defendant's convictions.³

I. FACTS AND PROCEDURAL HISTORY

¹ Zahra, P.J., not participating, having been appointed to the Michigan Supreme Court effective January 14, 2011.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ According to the Michigan Department of Corrections' Offender Tracking Information System, defendant was paroled on June 6, 2010, and was discharged from supervision on December 9, 2011.

Following a jury trial, defendant was convicted of arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. The central factual issue at trial was whether the fire in defendant's home was accidental. Our Supreme Court recited the underlying facts:

Defendant admitted that he was the only person present at his home just before it caught fire on the afternoon of November 13, 2006. He left the premises to visit his brother shortly before the fire was reported by neighbors. After the fire, defendant filed an insurance claim seeking compensation for the damage to his home. The investigating police detective and a fire investigator for defendant's insurer both concluded that the fire had been intentionally set and originated from a love seat in the living room. Accordingly, the prosecution charged defendant with arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. Defendant claimed that the fire was an accident likely caused by faulty electrical wiring. [*Mardlin*, 487 Mich at 612.]

Prior to trial, defendant's counsel requested public funds for appointment of an electrical expert to investigate the cause of the fire. The trial court denied the request, although the court did authorize funds for a general fire investigation expert. At trial, the prosecution presented expert testimony the fire had no electrical cause, and that the fire was intentionally set. In contrast, the defense's general fire expert opined that the fire could have had an electrical origin. After hearing the testimony of all the witnesses, the jury convicted defendant as charged.

Defendant appealed and sought a remand for both a *Ginther* hearing and an evidentiary hearing on a motion for a new trial based upon newly-discovered evidence. This Court remanded for a hearing on the motion for a new trial. *People v Mardlin*, unpublished order of the Court of appeals, issued June 10, 2008 (Docket No. 279699). The trial court held the evidentiary hearing and then denied defendant's motion for a new trial. Upon the return of the case to this Court, we reversed defendant's convictions on the ground that the trial court erred in admitting evidence of prior fires at trial. *People v Mardlin*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 279899) ("*Mardlin I*"). Because we found evidentiary error requiring reversal, we did not address defendant's other arguments on appeal.

Our Supreme Court reversed our decision on the evidentiary issue, reinstated defendant's convictions, and remanded to us for consideration of defendant's remaining arguments on appeal. *People v Mardlin*, 487 Mich 609, 612; 790 NW2d 607 (2010). The Court specifically noted, "[d]efendant's claim that his trial attorney should have retained an expert to test the wiring before trial should be considered by the Court of Appeals on remand." *Id.* at 617 n 46.

We then remanded to the trial court for a *Ginther* hearing. In our remand order we stated, "It appears that the conclusions reached by Larry Stalter, defendant's [proposed] electrical engineering expert, would not have been cumulative of those reached by defense [general] expert Robert Trenkle, and would have directly contradicted the prosecution's theory that defendant deliberately set the fire that damaged his home." *People v Mardlin*, unpublished order of the Court of Appeals, entered February 14, 2011 (Docket No. 279699). We retained jurisdiction,

and the case now returns to us. We address these issues in the order defendant presented the issues to the trial court.

II. ANALYSIS

A. DEFENDANT’S PRETRIAL REQUEST FOR APPOINTMENT OF AN ELECTRICAL EXPERT

In his initial appeal, defendant contended that the trial court erred by denying defendant’s request for public funds to retain experts in fire investigation and in electrical engineering. The trial court held a hearing on defendant’s request and granted funds for a fire investigator, but denied funds for an engineer. We review the trial court’s ruling for abuse of discretion. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

MCL 775.15 allows trial courts to provide public funds for indigent defendants to retain expert witnesses. The defendant has the burden of demonstrating that “there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial.” *Id.* The statute does not mandate that trial courts approve all requests to appoint expert witnesses. *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Rather,

an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant’s motion for appointment of an expert witness. [*Carnicom*, 272 Mich App at 617 (citations omitted).]

In his motion, defendant asserted that the facts and circumstances of the fire suggested that an electrical outlet in the living room was a possible cause of the fire. Defendant informed the court that his family had provided him with financial assistance to retain fire investigator Robert Trenkle to conduct a preliminary investigation. Defendant further informed the court that Trenkle had found severe damage in the living room near an electrical outlet. Defendant pointed out that Trenkle’s opinion regarding the fire directly contradicted the opinions of the prosecution’s experts. In addition, defendant informed the trial court that to defend himself against the charges he needed experts in the fields of fire investigation and electrical engineering.

In response to defendant’s motion, the prosecution acknowledged that Trenkle’s opinion directly conflicted with the prosecution’s experts’ opinions. The prosecution asserted, however, that defendant had failed to provide sufficient information concerning his proposed experts, their qualifications, and their costs. At the hearing on the motion, defendant’s trial counsel informed the court that Trenkle had 40 years of experience, that Trenkle disagreed with the prosecution’s experts regarding the cause of the fire, and that Trenkle could not yet determine the exact cause. Counsel brought Trenkle’s report to the hearing. Specifically, counsel advised the court that the prosecution’s experts did not test the electrical outlet or the power strip where the most damage occurred. The prosecution responded that one of their experts inspected the plugs. Defendant’s counsel informed the court that inspection of the plugs was insufficient, and that “Trenkle’s

opinion is that there is no way that one could rule out the point that this fire was started by electrical means, unless the proper tests are done on this electrical outlet to determine whether or not some fault caused this fire.” Counsel also reasserted that he sought funding not only for further investigation by Trenkle, but also for an electrical engineer to do testing.

The trial court decided that defendant had not provided enough information to support the request for an engineer. In our view, the trial court’s decision was based on a paradoxical standard. The court indicated that it would consider granting the request for an expert engineer to determine whether the fire was accidental, but only if defendant first provided an expert opinion that the fire was accidental. We acknowledge that this standard is arguably consistent with some Michigan case law.⁴ However, in this case the record indicates that defendant presented specific information confirming his need for an engineer.

Generally, a trial court is within its discretion to refuse to appoint an expert if the defendant fails to identify case-specific information that the defendant expects the expert to address, or the defendant fails to identify how the expert would benefit the defense. For example, in *People v Jacobsen*, 448 Mich 639; 532 NW2d 838 (1995), the defendant sought an expert to testify that the results of a breathalyzer test were unreliable due to a delay in conducting the test. *Id.* at 640. The defendant did not show that the expert was needed to complete an investigation, or that the expert had knowledge regarding the specific breathalyzer equipment at issue. Our Supreme Court held that “[t]he mere allegation that the delay was unreasonable . . . was not a sufficient showing” to require appointment of an expert. *Id.* at 641. Similarly, in *Tanner*, 469 Mich 437, the Court upheld the denial of a motion to appoint DNA and serology experts because the DNA evidence at issue was exculpatory, and because defendant failed to identify how a serology expert could benefit the defense. *Id.* at 443-444. Also, in *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002), this Court upheld the trial court’s refusal to appoint an expert accountant on the ground that the defendant had not identified the specific portion of the financial records that the requested expert could have explained. *Id.* at 689. Likewise, in *Carnicom*, 272 Mich App 614, this Court found no abuse of discretion in the refusal to appoint an expert when the defendant had failed to dispute the prosecution’s expert’s testimony concerning blood tests for methamphetamine and failed to relate the proposed defense expert’s testimony to the charged offense of drug possession. *Id.* at 618-619.

It is an abuse of discretion, however, to refuse to appoint an expert when the defendant has presented information demonstrating that the prosecution’s experts’ tests were faulty, that their procedures were inadequate, that their conclusions were erroneous, and that there is a nexus between the facts of the case and the need for a defense expert. See *In re Klevorn*, 185 Mich

⁴ Other judges have noted the paradoxical aspects of requiring expert testimony to support the appointment of an expert. See *Carnicom*, 272 Mich App at 620 (“If the court provides to indigent defendants the right to a court appointed and funded expert witness, there can be no requirement that the defendant first show the expert will support his claim. Otherwise, the right affords defendants no protection at all.” Cooper, J., concurring); see also *Tanner*, 469 Mich at 446-447 (Kelly, J., dissenting).

App 672, 679; 463 NW2d 175 (1990); see generally *Tanner*, 469 Mich at 444. Here, both parties agreed that the cause and origin of the fire was a matter for expert testimony. Moreover, the information that defendant presented from Trenkle directly challenged the tests and procedures of the prosecution's experts, particularly the allegedly inadequate testing of the electrical equipment. Defendant also informed the trial court of Trenkle's opinion that further testing was necessary. Defendant thereby presented the requisite grounds for appointment of an additional expert. Given the unique facts of this case, the trial court should have granted defendant's motion for an electrical engineer to perform the proposed tests on the electrical outlet and the power strip.

B. DEFENDANT'S MOTION FOR A NEW TRIAL

In his initial appeal, defendant contended that the trial court erred by denying his motion for a new trial. When defendant initially presented the motion, he submitted an affidavit from electrical engineer Larry Stalter. In the affidavit, Stalter stated that his preliminary observations indicated that the fire may have had an electrical cause and that further testing was needed. The trial court denied the motion for a new trial. Stalter subsequently tested the electrical equipment on a pro bono basis. After the testing, Stalter signed a new affidavit in which he described his testing and his observations. In the affidavit, Stalter opined that the fire was due to an electrical cause. On the basis of this newly discovered evidence, defendant asked this Court to remand to the trial court for an evidentiary hearing on a motion for a new trial. This Court remanded, and the trial court again denied the motion for a new trial. We review the trial court's ruling for abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). To the extent the court made factual findings, we review those findings for clear error. *Id.*

The trial court denied defendant's motion for a new trial on two grounds. First, the court noted that Stalter's testimony was inconsistent with the testimony of the prosecution's three experts. The court wrote:

Based upon [the] testimony and all of the physical evidence demonstrating the nature of the fire in question, this Court cannot find that evidence regarding the power-strip would render a different result likely upon retrial. This new evidence simply does not serve to rebut the overwhelming evidence that the origin of the fire was in a location remote from the power-strip. Especially considering that [the prosecution's expert] electrical engineer, who had the benefit of all of the relevant evidence in this case, found that the outlet box and power-strip were not the source of the fire.

The court also determined that Stalter's testimony was cumulative to Trenkle's testimony.

The trial court was correct insofar as it recited the standard for assessing a motion for a new trial. The standard requires:

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the

evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Cress*, 468 Mich at 692 (internal quotation marks and citation omitted).

The court was incorrect, however, in determining that defendant had failed to meet this standard. First, we note that Stalter's testimony was newly discovered. Until the time that Stalter performed his testing, he could not attest to the cause or origin of the fire. He completed the testing after the conclusion of the trial. The test results, and Stalter's conclusions, were thus newly discovered evidence.

Second, Stalter's testimony was not cumulative. Trenkle expressly acknowledged at trial that he knew the electrical outlet should be tested, and that he knew someone else should be involved. Had Stalter been involved at trial, the defense could have presented Stalter to explain matters that Trenkle could not explain. In particular, Stalter could have explained how the electrical components could have caused the fire. Moreover, as an engineer, Stalter's tests and his testimony could have been responsive to the prosecution's criticism of Trenkle's testimony.

Third, Stalter's testimony was not discoverable with reasonable diligence. Defense counsel had no funds available to retain Stalter or any other electrical engineer. Defendant sought, and was denied, funds to retain an engineer. Although the trial court left open the possibility of obtaining funds if defendant could establish a sufficient nexus, it is unclear how defendant could have gathered additional information without funds to do so. Under these circumstances, defendant exercised reasonable diligence to attempt to obtain an engineer opinion.

Fourth, there is a reasonable probability that Stalter's testimony would have altered the outcome of the trial. At the evidentiary hearing, Stalter testified that the fire started in a wall outlet box as a result of overheating of a ground wire. Stalter also addressed the factors upon which the prosecution's experts had relied and stated his view that these factors were not conclusive. In particular, Stalter explained how the power cord and a portion of the wall outlet could have remained intact even if the fire had started in the outlet. Stalter also explained his view that the prosecution's investigation could not accurately exclude an electrical cause of the fire.

Stalter's testimony, combined with the testimony from Trenkle, could have provided evidence that the fire originated in the electrical outlet. The jury would then have had the opportunity to assess the credibility and accuracy of all theories regarding the cause and origin of the fire. In sum, the trial court should have granted defendant's motion for a new trial on the basis of the newly discovered evidence from Stalter.

C. CUMULATIVE ERROR⁵

⁵ Defendant also argued in his original appeal that his counsel was ineffective. We remanded for a *Ginther* hearing. For the reasons stated by the trial court, we conclude that trial counsel's

Defendant did not argue in his initial appeal that cumulative errors required reversal of his conviction. Nonetheless, we address cumulative error as a controlling legal issue. See *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002) (appellate court has authority to address controlling legal issues not framed by the parties). We address this issue because the cumulative effect of several errors may warrant reversal, even if any one of the errors is relatively minor. See *People v Unger*, 278 Mich App 210, 261-262; 749 NW2d 272 (2008). Here, we must determine whether the combination of errors denied defendant a fair trial. *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

In this regard, we recognize the concerns of the three dissenting justices in our Supreme Court's *Mardlin I* opinion:

[A]fter defendant was convicted, an expert who previously worked with the Detroit Fire Department offered to investigate on a pro bono basis. He tested a power cord that ran behind the couch to an electrical outlet. Defendant's roommate testified that the power cord was to a computer and had to be "jiggled" to get the computer to work. Defendant's electrical expert tested the wiring and junction box and determined that they were the cause of the fire. The testing was videotaped. None of the prosecution's witnesses tested this box or wire. This evidence, in correlation with the improperly admitted evidence in this case, raises serious concerns about the fairness of defendant's trial. [*Mardlin*, 487 Mich at 647 n 44.]

In this case, defendant was denied the opportunity to obtain and present critical evidence at least three times: the trial court's denial of his request for appointment of an electrical engineering expert; the trial court's initial denial of defendant's motion for a new trial, and the trial court's denial of the motion after the evidentiary hearing. If any one of these denials had resulted in the opportunity to present Stalter's opinions to a jury, the outcome of the trial could have been different. Accordingly, we are compelled to conclude that the cumulative errors that prevented the presentation of Stalter's testimony denied defendant a fair trial.

Reversed. The prosecutor has the option of pursuing a new trial. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

decision not to renew the motion for appointment of an electrical engineering expert did not amount to ineffective assistance.