STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2012
v	No. 301700 Huron Circuit Court
THOMAS LEE O'NEIL, Defendant-Appellant.	LC No. 10-004861-FH

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and preparation to burn property, MCL 750.77(1)(d)(*i*). Defendant appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions. We disagree. When considering a claim of insufficient evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201. We do not second-guess the jury's assessment of the weight and credibility of the evidence and testimony. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Our review of the evidence is deferential, and we draw all reasonable inferences in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

A. ELEMENTS OF PREPARATION TO BURN

MCL 750.77 provides in relevant part as follows:

> (1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building or property described in section 72, 73, 74, or 75 with intent to willfully and maliciously set fire to or burn the building or property or who aids, counsels, induces, persuades, or procures another to do so is guilty of a crime as follows:

* * *

(d) If any of the following apply, the person is guilty of a felony . . .

(*i*) The property is personal or real property, or both, with a combined value of $20,000.00 or more.[1]

The prosecution must prove three elements for the crime of preparation to burn: (1) defendant put a flammable substance in or around the property in question; (2) defendant intended to cause a fire, knowing that the fire would damage the property without excuse; and (3) the property had a value of $20,000 or more at the time defendant intended to burn it. See CJI2d 31.6.

B. ELEMENTS OF HOME INVASION

MCL 750.110a(3) provides as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

The prosecution must prove two elements for the crime of second-degree home invasion: (1) defendant entered a dwelling, either by a breaking or without permission; and (2) defendant either had the intent to commit or actually committed a felony, larceny, or assault. See *People v Nutt*, 469 Mich 565, 592-593; 677 NW2d 1 (2004).

C. ANALYSIS

On appeal, defendant does not deny that the crimes actually occurred. Defendant only contends that insufficient evidence established his identity as the perpetrator of the crimes. For the following reasons, we conclude there was legally sufficient evidence to sustain defendant's convictions.

Matches found at the scene contained defendant's DNA. An expert in forensic analysis labeled defendant as a "major donor" because his DNA was overwhelmingly present on the matches. A logical inference from this evidence is that defendant was responsible for leaving the matches at the scene. Also, it is logical to infer that defendant was responsible for placing the flammable substances in the home as well. In this regard, the evidence established that defendant had access to flammable substances at his place of employment. We note that a DNA

[1] See MCL 750.72 (dwelling house).

match is "powerful inculpatory evidence." *McDaniel v Brown*, ___ US ___; 130 S Ct 665, 673; 175 L Ed 2d 582 (2010).

The prosecutor submitted additional evidence to prove defendant's guilt. Defendant's false allegation of another person's confession and defendant's unusual investigative tip to police may indicate knowledge of guilt. See *People v Dandron*, 70 Mich App 439, 443; 245 NW2d 782 (1976).

Defendant's repeated attempts to contact his ex-wife suggest a desire to, as defendant himself stated in an email, "[m]ake [her] life more miserable than it already is." Our Supreme Court has held that evidence of marital discord is relevant for showing motive. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Additionally, the Court in *Fisher* stated that in "cases . . . in which the proofs are circumstantial and the only witness is the accused, evidence of motive [is] highly relevant." *Id*. While the evidence here addressed post-marriage discord, not marital discord, the situation is closely analogous. The communications indicate defendant's attitude regarding his ex-wife. Accordingly, the communications helped to show defendant's reason or motivation for committing the crimes.

Defendant emphasizes that a second person's DNA was also found on the matches. He suggests that the second person could have started the fire without his involvement. Defendant further suggests that his convictions cannot be affirmed without excluding the possibility that the second person committed the crimes. This argument is without merit because the prosecutor was not required to specifically disprove alternative theories beyond a reasonable doubt. *Nowack*, 462 Mich at 400.

Defendant also argues that the testimony of his alibi witnesses raised a reasonable doubt about defendant's guilt. However, a jury may decide not to believe multiple alibi witnesses because witness credibility is within the jury's province. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); *People v Barnes*, 107 Mich App 386, 392; 310 NW2d 5 (1981) ("The jury was free to believe or disbelieve defendant's alibi witnesses."). The jury in the instant case apparently chose to credit the DNA evidence and the motive evidence over the testimony of the alibi witnesses. We will not reassess the jury's determination of witness credibility. *Bulmer*, 256 Mich App at 36. In sum, defendant's challenge to the sufficiency of the evidence is without merit.

II. GREAT WEIGHT OF THE EVIDENCE

Next, defendant argues that his convictions were against the great weight of the evidence. We disagree. We review the trial court's ruling on a motion for a new trial with respect to the great weight of the evidence for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). The trial outcome must appear to be a manifest injustice or have resulted in the conviction of an actually innocent person. *Id.* at 644. "Generally, a verdict may be vacated only when the evidence does

not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemmon*, 456 Mich at 647. Witness credibility is a sufficient ground for a new trial only when the testimony "contradicts indisputable physical facts or laws" or is "patently incredible or defies physical realities." *Id.* at 643 (quotations omitted).

Here, the evidence did not preponderate heavily against the verdict, so it would not be a miscarriage of justice to affirm the convictions. Although defendant denied committing the crimes and provided multiple alibi witnesses, the jury apparently found this testimony implausible. The jury's determination with respect to witness credibility will not be disturbed on appeal. *Lemmon*, 456 Mich at 643. Further, there is no indication that defendant's convictions were the result of passion, prejudice, sympathy, or other extraneous influence. *Lacalamita*, 286 Mich App at 469. Defendant's convictions were supported by DNA evidence linking him to the crime scene and by his attempts to influence the police investigation. The verdict was not against the great weight of the evidence, and the trial court did not abuse its discretion by denying defendant's motion for a new trial.

III. NEWLY DISCOVERED EVIDENCE

Defendant next argues that the trial court erroneously denied his motion for a new trial to the extent it was based on a cover letter that he maintained was newly discovered evidence. We disagree. We review a trial court's ruling on a motion for a new trial on the basis of newly discovered evidence for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

Our Supreme Court outlined a four-part test regarding newly discovered evidence in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003):

> 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. [Internal quotation marks and citations omitted.]

"Newly discovered evidence does not require a new trial . . . when it relates only to a witness's credibility." *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

In this case, the trial court correctly found that defendant's "newly discovered evidence" was not newly discovered. Defendant acknowledges that the cover letter was not newly discovered. He contends, however, that he could not have known the materiality of the letter until the time of trial or thereafter. We find no support in the record for this contention. Moreover, the relevant substance of the letter was cumulative; similar statements regarding defendant's desire for accuracy were in the timeline letters admitted at trial, and defendant testified that the timeline letters were not intended to provide his alibi witnesses with a script for

their testimony. In addition, defendant became aware during trial that the prosecution would argue the letters were intended as a script, and yet, he did not secure the letter from the recipient until after trial. Defendant cannot withhold evidence and then seek a second trial following an unfavorable result in the first trial. Defendant's failure to exercise reasonable diligence to produce the cover letter at trial is necessarily fatal to his attempt to obtain a second trial. Finally, because the jury apparently rejected this cumulative evidence, defendant cannot show the likelihood of a different outcome in the event of a retrial. Accordingly, the trial court properly denied defendant's motion for a new trial.

IV. EVIDENTIARY RULING

Finally, defendant argues that his "timeline" letters were irrelevant and prejudicial, and that the admission of the letters into evidence violated his right to due process. We review this issue for plain error because defendant did not object to the letters on these grounds below, and the arguments are therefore unpreserved. *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). Under the plain error rule, "defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich 763. The defendant bears the burden with respect to the third requirement. *Id*. Finally, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737, 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant asserts that the timeline letters were irrelevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, the letters were relevant and admissible at trial because they could reasonably be read as an attempt to influence the readers' testimony. *People v Lytal*, 119 Mich App 562, 575-576; 326 NW2d 559 (1982). Evidence of a criminal defendant's attempts to influence witness testimony is admissible to show consciousness of guilt. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981).

In his brief on appeal, defendant articulates his personal interpretation of the timeline letters. Because there is no explicit request for false testimony, defendant argues that it was erroneous for the prosecutor to argue that the letters were an attempt to suggest false testimony. However, a reasonable juror could have interpreted the letters as suggesting false testimony. See *Lytal*, 119 Mich App at 576 (interpretation of ambiguous letter "was a matter for the jury to decide by applying their common sense and experience"). Further, defendant conceded at trial that the letters contained information that he did not know to be true, as he did not remember what occurred during certain time periods. Consequently, the letters were relevant.

Defendant further asserts that the timeline letters were unduly prejudicial. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Crawford*, 458 Mich 376, 397-398; 582 NW2d 785 (1998).

"All relevant evidence will be damaging to some extent. . . . The fact that evidence is prejudicial does not make its admission unfair." *People v Murphy* (*On Remand*), 282 Mich App 571, 582-583; 766 NW2d 303 (2009). Evidence is unfairly prejudicial when it is "minimally damaging in logic [but] will be weighed by the jurors substantially out of proportion to its logically damaging effect." *Id.* at 583 (citation omitted).

The timeline letters were not unduly prejudicial under MRE 403. The only "prejudice" to defendant was the damaging inference that he attempted to influence witness testimony. This was a proper consideration for the jury. That the letters were damaging to defendant's position at trial did not render the admission of the letters unduly prejudicial. See *Murphy*, 282 Mich App 582-583.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot