[Cite as *State v. Nelson*, 2004-Ohio-4967.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO Appellee v. BRYAN NELSON Appellant	C.A. No. 04CA0001-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 03-CR-0044

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

{¶1} Appellant, Bryan Nelson, appeals the judgment of the Medina County Court of Common Pleas convicting him of aggravated arson in violation of R.C. 2909.02(A)(1). This Court affirms.

I.

{¶2} Appellant's house exploded on September 6, 2003. As a result, fire investigator James Churchwell along with several others conducted forensic examinations of the physical evidence. The final conclusion reached was that the explosion was caused by the detonation of natural gas that had accumulated in the

house as a result of gas valves in the basement of the house being left open. Investigators concluded that an electrical appliance on the first floor was likely the ignition source.

{¶3} Upon questioning, Appellant indicated that he had disassembled the burners for the boiler in his home heating system. In order to accomplish this, Appellant explained that he had to disconnect the gas lines to the boiler and turn off the valves supplying gas to those lines. At some point thereafter, Appellant re-opened the gas valves, but the gas lines were never reconnected to the boiler. As natural gas began to fill the house, Appellant left to spend two days in Windsor, Canada. During this time, his dog, Wally, was placed in a kennel. Upon arriving home, at approximately 2:30 to 3:00 in the afternoon, Appellant noted that the house was unharmed and that he did not smell anything out of the ordinary. Appellant stopped at the home only briefly, and then left and simply drove around for more than an hour. At 3:30 P.M., the house exploded. Multiple fire departments responded to the scene, but the home was completely destroyed.

{¶4} Subsequently, Appellant was indicted for aggravated arson and his trial began on October 27, 2003. A jury found Appellant guilty, and the trial court sentenced him to three years incarceration. Additionally, Appellant was required to make restitution in the amount of $177,337.80 to Westfield Insurance Company, the insurer of his home. Appellant timely appealed his conviction, raising four assignments of error.

II.

ASSIGNMENT OF ERROR I

> "THE EVIDENCE AT TRIAL CONCERNING THE ESSENTIAL ELEMENT OF 'KNOWINGLY' WAS INSUFFICIENT TO SUPPORT APPELLANT'S AGGRAVATED ARSON CONVICTION, AND THAT CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} Appellant, in his first assignment of error, argues that insufficient evidence was presented to support his conviction, and as such his conviction was against the manifest weight of the evidence. We disagree.

{¶6} We begin by noting that "[w]hile the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at 3, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). Further,

> "[b]ecause sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at 4.

{¶7} Therefore, we will address Appellant's assertion that his conviction was against the manifest weight of the evidence first as it is dispositive of Appellant's claim of insufficiency.

{¶8} When a defendant asserts that his conviction is against the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶9} Appellant was convicted of aggravated arson in violation of R.C. 2909.02(A)(1). R.C. 2909.02(A)(1) provides that:

> "No person, by means of fire or explosion, shall knowingly do any of the following:
>
> "Create a substantial risk of serious physical harm to any person other than the offender[.]"

{¶10} Additionally, R.C. 2901.22(B) defines knowingly as follows:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶11} Appellant contends that the State did not meet its burden of persuasion with regard to proving that Appellant acted knowingly.

{¶12} The record reflects that Appellant's home exploded as a result of the accumulation of natural gas. Further, a man working nearby was knocked to the ground by the force of the blast, and debris was thrown over seventy-five yards in

every direction. As such, Appellant does not contest that an explosion occurred or that the explosion created a substantial risk of harm to another person.

{¶13} Instead, Appellant argues that the State did not meet its burden with regard to proving the culpable mental state necessary for aggravated arson, i.e. knowingly. Because a defendant's mental state is difficult to demonstrate with direct proof, it may be "inferred from the surrounding circumstances." *State v. Logan* (1979), 60 Ohio St.2d 126, 131. Further,

> "proof of arson must often rely heavily on circumstantial evidence because of the nature of the crime. But, as in all crimes, circumstantial evidence may establish any given element of the offense. Motive and opportunity are facts which can weigh heavily in establishing arson." *State v. Shaver* (Dec. 20, 1989), 9th Dist. No. 89CA004505, at 7, quoting *State v. Pruiett* (Apr. 15, 1987), 9th Dist. No. 12858, at 3.

{¶14} It is uncontradicted that Appellant opened a gas valve in his basement allowing natural gas to fill his house. Further, Appellant admitted the gas valves were turned on after he attempted to repair the boiler in his basement. Appellant himself testified that he was a boiler technician in the Navy, and that he was familiar with the flammable nature of natural gas. Additionally, a State's witness testified that the smell of gas was so strong that it was noticeable from the road running in front of Appellant's property. While Appellant stated that he stopped at the home less than one hour before the explosion, he testified that he smelled nothing unusual while in the house. Further, it was shown that the gas valves were opened shortly before Appellant left to spend two nights in Windsor,

Canada. As such, ample circumstantial evidence was presented from which a jury could infer that Appellant had the opportunity to cause the explosion in question.

{¶15} Further, the State argued that Appellant's motive for causing the explosion was the financial incentive stemming from Appellant's insurance policies. The State presented a great deal of evidence regarding the debt that Appellant currently had. Appellant was behind on both of his mortgages, had stopped paying altogether on one loan, had received short-term loans on multiple occasions, had begun borrowing from his retirement plan, and traveled frequently to a casino in Windsor, Canada. Further, Appellant owed over $800 to the gas company and previously had his electricity turned off for failure to pay his bill.

{¶16} As such, the jury had ample circumstantial evidence from which to infer that Appellant had both motive and opportunity to commit aggravated arson. That, coupled with the fact that Appellant admitted to opening the gas valves, but could not explain why he opened the valves, provided evidence from which the jury could find that Appellant knowingly committed aggravated arson. Therefore, we cannot say that the jury lost its way in finding Appellant guilty of aggravated arson. Having disposed of Appellant's challenge to the weight of the evidence, we similarly dispose of Appellant's sufficiency challenge. Accordingly, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING UNSUBSTANTIATED EVIDENCE THAT

APPELLANT ALLEGEDLY HAD A GAMBLING PROBLEM AND OWED SUBSTANTIAL AMOUNTS OF MONEY FOR GAMBLING DEBTS, AND BY ADMITTING EVIDENCE THAT APPELLANT HAD ONCE BOUNCED A CHECK FOR PAYMENT OF DEBT."

{¶17} In his second assignment of error, Appellant argues that the trial court erred by admitting testimony regarding his gambling habit and by admitting evidence that he bounced a check when attempting to pay a debt. Appellant argues that the trial court abused its discretion by admitting this evidence even though its probative value was substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A). We disagree.

{¶18} The admission of evidence is within the sound discretion of the trial court. *State v. Ditzler* (Mar. 28, 2001), 9th Dist. No. 00CA007604, at 4. Therefore, unless the trial court has abused its discretion and the Appellant has been materially prejudiced thereby, this Court will not interfere. Id. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶19} Appellant first argues that evidence should not have been introduced regarding his gambling habits. As the State's case was premised on Appellant's financial motive to destroy his house, this evidence was probative of the cause of Appellant's financial problems. Additionally, the record is replete with instances in which witnesses testified regarding Appellant's gambling problem without

objection. In the absence of plain error affecting a substantial right, this Court need not consider this proposition of law because Appellant has waived this argument on appeal by failing to object to at trial. See *State v. Knight*, 9th Dist. No. 03CA008239, 2004-Ohio-1227, at ¶10. Appellant does not argue that the trial court committed plain error, so this Court will not determine whether the prosecution's introduction of this evidence constituted plain error. Id. Further, any prejudice caused by the introduction of testimony regarding Appellant's gambling habit that raised objections was drastically reduced by the sheer number of references to his gambling habit that were admitted without objection.

{¶20} Additionally, Appellant argues that evidence should not have been introduced that he bounced a check when attempting to repay a debt. While Appellant did object to the introduction of this testimony, he cannot establish that he was materially prejudiced by its introduction. As noted supra, the State's case focused on Appellant's financial motive to destroy his home. As such, a great deal of evidence was introduced regarding Appellant's debts and financial problems. Therefore, we cannot say that material prejudice resulted from the introduction of this evidence.

{¶21} Accordingly, we cannot say that the trial court acted in arbitrary, unreasonable, or unconscionable manner when admitting the above evidence. Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM APPELLANT'S NEIGHBOR CONCERNING A STATEMENT MADE BY THE WESTFIELD INSURANCE CLAIM ADJUSTER THAT HE HOPED APPELLANT'S HOMEOWNER'S INSURANCE POLICY HAD BEEN CANCELLED, WHERE THAT STATEMENT WAS NONHEARSAY OR ADMISSIBLE UNDER A HEARSAY EXCEPTION."

{¶22} In his third assignment or error, Appellant asserts that the trial court erred when it excluded a portion of the proposed testimony of Appellant's neighbor. This Court disagrees.

{¶23} Appellant sought to have his neighbor, Kenneth Beckman, testify that the claims adjuster for Westfield Insurance Company, Mike Carson, informed him that he hoped that Appellant's insurance policy had been cancelled. When Appellant attempted to elicit this information, an objection by the State was sustained on the grounds that the statement was hearsay.

{¶24} We reiterate that the admission of evidence is within the sound discretion of the trial court. *Ditzler*, supra, at 4. Therefore, unless the trial court has abused its discretion and the Appellant has been materially prejudiced thereby, this Court will not interfere. Id. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore*, 5 Ohio St.3d at 219.

{¶25} Appellant argues that the statement by Mike Carson should have been admitted to show the bias of the State's witnesses that worked for Westfield Insurance. Even if this Court were to find that the statement was admissible under a hearsay exception, Appellant has not demonstrated that he was materially prejudiced by its exclusion. Appellant's trial counsel was able to demonstrate the bias of every State's witness that worked for Westfield. His trial counsel questioned each witness at length about their desire to deny Appellant's claim. Further, the jury was informed that Appellant had filed suit against Westfield in an attempt to recover under his policy. The first page of that complaint was sent to the jury room as evidence that a suit had been filed. As such, we cannot say that the exclusion of this statement materially prejudiced Appellant.

{¶26} Accordingly, Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT."

{¶27} In his final assignment of error, Appellant argues that he was denied a fair trial due to the misconduct of the prosecutor. We disagree.

{¶28} The Supreme Court of Ohio has limited the instances when a judgment may be reversed on grounds of prosecutorial misconduct. See *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The analysis of cases alleging prosecutorial misconduct focuses on the fairness of the trial and not the culpability of the prosecutor. Id. A reviewing court is to consider the trial record as a whole, and is

to ignore harmless errors "including most constitutional violations." Id., quoting *United States v. Hasting* (1983), 461 U.S. 499, 508-509. Accordingly, a judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial. *State v. Carter* (1995), 72 Ohio St.3d 545, 557.

{¶29} "In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court must determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the defendant." *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47, discretionary appeal not allowed by *State v. Overholt*, 100 Ohio St.3d 1472, 2003-Ohio-5772, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Hill* (1996), 75 Ohio St.3d 195, 204, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647. Furthermore, the appellant must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78.

{¶30} Appellant points to three specific instances of misconduct in the State's case that he believes deprived him of a fair trial. Appellant claims that the State improperly questioned an expert witness about the cause of the fire, improperly argued the time that was required to fill the house with gas, and

improperly made personal assertions that Westfield Insurance "did not push for this prosecution."

{¶31} With regard to Appellant's first assertion, the State questioned fire investigator James Churchwell about the cause of the fire. Churchwell testified that natural gas was ignited by an appliance on the first floor of the home. The State then asked whether a phone call could have ignited the gas. Churchwell testified that such was possible, and that he had worked on a prior case in which a phone call had ignited an explosion. Appellant claims that this line of questioning was improper because Churchwell could only speculate as to the cause of the fire. However, Churchwell gave his expert opinion as to the cause of the fire based upon his education and experience, and Appellant never objected to the introduction of Churchwell's testimony. As such, we find that this line of questioning by the prosecutor was not improper.

{¶32} In his final assertion, Appellant claims that the State improperly argued in its closing argument. Appellant asserts that the State argued that the time of 44 hours for gas to fill the house was consistent with Appellant opening the gas valve and then leaving for his trip to Windsor. The record reflects that the State was merely reiterating the testimony given at trial. Both the State and Appellant used expert witnesses to determine how long the gas valves had been left open. Both concluded that the valves had to have been opened for some time between 44 and 62 hours. Further, each testified that these numbers were

estimates because there were several unknown variables. As such, we cannot say that the State committed misconduct by using one of the figures calculated by both experts.

{¶33} Further, during closing argument the State asserted that "there is no way whatsoever that this prosecution, this criminal prosecution, was pushed upon us by Westfield." Appellant claims that this constituted an improper personal assertion. However, the State's comment reiterated testimony given at trial by police detective Warren Walter. Walter testified that while Westfield Insurance did much of the investigative work, he was not influenced by Westfield in making a determination of whether to bring the case to the prosecutor's office. As such, we cannot say that the State made an improper personal assertion during closing argument.

{¶34} Additionally, the trial court instructed the jury that closing arguments were not to be considered as evidence. As such, Appellant has not demonstrated misconduct by the prosecutor, nor has he demonstrated that a reasonable probability exists that the outcome of his trial would have been different but for the misconduct. Accordingly, Appellant's final assignment of error is overruled.

III.

{¶35} Appellant's four assignments of error are overruled and the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

EDNA J. BOYLE
FOR THE COURT

CARR, P.J.
SLABY, J.
CONCUR

APPEARANCES:

DAVID V. GEDROCK, Attorney at Law, 209 S. Broadway, Medina, OH 44256, for Appellant.

DEAN HOLMAN, Prosecutor, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, 75 Public Square, Medina, OH 44256, for Appellee.