[Cite as *State v. Loterbaugh*, 2020-Ohio-1104.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JEFFREY L. LOTERBAUGH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CA 0931

Criminal Appeal from the
Court of Common Pleas of Carroll County, Ohio
Case No. 18 CR 6312

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Steven D. Barnett, Prosecuting Attorney, *Atty. Michael J. Roth*, Chief Assistant. Prosecuting Attorney, 7 East Main Street, Carrollton, Ohio 44615 for Plaintiff-Appellee and

Atty. Herbert J. Morello, Morello Law Offices Ltd., 700 Courtyard Centre, 116 Cleveland Avenue, NW, Canton, Ohio 44702 for Defendant-Appellant.

Dated: March 2, 2020

Robb, J.

{¶1} Defendant-Appellant Jeffrey L. Loterbaugh appeals the judgment entered in the Carroll County Common Pleas Court after a jury found him guilty of arson. He contests the sufficiency of the evidence and claims the jury verdict was against the manifest weight of the evidence. He raises ineffective assistance of counsel for failing to show him photographs before trial and for failing to subpoena one of the two law enforcement officers who responded to the fire. Lastly, Appellant argues the trial court should have granted his mistrial motion as his mother testified that he was in jail before the offense. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On November 9, 2018, Appellant was indicted on two counts of aggravated arson. The case was tried to a jury. Testimony established that the sheriff's department and the local fire department responded to an emergency call about a mobile home fire in Malvern, Ohio, which was received at 11:52 p.m. on October 15, 2018. The fire chief testified that he arrived within ten minutes and saw Appellant walking around the yard of the mobile home and smoke coming from the front door. (Tr. 104, 107, 110). He briefly attempted to obtain information from Appellant in order to formulate a plan for approaching the fire; however, Appellant did not provide coherent responses and asked to enter the fire chief's vehicle. (Tr. 108-109, 123). The fire chief circled the mobile home to assess the situation, and the volunteer firefighters soon arrived with the fire trucks. (Tr. 106, 108, 110).

{¶3} The firefighters opened the front door and encountered heavy smoke and a fire near the door, which they extinguished. (Tr. 111-112). Thereafter, the fire chief observed three separate rooms with evidence of different fires. He testified: (1) in the living room, the furniture and carpet was burned and the walls showed charring; (2) in the east bedroom, a mattress was burned; and (3) in the west bedroom, a mattress was burned and the walls showed heat damage. (Tr. 113-118). The soot blackening the interior sides of these bedroom doors indicated they were closed during the fires. (Tr.

113-114). The fire chief noticed the smoke detectors had been taken off the walls. (Tr. 113).

{¶4} A deputy sheriff arrived at the scene and saw Appellant in the front yard and smoke coming from the closed front door. (Tr. 134). The deputy testified that Appellant smelled like burnt material, looked ashy, and had charred hairs on his head and arms. (Tr. 134-135, 149). Initially, Appellant denied suffering any injury and said he fell asleep with a cigarette. (Tr. 152). The deputy said Appellant was talking extremely fast, rhyming, talking about the walls, "not making any sense," and rubbing his hands. (Tr. 134). Confirming the deputy's belief that Appellant was impaired, Appellant said he was high on methamphetamine and drank vodka. (Tr. 134-136).

{¶5} Appellant's mother, who owned the mobile home but did not live there, arrived at the scene and appeared to be upset with Appellant. The deputy overheard Appellant tell his mother "he had been (inaudible) for insurance purposes," which prompted the deputy to place Appellant under arrest as he understood the statement to mean "that he intentionally set the fire * * *." (Tr. 134, 140-141). Appellant requested treatment for smoke inhalation; the deputy heard him coughing and saw evidence of smoke inhalation around his nostrils. (Tr. 137, 142, 149-150). He was transported to the hospital by ambulance.

{¶6} The deputy noticed Appellant's brother arrived at the scene after their mother's arrival, but the deputy did not speak to the brother, who was approached by the other responding deputy. (Tr. 150). Appellant's mother testified that when she arrived, she gave Appellant a cigarette but engaged in no conversation with him. (Tr. 189). She estimated her other son arrived twenty minutes later. (Tr. 190). She said that she performed the repairs to the mobile home, mentioning smoke damage to the walls and burnt carpeting. (Tr. 191-192).

{¶7} Appellant's brother testified that he lived at the trailer and was present when Appellant started lighting fires that night. He and Appellant arrived at the trailer after drinking alcohol at a friend's house. (Tr. 157). Because Appellant was acting belligerent, he told Appellant to go to sleep. When the brother entered the east bedroom, he noticed paper on fire on his bed which he was able to extinguish by patting it out. (Tr. 158, 161). He instructed Appellant "to go lay down before I laid him down." (Tr. 158). After returning

to the east bedroom, the brother heard a smoke detector and found Appellant burning paper in an ashtray; the fire burned itself out. (Tr. 158, 163-164). He told Appellant to take the smoke detector down. Soon, the brother heard another smoke detector. As he was removing it from the wall, he felt heat emanating from the closed door of the smaller of the two west bedrooms. (Tr. 158, 164-165, 177). He opened the bedroom door and saw the bed on fire to such an extent that he could not extinguish it. (Tr. 158, 165).

{¶8} The brother noticed Appellant on the couch with the spare phone and yelled, "What the fuck are you doing? * * * you could burn the house down." (Tr. 178). The brother panicked, grabbed the phone from Appellant, and fled the mobile home. (Tr. 165, 178). He intended to call 911 but ended up calling a friend who picked him up on the road. (Tr. 158, 166, 179). The friend returned to the mobile home with him where they saw smoke coming from the front door and the friend called 911. (Tr. 158-159, 166). The brother testified that he broke a window, yelled, and heard Appellant talking (possibly to himself). (Tr. 159, 169, 181). He said the fire and police departments arrived but he left with his friend; he returned when he received a call summoning him back. (Tr. 159, 170, 183).

{¶9} The investigator from the state fire marshal's office evaluated the scene the next day and took photographs. As to the exterior, he testified there was soot visible on the trailer above the front door and window and a light smoke haze around the back door. (Tr. 204-206). He confirmed the existence of three separate originating fires: (1) in the living room, a V-shaped pattern emanated to the walls from the love seat which was burned to the frame (and another couch was burned by radiant heat); (2) in the east bedroom, the mattress was burned on the top and side; and (3) in the west bedroom, a more extensive fire burned the bed and charred the walls and ceiling. (Tr. 207-209, 215-216, 219, 224). The K-9 he used found no indication of an accelerant. (Tr. 231). The fire investigator concluded the fire was incendiary, meaning it was set by hand with an open flame device applied to combustible material. (Tr. 218, 230).

{¶10} After the court denied the acquittal and mistrial motions presented by the defense, the jury found Appellant guilty as charged and the court sentenced him. Appellant filed a timely notice of appeal from the February 7, 2019 judgment of conviction. Appellant sets forth four assignments of error.

SUFFICIENCY OF THE EVIDENCE

{¶11} Appellant addresses weight of the evidence first, but we begin with the second assignment of error addressing sufficiency of the evidence as follows:

"The Convictions of Aggravated Arson Were Not Supported by Sufficient Evidence."

{¶12} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). In other words, sufficiency involves the state's burden of production rather than its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). If the court finds insufficient evidence to support a conviction, then a retrial is barred. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20 (even erroneously admitted evidence can be considered to determine whether the evidence was sufficient to sustain the guilty verdict because the remedy for the erroneous admission of prejudicial evidence is a new trial).

{¶13} We note Appellant mentions his motion for acquittal in another assignment of error. "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). The test used by an appellate court to review sufficiency of the evidence is the same as used to review a motion for acquittal. *See id. See also State v. Prieto*, 2016-Ohio-8480, 82 N.E.3d 450, ¶ 26 (7th Dist.). Sufficiency is the legal standard used to determine whether the case may go to the jury and to determine whether the evidence was legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997).

{¶14} A conviction cannot be reversed on the grounds of insufficient evidence unless the reviewing court views the evidence in favor of the prosecution and still determines that no rational juror could have found the elements of the offense proven

beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Any rational inference to be drawn from the evidence is also evaluated in the light most favorable to the state. *See State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999).

{¶15} The elements of the first-degree felony aggravated arson conviction are: by means of fire or explosion knowingly create a substantial risk of serious physical harm to any person other than the offender. R.C. 2909.02(A)(1). As for identity, only Appellant and his brother were present at the mobile home. Appellant's brother testified that Appellant started two small fires (which were extinguished) and one large mattress fire which he could not extinguish before fleeing from the mobile home. While the brother panicked and fled, Appellant did not. The circumstances show another fire was set on the living room couch and the first fire, on the mattress in the east bedroom, was reignited.

{¶16} The fire investigator concluded the fires were incendiary, meaning they were set by hand with an open flame device applied to combustible material. Appellant told the deputy the fire started when he fell asleep with a cigarette; however, at least three fires were separately set on pieces of furniture in three different rooms. (Tr. 152, 216-217). The deputy overheard Appellant incriminate himself to his mother, suggesting he started the fire for insurance purposes. (Tr. 134, 140-141). The credibility of the testimony presented by the deputy or the brother and the weight to be assigned to the testimony are subjects for the assignment of error addressing the manifest weight of the evidence. For purposes of sufficiency, the testimony is viewed in the light most favorable to the state. In doing so, a rational trier of fact can find Appellant was the person who started the fires.

{¶17} Appellant next suggests that even if his brother's story and the deputy's testimony are taken as true, he did not knowingly create a substantial risk of serious physical harm to anyone except himself. Serious physical harm to a person includes: a condition of such gravity as would normally require hospitalization (including psychiatric); any physical harm carrying a substantial risk of death; any physical harm involving some permanent incapacity (partial or total) or temporary, substantial incapacity; any physical harm involving some permanent disfigurement or temporary, serious disfigurement; and any physical harm that involves acute pain of such duration as to result in substantial

suffering or that involves any degree of prolonged or intractable pain. R.C. 2901.01(A)(5)(a)-(e).

{¶18} A "substantial risk" is a strong possibility that a certain result may occur or that certain circumstances may exist, as contrasted with "risk" which is defined as a significant possibility. R.C. 2901.01(A)(7)-(8). The state was not required to show Appellant purposely created a substantial risk or that it was his specific intention to create that risk; rather, it was sufficient to show he knowingly created the substantial risk of serious physical harm. *See* R.C. 2909.02(A)(1) (defining the offense); R.C. 2901.22 (defining the mental states). A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. R.C. 2901.22(B) (a person has knowledge of circumstances when he is aware such circumstances probably exist). Because a defendant's intent dwells in his mind, the surrounding facts, circumstances, and resulting inferences are all used to demonstrate intent. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). Circumstantial evidence inherently possesses the same probative value as direct evidence. *Id.*

{¶19} To recap the facts set forth in our Statement of the Case above: Appellant lit a fire on his brother's bed which his brother extinguished; his brother yelled at him, told him to go to sleep, went back to his room, and laid on his bed; Appellant started a fire in an ashtray prompting the removal of a smoke detector; Appellant lit a mattress on fire in a bedroom on the opposite end of the trailer and closed the door; his brother discovered this fire when a different smoke alarm alerted; feeling the bedroom door was hot, the brother opened it and realized the fire was too large to extinguish; the brother fled, but Appellant did not; the loveseat was then set on fire; the mattress was reignited in the brother's bedroom; the smoke in the living room deterred the brother from re-entering to find Appellant; and firefighters had to extinguish the living room fire upon entering the mobile home.

{¶20} The statutory phrase "create a substantial risk of serious physical harm to any person" specifically includes the creation of a substantial risk of serious physical harm to any emergency personnel. R.C. 2909.01(A),(B)(3) (specifically including volunteer firefighters), citing R.C. 2909.02 (aggravated arson statute); *State v. Powell*, 132 Ohio

St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 138. Regardless of the risk to the emergency responders, a rational fact-finder could find Appellant was aware his conduct would probably create a strong possibility that his brother may suffer serious physical harm from the various fires he started at different places throughout the mobile home. "A conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124, 580 N.E.2d 1 (1991).

{¶21} Appellant's brother lived in the mobile home and was clearly present at the time. They had just returned from a party where drinking occurred. It was near midnight, and Appellant's brother was lying in bed (after telling Appellant to go to sleep). One of the smoke detectors had already been removed due to the noise after Appellant's ashtray fire. Fortunately, a second smoke detector alerted the brother of a fire in a bedroom. The photographs showed the extent of the damage and indicated the danger of serious physical harm posed by the fires. There was a strong possibility Appellant's brother could have suffered burns and smoke inhalation constituting serious physical harm while trying to extinguish the fires, save personal items, save his brother, or just flee from the mobile home. The test revolves around the substantial risk, not the actual result. *State v. Gervin*, 2016-Ohio-8399, 79 N.E.3d 59, ¶ 151 (3d Dist.). Upon viewing the evidence in the light most favorable to state, a rational trier of fact could conclude that Appellant was aware the starting of multiple fires in multiple locations carried substantial risk that his brother may suffer serious physical harm.

{¶22} As to the second count, the elements of second-degree felony aggravated arson are: by means of fire or explosion knowingly cause physical harm to any occupied structure. R.C. 2909.02(A)(2). The evidence as to who set the fires was discussed supra, and the weight of this evidence is discussed infra. It is not disputed that the mobile home was an occupied structure where Appellant's brother lived and was present. (Tr. 156, 186). *See* R.C. 2909.01(C). Appellant suggests that no rational trier of fact could have found he knowingly caused physical harm to the mobile home. Appellant's intent can be gleaned from his statement to his mother, his brother's testimony, and from other circumstantial evidence with emphasis on Appellant's actions of setting multiple fires throughout the mobile home. Since a defendant's intent dwells in his mind, the surrounding facts, circumstances, and resulting inferences can all be combined to

ascertain intent. *Treesh*, 90 Ohio St.3d at 485. A rational person could find he was "aware" that setting the fires would "probably cause" physical harm to the mobile home. *See* R.C. 2901.22(B) (defining knowingly).

{¶23} For this type of aggravated arson, the physical harm (to the occupied structure) must be actual (rather than merely a risk or substantial risk of physical harm). R.C. 2909.02(A)(2). Nevertheless, the actual physical harm inflicted need not rise to the level of serious physical harm. *See id.* This type of aggravated arson addresses physical harm to property in the specific category of occupied structures. *See id. See also State v. Sheldon*, 3rd Dist. Hardin No. 6-18-07, 2019-Ohio-4123, ¶ 29. The general phrase "physical harm to property" is statutorily defined as "any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment." R.C. 2901.22(A)(4). *Compare* R.C. 2901.01(A)(6) (defining serious physical harm[1]).

{¶24} Appellant's mother, who owned the mobile home, provided limited testimony and did not estimate the loss to value or repair cost. The day after the fire, she opened the door and looked into the living room, but she did not enter. At that time, she observed smoke damage to the walls and burnt carpet (in addition to burnt furniture). (Tr. 191-192). She did not obtain a repair estimate and said she performed the repairs herself sometime later ("a couple of weeks ago. I'm not sure."). (Tr. 193). The noticeable damage was described by the fire chief and the fire investigator. A layer of soot was seen throughout the mobile home. (Tr. 209, 215-216). The fire investigator explained that soot indicated smoke damage while charring indicated burned areas.

{¶25} Although the east bedroom suffered burning only on the bed, the walls of the west bedroom and the living room suffered extensive charring. (Tr. 115, 207, 215-216). It was explained how the living room walls showed a V-shaped burn pattern pointing to the origin of the fire in that room. Furthermore, the photographs depicted the state of the mobile home after the fires and the damage caused by the fires. Clearly, the fire caused damage to the occupied structure that resulted in loss to its value before the

[1] Serious physical harm to property (a) results in substantial loss to the value of the property or substantial amount of time, effort, or money to repair or (b) temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time. R.C. 2901.01(A)(6).

repairs (regardless of the degree of loss). R.C. 2901.01(A)(4) (defining physical harm). Alternatively, there was damage to the occupied structure that interfered with its use or enjoyment (regardless of the degree of interference). *Id.*

{¶26} Viewing all of the evidence and rational inferences in the light most favorable to the prosecution, a rational juror could find all the essential elements proven beyond a reasonable doubt. This assignment of error is therefore without merit.

MANIFEST WEIGHT OF THE EVIDENCE

{¶27} We now address Appellant's first assignment of error, which contends:

"The Convictions of Aggravated Arson Were Against the Manifest Weight of the Evidence."

{¶28} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *Thompkins*, 78 Ohio St.3d at 387 (it involves the effect of the evidence in inducing belief but is not a question of mathematics). A weight of the evidence review considers whether the state met its burden of persuasion. *See id.* at 390 (Cook, J., concurring) (as opposed to the burden of production involved in a sufficiency review). When a defendant claims the conviction is contrary to the manifest weight of the evidence, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶29} The discretionary power of the appellate court to grant a new trial on manifest weight grounds is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.* Additionally, where a case was tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 389, citing Ohio Constitution, Article IV, Section 3(B)(3). The power of the court of appeals to sit as the "thirteenth juror" is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses and the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 389. When more than one competing interpretation of the evidence is

available and the one chosen by the jury is not unbelievable, we generally do not choose which theory we believe is more credible and impose our view over that of the jury. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶30} We incorporate our Statement of the Case above, where we reviewed the testimony, into our factual review here. In contesting the weight of the evidence, Appellant contends the fire chief's testimony contradicted the deputy's testimony on the order of arrival at the scene, Appellant's appearance, and the amount of smoke coming from the mobile home. On the latter topic, the deputy and the fire chief both testified that smoke was coming from around the closed front door when they arrived. (Tr. 104, 134). Appellant notes the fire chief described it as "light smoke" while the deputy said "smoke was coming from the home. Um…main door. Um…it was charred with smoke coming up the walls." (Tr. 104, 107, 134). Although the state fire investigator said there were no burns on the exterior of the mobile home, he did point out how soot was visible at the top of the front door in the photographs he took the next morning. (Tr. 204-205). The deputy's use of the word "charred" instead of blackened is not dispositive.

{¶31} As to arrival times, the fire chief estimated that he arrived ten minutes after the 11:52 p.m. emergency call. Contrary to Appellant's contention, the fire chief did not testify he was alone at the scene with Appellant for any length of time (or conflict with the deputy's testimony). His statement about being the first to arrive must be read in context; the fire chief was asked if there were any other fire vehicles at the scene when he arrived, and he responded that he arrived first (among the firefighters). (Tr. 106). The fire chief was focused on formulating a plan of attack for the fire. He briefly attempted to gain pertinent information from Appellant but could not get a coherent answer. (Tr. 108-109). When Appellant asked to enter the fire chief's vehicle, the deputy was asked to intervene while the fire chief approached the house. (Tr. 109-110). The fire chief believed the fire engines arrived five minutes after him and said the deputy arrived before the fire engines. (Tr. 106, 109). Moreover, the fire chief said he only spoke with Appellant for 30 seconds when he first arrived. (Tr. 123). The deputy estimated his arrival at five to ten minutes after the dispatch, which was received as he was loading his car to begin his midnight shift. (Tr. 132-134). He believed he pulled up to the scene at "about the same time" as

the fire chief. (Tr. 134, 151-152). This timeline is not incredible as suggested by Appellant.

{¶32} As to Appellant's demeanor, the deputy believed Appellant was impaired due to his extremely fast speech, speech pattern (rhyming), lack of coherent speech, body language (such as hand rubbing), and other movements. This was confirmed by Appellant's statement that he was high on methamphetamine and had been drinking vodka and by his brother's statement that Appellant had been drinking that evening. This was also consistent with the fire chief's testimony that Appellant was incoherent when he attempted to obtain tactical information from him.

{¶33} Concerning Appellant's appearance, the fire chief testified that he did not remember Appellant being covered in soot, noting it was dark and he spoke to Appellant for only 30 seconds when he first arrived (and then for a minute after the fire). (Tr. 122-123, 128). The deputy, who was with Appellant while the fire chief was supervising the firefighters, provided more detail on Appellant's appearance including charred hair on his head and arms and black soot under his nostrils. The fact that the fire chief did not notice these details does not mean the deputy's testimony was incredible. The smoke inhalation was confirmed by Appellant's coughing and his own statement to the deputy that he needed hospital treatment for smoke inhalation.

{¶34} Next, Appellant argues his brother was not a credible witness because he: had two prior felony convictions; was under indictment at the time of trial; was likely impaired as he spent the evening with Appellant (who was drunk and high on methamphetamine); presented a confusing timeline; claimed he was unable to call 911 but was able to call a friend; admitted he was mad at Appellant that night; and left Appellant in a burning trailer. However, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The jury occupied the best position from which to weigh the evidence and judge each witness's credibility by observing gestures, voice inflection, and demeanor. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors were free to believe some, all, or none of the testimony of each witness, separating the credible from the less

credible parts. *See State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42.

{¶35} Appellant assumes his brother lied about breaking a window in an attempt to save him because the fire chief did not notice a broken window when he responded to the scene in the dark and the fire investigator testified that he did not notice a broken window the next morning. (Tr. 108, 110, 213). Nevertheless, the photographs taken by the fire investigator and provided to the jury contain evidence regarding the condition of the windows. For instance, a screen can be seen on the grass leaning at an angle against the mobile home under the kitchen window near the back door. (St.Ex. 3, 4). An interior photograph depicted the bottom window pane in the kitchen: the curtain was askew; what appeared to be glass shards sat on the inner windowsill; and there was a clear view outside. (St.Ex. 13). As to the latter observation, there was no layer of soot blocking the view, whereas the top pane of the kitchen window was coated by a film of soot as seen in a different photograph. (St.Ex. 9). Additionally, a photograph from inside the charred west bedroom depicts shards of glass protruding from the frame where this bedroom's top window pane would have been and there was a clear view outside (as compared to the soot obstructing the view from the bottom window pane). (St. Ex. 19).

{¶36} Finally, Appellant suggests the deputy was inexperienced and misinterpreted Appellant's statement to his mother on insurance purposes, which the deputy overheard and construed as an admission. Whether the deputy's recollection and interpretation of Appellant's various statements was accurate was a matter for the jurors. The jury could find the deputy misheard Appellant's statement or failed to describe it in enough detail to consider it an admission and could still find Appellant knowingly set the fires which caused physical harm to the occupied structure and put his brother at substantial risk of serious physical harm. Appellant generally complains about relying on circumstantial evidence, but circumstantial evidence inherently possesses the same probative value as direct evidence. *See Treesh*, 90 Ohio St.3d at 485.

{¶37} In reviewing the entire record, weighing the evidence and all rational inferences, and considering credibility, there is no indication the jury clearly lost its way in resolving conflicts in the evidence or created such a manifest miscarriage of justice that a new trial is required. *See Lang*, 129 Ohio St.3d 512 at ¶ 220, citing *Thompkins*, 78 Ohio

St.3d at 387. The testimony supporting the essential elements was not unbelievable, and we are not presented with an exceptional case where the evidence weighs heavily against the conviction. *See id. Gore*, 131 Ohio App.3d at 201. In accordance, this assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶38} Appellant's third assignment of error alleges:

"Appellant was Denied Effective Assistance of Counsel Contrary to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶39} To show ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (if the performance was not deficient, then there is no need to review for prejudice and vice versa). In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct fell within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-142, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶40} On the prejudice prong, the identified deficiency by counsel must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id.* Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Id.*, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693.

{¶41} First, Appellant claims his attorney failed to show him photographs before trial that had been provided by the state in discovery and were used by the state as evidence at trial. In anticipating the state's argument that a defendant cannot raise on

direct appeal a claim of ineffective assistance of counsel that occurred outside of the record (such as a failure to show the defendant the state's discovery disclosures), Appellant says his interruption at trial placed the matter on the record.

{¶42} That is, while the state fire investigator was testifying on direct examination, a voice interjected, "Can I ask a question? * * * Was there evidence of a window being broken out? * * * I couldn't see the pictures from here." (Tr. 210-211). We note: the transcriptionist labeled the speaker as Appellant; the common pleas court proceedings were transcribed from an electronic recording; the question prompted a discussion about whether the jury should be shown the photographs before or after the witness; the prosecutor said he would show the photographs to the witness and then to the jury; the court then explained, "Now you know you'll have these with you in the jury room"; and a voice identified by the transcriptionist as a juror responded, "Oh, I didn't know that. Okay." (Tr. 211-212, 248).

{¶43} During this discussion, the court asked defense counsel if he viewed the photographs. Counsel answered in the affirmative and added, "I have them on disk, Your Honor, which [is] in color. You know, I haven't shown them to him. You know, if I could take those for five seconds and just show 'em to him." (Tr. 211-212). The state believes the issue of whether Appellant saw the photographs before trial is still outside the record because Appellant had two attorneys. (Also, the reference to "in color" may suggest Appellant saw them, just not in color.) Assuming the record sufficiently indicates he was not shown the photographs until mid-trial, Appellant says his pre-trial viewing of the photographs was important because if he knew there were no windows broken out, he could have anticipated the fire investigator would have testified to this and he could have prompted his counsel to cross-examine his brother on the claim that he broke windows in an attempt to save Appellant.

{¶44} We refer to our discussion in the prior assignment of error about the photographs, which contain evidence of broken windows. As the photographs do not detract from the brother's credibility on that topic, the claimed example of prejudice is without merit. Appellant has not identified a reasonable probability that his pretrial review of the photographs would have been outcome determinative. Furthermore: the photographs were disclosed by the state in discovery long before trial; the prosecutor filed

notice of this response to discovery which specifically listed the fire investigator's photographs as part of the disclosed evidence; counsel reviewed the photographs before trial; and it was counsel's function to review the discovery evidence, formulate the defense, and construct the questions to ask. A closer look at the photographs would have only bolstered the brother's credibility. The failure to focus the jury's attention on the details of the photographs may thus have been a tactical decision by counsel, and we will not second-guess such strategy. *See Carter*, 72 Ohio St.3d at 558. This argument is without merit.

{¶45} Next, Appellant points to the absence from trial of the deputy who spoke to his brother on the night of the fire. He contends that defense counsel should have subpoenaed the deputy or asked for a continuance once they learned the state was not calling the deputy (and the deputy was out of town). Appellant says the deputy wrote an incident report and had "potential" exculpatory evidence.

{¶46} Appellant does not explain what evidence this deputy could have provided, and in any event, the record does not indicate his testimony would have been outcome determinative or even desirable. The incident report authored by the absent deputy is not part of the record on appeal. The record shows only that he spoke to Appellant's brother after the fire. "[T]he potential content of this officer's testimony is a matter outside of the record. If establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal." *State v. Miller*, 7th Dist. Mahoning No. 17 MA 0120, 2018-Ohio-5127, ¶ 34, citing *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001). The failure to subpoena a witness is not deficient performance if it is not established how the testimony would have aided the defense. *State v. Gettings*, 7th Dist. Mahoning No. 16 MA 0050, 2017-Ohio-7764, ¶ 21.

{¶47} Due to hearsay rules, the absent deputy's testimony may have been of limited use, whereas the hearsay rules did not similarly limit the testimony of the deputy who questioned the defendant himself. *See, e.g.,* Evid.R. 801(C) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted), (D)(2)(a) (admission by a party-opponent is not hearsay when offered against that party); Evid.R. 802 (general inadmissibility of hearsay). The evidence on the record in the direct appeal does not demonstrate that the failure to subpoena the deputy constituted deficient

performance or that it was outcome determinative. *See generally State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001) ("Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court. [And, the appellant] fails to explain how counsel's failure to call these two witnesses prejudiced him"); *State v. Ash*, 2018-Ohio-1139, 108 N.E.3d 1115, ¶ 30 (7th Dist.). This assignment is overruled.

MISTRIAL MOTION

{¶48} In the fourth assignment of error, Appellant argues:

"The Trial Court Erred in Denying Appellant's Crim.R. 29 Motion and Appellant's Convictions Must Be Reversed as a Matter of Law."

{¶49} The text of this assignment of error refers to Crim.R. 29, which speaks of an acquittal motion. We addressed the Crim.R. 29 motion for acquittal under the sufficiency assignment of error. The arguments set forth under the fourth assignment of error pertain to the *mistrial* motion (made at the same time as the acquittal motion).

{¶50} Appellant emphasizes his mother's testimony that Appellant had recently been released from jail at the time of the fire. During her testimony, the state asked who lived in the mobile home she owned at the time of the fire, and the mother only mentioned Appellant's brother. The prosecutor asked if anyone else was living there with him. When the mother answered in the negative, the prosecutor asked: "was your son, Jeffrey, had, did he have the occasion to visit there or stay there?" She responded, "Well, he lived there but was in jail and then he just got out." The court sustained the objection from the defense and struck the answer. (Tr. 186).

{¶51} Later, the defense moved for a mistrial, underscoring how the court had ordered the prosecutor to refrain from eliciting testimony on Appellant's incarceration. The day before trial, the defense filed a motion in limine asking to prohibit testimony on Appellant's past criminal record and his recent release from jail. (2/5/19 Motion). The prosecutor said he went to the victim-witness office to instruct the witnesses on the court's ruling, told the brother to avoid the subject, did not tell the mother as she was outside smoking, and could not wait for her as it was time to return to the courtroom. (Tr. 241).

{¶52} The trial court disapproved of this excuse for failing to instruct the mother but denied the mistrial motion, opining the defense was not prejudiced by the mother

mentioning Appellant had been in jail. The court offered to further instruct the jury on the matter, stating defense counsel could draft the instruction while noting this could bring further attention to the matter. (Tr. 244). Defense counsel said he was satisfied with the court's handling of the issue by striking the answer from the record. (Tr. 244-245).

{¶53} Appellant states that his mother's mention of his prior incarceration in jail was an improper disclosure of other acts of evidence precluded by Evid.R. 404(B) and violated the trial court's pretrial ruling on this precise subject. Pursuant to Evid.R. 404(B), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Appellant argues his mother's revelation was not cured by striking the answer as the bell "cannot be unrung." He asks this court to evaluate the existence of prejudice from the disclosure in conjunction with the absence of the second deputy from the trial, which defense counsel also mentioned when moving for a mistrial. We discussed the failure to subpoena this witness in the prior assignment of error, where it was pointed out that the deficiency of counsel and prejudice due to the lack of the deputy's testimony cannot be presumed.

{¶54} The decision on a mistrial motion is in the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). The mere existence of error or irregularity does not warrant a mistrial. *Id.* (a mistrial was not necessitated by testimony on the defendant's request for an attorney after the court specifically warned the prosecutor to avoid the subject). "The granting of a mistrial is necessary only when a fair trial is no longer possible." *Id.*, citing *State v. Franklin,* 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991) ("Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible"). The context of the prosecutor's question is considered as is the curative instruction. *Treesh*, 90 Ohio St.3d at 480.

{¶55} Here, the court struck the answer from the jury's consideration and had already instructed the jury: if the court sustains an objection, then the jury must not speculate on the answer; if the witness answers before the court sustains the objection, then the jury will be instructed to strike the answer and consider the question as not answered at all; and the jury must disregard any stricken answer and not speculate as to the reason for the ruling. (Tr. 89-90). Moreover, the court's final instructions reiterated

the admonition that the statements the court struck or instructed the jury to disregard "are not evidence and must be treated as though you never heard them." (Vol. 2, Tr. 4).

{¶56} "We presume that the jury followed the court's instructions, including instructions to disregard testimony." *Treesh*, 90 Ohio St.3d at 480. Notably, the trial court also offered to provide a more specific curative instruction, which the defense could have drafted, but the defense declined this offer so as not to highlight the mother's remark that Appellant had been in jail. *See State v. Wagers*, 12th Dist. Preble No. CA2009-06-018, 2010-Ohio-2311, ¶ 66-67 (where the defense rejected a curative instruction after a witness testified the defendant was previously in jail in violation of a motion in limine ruling).

{¶57} Furthermore, although the prosecutor should have ensured each witness was informed of the court's pretrial ruling, it was not reasonably foreseeable the prosecutor's question would elicit this answer from Appellant's mother. This was a brief and isolated incident, lacking in inflammatory characteristics. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 175 ("reference to [defendant's] prior conviction was a brief and isolated remark that was followed by a curative instruction. The mere mention of [the] conviction, without more, did not unfairly prejudice [defendant] so as to require a mistrial"); *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995) ("reference to the defendant's prior arrests was fleeting and was promptly followed by a curative instruction. The trial court did not abuse its discretion in failing to order a mistrial").

{¶58} We note that no specific prior bad act was disclosed. *See State v. W.J.*, 10th Dist. Franklin No. 14AP-457, 2015-Ohio-2353, ¶ 52 (reference to the defendant's prior prison incarceration was vague and did not reference any specific crime). We also note Appellant said he was high on methamphetamine (an illegal substance), making prior jail incarceration less prejudicial than it could be in other cases. In addition, a past incarceration in jail does not mean a conviction resulted and is less serious than testimony on prior prison time. *Compare id.* (finding the trial court did not abuse its discretion in denying a mistrial motion where the witness testified the defendant was previously in prison); *State v. Bigsby*, 7th Dist. Mahoning No. 12 MA 74, 2013-Ohio-5641, ¶ 57, 60 (testimony that the witness visited the defendant in prison did not violate the right to a fair trial where the court struck the answer). Under the totality of the circumstances, there is

no indication Appellant's right to a fair trial was affected by his mother's mention that he had been in jail before the fire. The trial court did not abuse its discretion. This assignment of error is overruled.

{¶59} For all of the foregoing reasons, the trial court's judgment is affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Carroll County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.