# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 23, 1999 |
| v | No. 208819<br>Wayne Circuit Court |
| FRANKLIN JONES, JR.,<br><br>Defendant-Appellant. | LC No. 97-001565 |

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

The people charged defendant with assault with intent to murder, MCL 750.83; MSA 28.278, and arson of a dwelling house, MCL 750.72; MSA 28.267. A jury convicted him of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and arson. The court sentenced defendant to concurrent terms of 11 to 20 years' imprisonment for the arson conviction and 6-1/2 to 10 years' imprisonment for the assault conviction. He appeals as of right, and we affirm.

I

Defendant contends that the prosecutor failed to prove the elements of the crimes charged. Specifically, he argues that the prosecutor failed to prove that he intentionally set the fire and that he intended to kill the victim, Amaka Onumono. He is wrong.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). We resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).[1] The elements of the crime may be established with circumstantial evidence and reasonable inferences drawn from circumstantial evidence. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

The elements of arson are (1) that defendant set fire to a building, (2) that the building was a dwelling house, and (3) that when defendant burned the dwelling, he intended to set a fire, knowing this

would cause injury or damage to another person or property, and defendant acted without just cause or excuse. CJI2d 31.2. The house need not be occupied at the time of the burning, MCL 750.72; MSA 28.267, but it must be intended to be occupied as a residence and in such a condition that it could be dwelt in. *People v Reeves*, 448 Mich 1, 9; 528 NW2d 160 (1995); *People v Losinger*, 331 Mich 490, 502; 50 NW2d 137 (1951). The building need not be destroyed by fire; even the slightest damage is sufficient. *Id.* at 502-503. Because proof of a fire alone gives rise to the presumption "that the fire was the result of accident or of some providential cause," the prosecutor must also show that the fire was intentionally or wilfully set. *People v Lee*, 231 Mich 607, 612; 204 NW 742 (1925).

There is no dispute that a dwelling home was damaged by fire. The evidence showed that defendant, Onumono, and her young daughter were the only people in the home. Defendant took the child out to the car, at which time there was no fire and Onumono was lying unconscious on her bed. He went back in, then came out and drove away. When he returned, the house was on fire. The fire investigators testified that the burn pattern left by the fire evinced the use of an accelerant, and that the fire could not have started from grease splattered on the stove as defendant had claimed. Onumono's physician testified that she had apparently been burned by some sort of flammable substance in direct contact with her skin. Defendant gave false exculpatory explanations for the fire, which were evidence of guilt. *People v Dandron*, 70 Mich App 439, 442; 245 NW2d 782 (1976). Such evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant intentionally set the fire.

The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *Hoffman, supra* at 111. The intent to kill may be proven by inference from any facts in evidence, including proof of the victim's injuries, and minimal circumstantial evidence is sufficient. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *People v McRunels*, __ Mich App __; __ NW2d __ (Docket No. 204349, issued 8/12/99), slip op at 5.

The evidence showed that defendant and Onumono had an argument in her bedroom and that defendant threatened to kill her. Their daughter then saw Onumono, who was fully clothed, passed out on the bed. Onumono had a fractured cheek bone, which was consistent with a punch to the face. Onumono was found completely naked on the kitchen floor with severe burns to her body. Her doctor testified that, given the length of time her body was on fire, she must have been unconscious at the time. There was evidence that the fire was started with the use of an accelerant, some of which was apparently poured directly on Onumono's body. As noted above, there was circumstantial evidence that defendant set the fire while he was alone in the house with Onumono. Such evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant intended to kill Onumono.

II

Defendant argues that the court erred in denying his motion to suppress a statement he made without first being advised of his *Miranda*[2] rights. We review the entire record and make an independent determination whether the defendant's statement was voluntary. *Gould, supra* at 88. The

trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v LoCicero (After Remand),* 453 Mich 496, 500; 556 NW2d 498 (1996). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans,* 227 Mich App 113, 119; 575 NW2d 84 (1997).

Defendant was in custody when he made the statement at issue. Based on the whole record, we agree with the trial court's finding that defendant's statement was made spontaneously and not in response to questioning or its functional equivalent. Therefore, the statement was admissible despite the absence of *Miranda* warnings. *People v Raper,* 222 Mich App 475, 479; 563 NW2d 709 (1997); *People v Anderson,* 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

III

Defendant next argues that the court erred in excluding evidence intended to impeach the investigating officers' testimony. We review evidentiary rulings for an abuse of discretion. *People v Howard,* 226 Mich App 528, 542; 575 NW2d 16 (1997). Defendant had a right to impeach the witnesses' testimony. *People v McIntire,* 232 Mich App 71, 102; 591 NW2d 231; rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). However, the evidence that was excluded was not calculated to test the witnesses' credibility and, therefore, was irrelevant and inadmissible. MRE 401, 402. Moreover, defendant voluntarily abandoned one line of questioning in response to the prosecutor's objection and thus waived the right to claim error on appeal. See *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health,* 207 Mich App 482, 484; 525 NW2d 466 (1994) "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.")

IV

Defendant challenges the sufficiency of the jury instructions. The court must "instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Mills, supra* at 80. The instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant has failed to brief whether the curative instruction requested was necessary and is therefore deemed to have abandoned the issue. *People v Canter,* 197 Mich App 550, 565; 496 NW2d 336 (1992). Defendant did not request a curative instruction regarding an unredacted written statement and has therefore failed to preserve the issue. *People v Sardy,* 216 Mich App 111, 113; 549 NW2d 23 (1996). Inasmuch as the matter did not pertain to a basic and controlling issue in the case, manifest injustice will not result from our failure to review the issue. *People v Torres (On Remand),* 222 Mich App 411, 423; 564 NW2d 149 (1997). The court properly instructed the jury on the specific intent necessary for conviction of each crime charged and each of the lesser included offenses.

V

Finally, defendant contends that his sentence of eleven to twenty years for arson is disproportionate. We review the trial court's sentencing decision for "an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender." *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Defendant's minimum sentence was within the sentencing guidelines' recommended minimum sentence range and is thus presumptively proportionate. *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997); *Daniel, supra* at 54. Defendant has not identified any unusual circumstances that would overcome that presumption. *Id.* We find no abuse of discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] Contrary to defendant's contention, it "is unnecessary for the prosecutor to negate every reasonable theory consistent with the defendant's innocence. It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).