

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD KEITH,

Defendant-Appellant.

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UNPUBLISHED

February 23, 2001

No. 219274

Wayne Circuit Court

Criminal Division

LC No. 98-005826

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of arson of personal property over \$50, MCL 750.74; MSA 28.269. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to seven to fifteen years' imprisonment. We affirm.

Defendant first contends that there was insufficient evidence to support his conviction. Defendant is not disputing that the victim's car was burned, that a flammable liquid accelerant was used to start the fire, and that the value of the vehicle before the fire was over \$50. Defendant does assert, however, that insufficient evidence was adduced at trial to show that he was responsible for the car fire. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

Defendant's former girlfriend testified at trial that during a confrontation with her on October 29, 1997, defendant stated that "if I went to the police, that he would have my house firebombed, my family. And he said that's why I got Juanita's car burned up; I'll do the same to you if you go tell the police." Other testimony at trial indicated that defendant had a strong dislike for the victim because of her relationship with his former girlfriend. Viewing this evidence in the appropriate light, we conclude that, while not overwhelming, sufficient evidence was produced to establish that defendant was responsible for starting the fire.

To the extent that defendant challenges the trial court's credibility determination with regard to his former girlfriend, we observe that credibility is a matter for the trier of fact. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). "[T]his Court will rarely overturn a

conviction when the only issue is the credibility of a witness.” *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996). This is particularly true where, as here, defendant’s trial counsel pointed out the discrepancies in witness testimony to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Next, defendant argues that resentencing is required because the trial court erred when it permitted his former girlfriend to speak at his sentencing hearing. Because defendant did not raise objection to the statement until after sentencing was complete, we conclude that it has not been preserved for appellate review. Accordingly, we review the alleged error under the plain error rule. “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . .” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ““seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”” *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Defendant contends that his former girlfriend was not a “victim” for purposes of the arson case because she did not own the vehicle burned. Regardless of whether the former girlfriend may be characterized as a victim for purposes of MCR 6.425(D)(2)(c) or MCL 780.765; MSA 28.1287(765), we conclude that the trial court did not abuse its discretion by allowing the former girlfriend to speak at his sentencing. The trial court has broad discretion in determining who may speak at sentencing. See *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994)(observing that “a sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant’s life and characteristics”). Under the circumstances of this case, we conclude that the trial court did not abuse its discretion when it allowed the former girlfriend to speak. Absent plain error, defendant is not entitled to relief. *Carines, supra* at 763.

Defendant also claims that his trial counsel was ineffective because he did not object to the admission of the October 31, 1997 police report, which concerned defendant’s confrontation with his former girlfriend. We disagree. “To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial.” *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We find that defendant has not overcome the presumption that his trial counsel’s failure to object to the admission of the police report was sound trial strategy. The admission of the police report was beneficial to defendant because it demonstrated that defendant’s former girlfriend did not tell police about defendant’s admission at the first opportunity. Instead, it provided evidence that she waited until two weeks later to inform arson investigators of

defendant's admission. This supported defendant's theory that his former girlfriend had ample opportunity to speak with the victim and fabricate his admission to secure revenge against defendant. Under these circumstances, the decision not to oppose the report's admission was strategically sound. The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Finally, defendant argues that the district court erred when it bound defendant over to circuit court. Again, we disagree. We review a circuit court's decision de novo to determine whether the district court abused its discretion in binding over a defendant. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). "A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed the felony." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). "Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with the defendant's guilt. Circumstantial evidence coupled with those inferences arising therefrom, is sufficient to establish probable cause to believe that the defendant committed a felony." *Id.* at 575. "Even if the evidence conflicts or reasonable doubt exists concerning the defendant's guilt, if the prosecutor shows probable cause that the defendant committed a felony, the district court is required to bind over the defendant and leave those issues for the trier of fact." *People v Baugh*, 243 Mich App 1; \_\_\_ NW2d \_\_\_ (2000).

Defendant's challenge to the bind-over decision is premised on the following statements made by the district court:

It's a close call. I don't think – I don't think the case is going to withstand the standard over in Wayne County Circuit Court. But based on the witness' testimony of the admission, that's the only reason why this Court will bind over. So if it turns out that that statement is not going to be admissible, there is not going to be a case, because that's the only evidence there is here. It's as simple as that. I haven't heard anything else.

Defendant contends that this statement indicates that the district court doubted defendant's guilt and, therefore, the district court should not have bound defendant over to circuit court.

We disagree that these comments warrant the conclusion that the district court abused its discretion when it bound defendant over for trial. As a panel of this Court recently observed,

“[i]t is the contrast of probable cause and proof beyond a reasonable doubt that inevitably makes for examinational purposes differences between the preliminary hearing and the trial. Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Proof beyond a reasonable doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. The gap between these two concepts is broad. *A magistrate may become satisfied about probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could*

*legitimately find probable cause while personally entertaining some reservations. By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause.’” [Hudson, supra at 277-278, quoting People v Justice (After Remand), 454 Mich 334, 344; 562 NW2d 652 (1997), quoting Coleman v Burnett, 155 US App DC 302, 316-317; 477 F2d 1187 (1973).]*

Moreover, our review of the preliminary examination record reveals that sufficient evidence was presented to establish probable cause and warrant defendant’s bind-over to circuit court on the arson charge.

Affirmed.

/s/ Janet T. Neff  
/s/ Donald E. Holbrook, Jr.  
/s/ Kathleen Jansen