STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2001
v BRANDON JERMIAH THERON LEWIS, Defendant-Appellant.	No. 216719 Monroe Circuit Court LC No. 97-028059-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v GREGORY ALAN WEIRICH, Defendant-Appellant.	No. 216727 Monroe Circuit Court LC No. 97-028060-FH

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following separate jury trials, defendant Lewis was convicted of arson, MCL 750.73, and breaking and entering, MCL 750.110, and defendant Weirich was convicted of accessory after the fact to arson, MCL 750.505, and breaking and entering, MCL 750.110. Lewis was sentenced to two concurrent prison terms of 5-1/2 to 10 years each for his convictions. Weirich was sentenced to concurrent terms of 5-1/2 to 10 years for the breaking and entering conviction and three to five years for the accessory after the fact. Both defendants now appeal as of right. We affirm.

I. Facts and Proceedings

Defendants' convictions arose out of the burning of the Faith Baptist Church in Monroe County in the early morning hours of August 12, 1996. During the investigation, it was

determined that the church was intentionally set on fire through the use of a heavy range product, such as kerosene, diesel fuel, fuel oil or charcoal starter being placed on the floor of the church.

At Lewis' trial (Docket No. 216719), the key prosecution witness, Richard Geer, testified that after attending a party with defendants, they went to the church where Lewis got out of his car, carrying a gas can. Geer then testified that he left the scene and went to a nearby park, where he waited for Lewis. According to Geer, when Lewis arrived at the park, Lewis informed him that he had burned down the church in order to get rid of his fingerprints. Geer also testified that following the fire, they went to Lewis' home, where Lewis showed him a "gold plaque like a scroll" that he had taken from the church. In this regard, the church's retired pastor, George Sanders, testified that at the time of the fire, the church contained a plaque with a "metal type scroll." In addition to Geer and Sanders, the prosecution called three of Lewis' cellmates,[1] one of whom testified Lewis had admitted to burning down the church. The other two cellmates both testified that while Lewis had never admitted to directly burning down the church, he had indicated to both of them that he (1) had been walking around with a gas can that evening, (2) could not remember all of what had occurred, (3) watched the church burn, and (4) indicated that since it was a small church, it could build a much bigger one with the insurance money it was going to receive as a result of the fire.

Geer was also the key prosecution witness at Weirich's trial (Docket No. 216727). There, Geer testified that Weirich was with Lewis when he left the car carrying the gas can. In addition, Special Agent Fredrick Sharp of the Bureau of Alcohol, Tobacco and Firearms and Officer Allison King of the Michigan State Police testified that Weirich admitted to them that he was in the car with Lewis when they stopped by the church and that, while Lewis set the fire, he remained outside the church in order to act as a lookout.

II. Docket No. 216719[2]

On appeal, defendant first argues that the prosecutor's improper and prejudicial comments regarding his character deprived him of a fair and impartial trial. Specifically, defendant contends that the prosecutor, by stating several times during closing argument that defendant and Geer were "cut from exactly the same cloth," improperly injected defendant's character into the trial and therefore committed prosecutorial misconduct.

This Court reviews alleged prosecutorial misconduct during closing arguments under a harmless-error analysis. *See People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996). An error is harmless when it appears from the record that it is "highly probable that the [errors] did not contribute to the verdict." *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 121 (1998). Thus, even if the complained of statements arose to the level of prosecutorial misconduct, reversal is not warranted unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the improper remarks were outcome

[1] The individuals were Lewis' cellmates while Lewis was waiting to be bonded out on these charges.

[2] For this section, the term "defendant" refers to defendant Lewis.

determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). To this end, the defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Lukity*, *supra*; *Brownridge*, *supra*.

While we agree with defendant that the prosecutor improperly commented on defendant's character when it was not at issue, see *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996), based on the overwhelming evidence against defendant, we conclude that even if the prosecutor's statements arose to the level of prosecutorial misconduct, they were not outcome determinative and therefore did not result in a miscarriage of justice. *Lukity*, *supra*; *Brownridge*, *supra*; see also *Mitchell*, *supra*.

As previously stated, Geer testified that he was with defendant when they arrived at the church and that defendant (1) left his car carrying a gas can, (2) admitted that he broke into the church and burned it down, (3) had in his possession a plaque that fit the description of one that had been hanging in the church before the fire. This testimony was collaborated in large part by the testimony of one of defendant's cellmates and Sanders. In addition, two other prosecution witnesses testified that defendant admitted to them that he (1) watched the church burn, (2) carried a gas can near the church, and (3) had stated that the church was better off because of the insurance money it was going to receive. Given this evidence, we are satisfied that it is more probable than not that the prosecutor's improper remarks were not outcome determinative. *Lukity*, *supra*; *Brownridge*, *supra*. Thus, even if the prosecutor's statements regarding defendant's character amounted to prosecutorial misconduct, we conclude that it is "highly probable that [the statements] did not contribute to the verdict," *Mitchell*, *supra*; therefore, reversal is not warranted. *Lukity*, *supra*; *Browridge*, *supra*.

Based on the foregoing analysis, we also reject defendant's claim that his convictions were not supported by sufficient evidence. When reviewing a claim of insufficient evidence following a jury trial, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992).

Here, the testimony of Geer, defendant's cellmates, as well as Sanders, viewed in the light most favorably to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that defendant was guilty of both arson, MCL 750.73, and breaking and entering, MCL 750.110. *Johnson*, *supra*; *Wolfe*, *supra*; see also *People v Adams*, 202 Mich App 385; 509 NW2d 530 (1993) and CJI2d 31.1. Although defendant asserts that Geer's testimony was "inherently untrustworthy and self-contradictory" and that the testimony of his jail cell companions was "equivocal," questions concerning weight and credibility are left to the trier of fact to resolve, and this Court will not resolve them anew. *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Finally, there is no merit to defendant's claim that the trial court erred in allowing Geer to testify pursuant to an agreement with the prosecution whereby he received favorable treatment in exchange for his testimony. Defendant's reliance on 18 USC 201(c)(2) is misplaced because that statute applies only to the federal government, not state governments. Moreover, we are not

persuaded that 18 USC 201(c)(2) applies to plea agreements offered by federal prosecutors. Cf *United States v Singleton*, 165 F3d 1297, 1302 (CA 10, 1999) (en banc), *United Stated v Haese*, 162 F3d 359, 366 (CA 5, 1998) and *United States v Ware*, 161 F3d 414, 418 (CA 6, 1998).

III. Docket No. 216727[3]

Defendant argues that the trial court erred when it departed from the sentencing guidelines' recommendation and imposed a sentence of 5-1/2 to 10 years for his breaking and entering conviction.[4] We disagree.

This Court reviews a defendant's sentence for an abuse of discretion. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion if it violates proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *Rice, supra*. In imposing sentence, the court must articulate on the record the criteria and reasons that support the court's decision regarding the length and nature of the sentence. See *id*. at 446, citing *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989). In addition, in imposing sentence the court should consider the following factors: (1) reformation and punishment of the offender, (2) protection of society, and (3) deterrence of others from committing similar crimes. See *Rice, supra*, citing *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Further,

> [w]here there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. [*People v Benson*, 200 Mich App 598, 602; 504 NW2d 911 (1993), quoting *Milbourn, supra* at 659-660, rev'd on other grounds 444 Mich 925; 509 NW2d 514 (1994).]

In this case, it appears as if the trial court's primary basis for departing from the guidelines was the seriousness of the offense, which caused approximately $600,000 in damages, including the loss of valuable church work and files. The severity of a crime is a permissible sentencing consideration. *Rice, supra*. In addition, a trial court may base a departure decision on facts and circumstances that are not adequately embodied within the variables used to score the guidelines. *Milbourn, supra*; *Benson, supra*. To this end, we note that while offense variable 17 attempts to address the value of property stolen, damaged or destroyed, we agree with the trial court that it fails to adequately reflect the extent of the loss in this case. Thus, the trial court

[3] For this section, the term "defendant" refers to defendant Weirich.

[4] Because defendant's crimes occurred before January 1, 1999, the trial court correctly sentenced defendant pursuant to the judicial sentencing guidelines and not the statutorily enacted sentencing guidelines. See MCL 769.34 (1) and (2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). See also Administrative Order No. 1998-4, 459 Mich clxxv (1998) (Stating that the sentencing guidelines promulgated in Administrative Order No. 1988-4, 430 Mich ci (1988), remain in effect for offenses committed before January 1, 1999).

properly considered the substantial loss occasioned by defendant's crime as a basis for departure. *Milbourn*, *supra*; *Benson*, *supra*. Similarly, we find that while offense variable 13 addresses emotional harm to a victim, it does not adequately reflect the emotional harm to a whole congregation of people; therefore we conclude that the trial court properly considered the "severe emotional effect on the church congregation" as a separate basis for departing from the guidelines. *Id.*; see also *People v Harris*, 190 Mich App 652, 668-669; 476 NW2d 767 (1991). Further, the court's consideration of a federal investigation into church burnings and the need to discourage such burnings was not improper. By referring to the rash of church burnings across the country, the trial court properly recognized that there was a need to deter others from committing similar crimes. See *Rice*, *supra*; see also *People v Broden*, 428 Mich 343, 349-350; 408 NW2d 789 (1987) and *People v Gjidoda*, 140 Mich App 294, 301; 364 NW2d 698 (1985) ("'[T]he deterring of others from committing like offenses' is a proper and permissible criterion for determining an appropriate sentence.") (citations omitted). Thus, we conclude that defendant's 5-1/2 to 10 year sentence for the breaking and entering conviction does not violate the principle of proportionality, *Milbourn*, *supra* at 635-636; *Rice*, *supra* at 445, and that the trial court did not abuse its discretion. *Id.*

IV. Conclusion

In summary, in Docket No. 216719, because we find no error requiring reversal, we affirm Lewis' convictions for breaking and entering and arson, MCL 750.110 and MCL 750.73. Likewise, in Docket No. 216727, because the trial court articulated sufficient reasons for deviating from the sentencing guidelines and therefore acted within its discretion we affirm Weirich's sentence of imprisonment for a term of 5 ½ to 10 years.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder