STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 262860 Macomb Circuit Court
RONALD EUGENE MCCOMBS, JR., Defendant-Appellant.	LC No. 04-000445-FH

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for arson of a dwelling home, MCL 750.72. Defendant was sentenced to 40 months to 20 years' imprisonment for his conviction. We affirm.

Defendant claims that defense counsel was ineffective on several grounds. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).

Defendant first argues that defense counsel was ineffective because he failed to present evidence of Candace Kampfer's bias toward him during trial. We disagree. To establish a claim of ineffective assistance of counsel a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Walker, supra*, p 545. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). The defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra*, p 545.

Defendant's claim that defense counsel was ineffective for failing to question Kampfer about her bias toward him is without merit. Kampfer's testimony itself was sufficient to show any bias that Kampfer may have had toward defendant. Throughout her testimony, Kampfer made statements showing that she and defendant were not on good terms and that there was animosity between them. Kampfer admitted that "maybe she was upset" that defendant was "carousing" with other women in front of her face.

Moreover, review of the record shows that defense counsel's failure to specifically question Kampfer about any bias toward defendant was likely trial strategy. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant also argues that defense counsel was ineffective for failing to call "Vitaly" as a witness. We disagree. "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant fails to provide any proof, by affidavit or other means, showing how Vitaly's testimony would have contributed to his defense. Accordingly, defendant's claim that he was denied a substantial defense because Vitaly was not called as a witness is without merit.

Defendant next argues that trial counsel was ineffective for failing to move for dismissal of the charge based on his right to a speedy trial. We disagree. A defendant has the right to a speedy trial under both state and federal constitutions. *People v Cain*, 238 Mich App 95, 111-112; 605 NW2d 28 (1999). A four-part balancing test is used to determine whether a defendant's right to a speedy trial has been violated. *Id*. The test requires a court to consider: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id*. "This fourth element, prejudice, is critical to the analysis. A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice." *Id*.

While almost a year had passed from the time that defendant waived arraignment until trial commenced, "the length of delay is not determinative of a speedy trial claim." *Cain*, *supra*, p 112. The *Cain* Court found that a 27-month delay between the defendant's arrest and trial did not violate the defendant's state and federal constitutional rights. *Id*. at 111. The Court concluded that although the delay was "somewhat lengthy," no constitutional violation occurred because the prosecution presented a legitimate reason for the delay, the defendant was on bond pending trial, and the delay did not subject the defendant to lengthy pretrial incarceration. *Id*. at 113.

Defendant has failed to show that he was denied his right to a speedy trial. Less than a year passed from the time that defendant waived arraignment until trial commenced. Between the arraignment waiver and trial, defense counsel filed several motions on defendant's behalf, including a motion to quash the information. These motions contributed to the delay in proceeding to trial. Because defendant was released on personal recognizance after he waived arraignment, the delay did not subject defendant to lengthy pretrial incarceration.

Defendant has failed to show that he was denied his right to a speedy trial, and therefore, defendant has failed to show that counsel was ineffective for failing to move for dismissal of the charge against him on this ground.

Defendant next argues that the trial court erred when it denied his motion for a directed verdict of acquittal on the charge of arson of a dwelling house. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, [we review] the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable

to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove arson of a dwelling house the prosecution must show that defendant wilfully or maliciously burned Kampfer's dwelling house, either occupied or unoccupied. MCL 750.72; *People v Barber*, 255 Mich App 288, 294; 659 NW2d 674 (2003). When defendant moved for a directed verdict of acquittal the prosecution had presented sufficient evidence for a jury to conclude that the elements for an arson of a dwelling house conviction were proven. Because there is rarely direct evidence in arson cases, the trier of fact usually draws inferences from the circumstantial evidence. *People v Nowack*, 462 Mich 392, 402; 614 NW2d 78 (2000). The evidence presented showed that Kampfer's apartment was set on fire. On the morning of the fire, Kampfer and defendant had a confrontation that resulted in name-calling and threats made by defendant. The evidence showed that defendant was not happy about Kampfer's plans to move in with another man. Kampfer testified that defendant called her a "slut" and a "whore." Kampfer also testified that defendant told her on that day to "watch what happens when you get home, when you get home today." About an hour later, Kampfer received a phone call from her friend that her house was on fire.

Shortly before the fire started, Kay Riley witnessed defendant leaving Kampfer's home. Although Riley did not see defendant set the fire, she did see defendant leave Kampfer's apartment minutes before the fire started. Lisa Smith and Kampfer were neighbors who shared a common wall. Shortly before the fire, Smith maintained that defendant stated to everyone in her house that he was leaving and that they should do the same. Smith remained at her house; however, minutes after defendant's announcement Smith saw smoke coming up from the walls.

The evidence also showed that when firefighters arrived Kampfer's door wall window was already broken, which was consistent with Riley's testimony that she saw defendant leave Kampfer's home from the door wall window. Although Fire Marshal Means was unable to determine the cause of the fire, he reported the fire as a "suspicious fire." Means also concluded that there was nothing in the apartment capable of starting the fire without human involvement.

The evidence was sufficient for a jury to conclude the prosecution proved the elements of the charged offense beyond a reasonable doubt. The evidence clearly showed that Kampfer's apartment was set on fire and that defendant was seen leaving the apartment shortly before the fire started. The evidence was sufficient for a jury to conclude that defendant burned Kampfer's apartment and that he did so willfully and maliciously. MCL 750.72; *Barber*, *supra*, p 294. Defendant's claim that the trial court erred when it denied his motion for a directed verdict of acquittal on the charge of arson of a dwelling house is without merit.

Defendant also argues the trial court abused its discretion when it denied his motion to quash the felony information. We disagree. This Court reviews a circuit court's decision to grant or deny a motion to quash the information de novo to determine if the district court abused its discretion in binding over a defendant for trial. *People v Green*, 260 Mich App 710, 714; 680 NW2d 477 (2004).

A 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 that felony." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). In order to bind the defendant over for trial the judge is not required to find that the evidence at the time of the preliminary examination proves the defendant's guilt beyond a reasonable doubt. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000).

As mentioned, *supra*, to prove arson of a dwelling home the prosecution must show that defendant wilfully or maliciously burned Kampfer's dwelling house, either occupied or unoccupied. MCL 750.72; *Barber, supra*, p 294. During the preliminary examination, Kampfer testified that her apartment was set on fire. Kampfer maintained, on the morning of the fire, she and defendant got into a confrontation about their son. According to Kampfer, defendant was drinking on that day and that defendant was angry with her. Kampfer maintained that defendant stated to her "bitch, watch what happens when you get home today." Shortly after, Kampfer received a call that her apartment was on fire.

During the preliminary examination, Riley testified that she heard a loud noise and when she looked outside she witnessed defendant leaving Kampfer's apartment though the glass door wall. About ten minutes later, Riley noticed smoke emitting from the apartment. The evidence showed that Fire Marshal Means was unable to determine how the fire was started. However, Fire Marshall Means concluded that the fire was a "suspicious fire" because they were unable to find any accidental cause for the fire.

Based on the evidence presented at the preliminary examination, the circuit court properly denied defendant's motion to quash the felony information. The prosecution presented sufficient evidence during the preliminary examination to show a felony was committed and that defendant committed that felony. *Northey, supra*, p 574. The evidence showed that Kampfer's apartment was set on fire and that prior to the fire defendant threatened her. The evidence also showed that defendant was seen leaving Kampfer's apartment minutes before the fire started. The evidence was sufficient to show that defendant wilfully or maliciously burned Kampfer's dwelling house. MCL 750.72; *Barber, supra*, p 294.

Even if the district court erroneously concluded that sufficient evidence was presented at the preliminary examination to bind over defendant for trial, the error is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Libbett*, 251 Mich App 353, 410; 650 NW2d 407 (2002).

Defendant further contends that the trial court violated his state and federal constitutional rights when it sentenced him to 40 months to 20 years' imprisonment for his conviction. We disagree. We review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant raises several arguments to support his claim that his sentence is improper. Defendant first argues that the trial court sentenced him based on inaccurate and incomplete information which failed to adequately identify his rehabilitative potential. We disagree.

Although a sentence is invalid if it is based on inaccurate information, *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), there is nothing in the record that suggests the court relied on inaccurate information. At defendant's request, the trial court made corrections to the presentence investigation report during defendant's sentencing hearing. In addition, before the

trial court imposed sentence, the trial court asked both defense counsel and defendant whether they had anything else to add and neither of them requested additional changes. Because defendant failed to raise this issue at sentencing, in a motion for resentencing, or in a motion for remand in this Court, defendant is precluded from challenging his sentence on appeal on these grounds. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant also argues that his sentence is disproportionate. We disagree. The statutory sentencing guidelines are presumptively proportionate, *People v McLaughlin*, 258 Mich App 635, 669-671; NW2d 860 (2003). If a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, *supra*, at 309. Here, defendant cannot show that the trial court relied on inaccurate information or that there was a scoring error. Thus, because defendant's sentence is within the appropriate guidelines we must affirm his sentence.

Defendant further argues that his sentence violates both state and federal constitutional prohibitions against cruel and unusual punishment. See US Const, Am VIII (prohibition against cruel and unusual punishment); Const 1963 art 1, § 16 (prohibition against cruel and unusual punishment). We disagree. A proportionate sentence does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). Because defendant's sentence is within the appropriate guidelines it is proportionate, and defendant's claim that his sentence is cruel and unusual punishment is without merit. *Id*.

Defendant also argues that his sentence violated Michigan's sentencing goals of rehabilitation, deterrence, protection of society and punishment, and thus also violated his constitutional rights. Defendant claims that the trial court only considered punishment and protection of society when it imposed its sentence. This claim is also without merit. Before imposing sentence the trial court should consider the following objectives: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *People v Rice*, 235 Mich App 429, 446; 597 NW2d 843 (1999). However, "there is no requirement that the trial court expressly mention each goal of sentencing when imposing sentence," and therefore, on this record defendant's claim is without merit. *Id*.

Finally, defendant argues that he is entitled to resentencing pursuant to the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), which held that factual determinations underlying the enhancement of sentencing maximums be made by a jury. We disagree, since *Blakely* does not apply to sentences imposed in Michigan. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello