

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR J. BOSSERT, JR.,

Defendant-Appellant.

UNPUBLISHED

August 12, 2010

No. 291023

Ogemaw Circuit Court

LC No. 08-003059-FH

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of arson of a dwelling house, MCL 750.72. The trial court sentenced him to 32 months to 20 years' imprisonment. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

On April 20, 2007, Denise Ramsey's home was destroyed by arson. The prosecution presented evidence that Todd Wangler had approached defendant and asked him to set fire to "Denise's home." Defendant in turn approached Roy Newman for help in setting the fire. Newman admitted at trial to helping defendant destroy Denise Ramsey's home by arson. However, Newman denied actually setting the fire. Defendant denied any involvement in the arson.

On appeal, defendant argues that he is entitled to a new trial because defense counsel failed to object to several instances of prosecutorial misconduct. We disagree.

In her closing argument, the prosecutor told the jury that if they believed a witness presented at trial who testified "that the defendant admitted that he had to go back and finish the job after he saw [Newman] and was so impressed with the prep work, then you have more than enough to convict the defendant as charged." Defendant argues that the prosecutor mischaracterized the cited testimony. The prosecutor's remarks were presumably based on the following exchange with the witness:

Q. Well, let me ask you this. Did he say something else about the Rose City house fire?

A. Just that it had something to the effect of going back to finish the job, but that is it.

Q. So he said that. Did he go back to finish the job?

A. I have no idea whether it was—whether he was talking about him or him and Roy or what.

Q. Let me stop you there. So it was either him or him and Roy.

A. Yes.

The prosecutor's characterization was not a distortion of the evidence. While the witness made it clear that he was not sure whether defendant was referring only to himself or to himself and Newman, the clear import of the testimony is that defendant indicated in either scenario he returned to the home to "finish the job." Moreover, the jurors were clearly instructed that it was their "job and nobody else's" to decide the facts of the case, and that "[t]he lawyers' statements and arguments are not evidence." Jurors are presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor's comments concerning this testimony diminished plaintiff's burden of proof. According to defendant, the prosecutor violated the principle that a criminal conviction must be supported by sufficient evidence when arguing to the jurors that if they believed the cited testimony they had more than enough evidence to convict. This argument lacks merit. As explained above, the prosecutor did not distort the testimony. Second, defendant's contention that the cited testimony was merely "some evidence" is only a characterization of the weight of the evidence. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). In this case, there was no dispute that the house was burned on a certain date in a certain county and that it was a dwelling house. Defendant did dispute that he was involved, and the testimony at issue was highly probative on this question. In addition, the trial court properly instructed the jury on reasonable doubt, the burden of proof, and the elements of the crime. See *Graves*, 458 Mich at 486.

Defendant also asserts that the prosecutor deliberately distorted the evidence by claiming that defendant's former girlfriend came forward to offer her information to law enforcement officers before she began dating Wangler, the man who had approached defendant about setting the fire. This version of the facts of the dating relationship is at odds with the testimony of the two individuals. Assessing the credibility of trial witnesses is within the province of a competent jury, *Wolfe, supra*, 440 Mich at 514, and we will not second-guess its judgment on appeal.

Finally, defendant argues that the prosecutor invaded the province of the jury by asking defense witnesses if other witnesses were lying. Specifically, defendant objects on appeal to the prosecutor's questions to the homeowner and defendant regarding the truthfulness of other witnesses. We agree that this was improper. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 472 (1985). However, as in *Buckey*, defendant has not shown that the outcome of the proceedings was affected by the error. *Buckey*, 424 Mich at 17; see also *People v Carines*, 460

Mich 750, 763; 597 NW2d 130 (1999). When asked if a state trooper had lied about defendant admitting to having initially agreed to set the fire, defendant responded that the possibility exists that the officer had simply misspoken. *Buckey*, 424 Mich at 17. As for the homeowner, she too handled the question effectively, simply denying the accuracy of the cited testimony, but even acknowledging that the witness had no reason to make the story up. *Id.* Additionally, in both instances a timely objection could have resulted in an appropriate, and presumptively effective, curative instruction. *Id.* at 18.

Defendant also argues that trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. As previously discussed, the only instance of prosecutorial error that is supported by the record resulted from the prosecutor's improper questions to the homeowner and defendant regarding the credibility of other witnesses. With respect to the other alleged errors, counsel cannot be faulted for failing to raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

The standard by which a trial attorney's counsel is evaluated was stated as follows in *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (citation omitted):

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.

A defendant claiming that counsel was ineffective bears a heavy burden to show that any errors made were so serious that counsel was not performing as guaranteed by the Sixth Amendment, US Const, Am VI. *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant fails to show that defense counsel's conduct was deficient or that he was deprived of a fair trial in either instance. In regard to the question posed to defendant, counsel could have reasonably determined that defendant's response was effective and countered any undue prejudice resulting from the prosecutor posing the question. In regard to the homeowner, the prosecutor's question directly challenged the homeowner's credibility, not defendant's credibility. Given this, and that it would have been reasonable for defense counsel to suppose that the jury would not be surprised by the homeowner's denial that she sought to have the house burned, counsel could have decided that the best strategy was not to raise an objection. In any event, defendant fails to show how any possible error on the part of trial counsel was so prejudicial to his interests that a reasonable probability exists that the trial outcome would have been different had counsel objected. *McGhee*, 268 Mich App at 625. The evidence adduced in favor of conviction was substantial. Further, the court instructed the jury that it was solely

responsible for assessing witness credibility. *Graves*, 458 Mich at 486. There is no indication in the record that the jury abdicated this responsibility.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly