# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 16, 2010 |
| v | No. 293320<br>Saginaw Circuit Court |
| CHRISTOPHER MORRIS MANNING,<br><br>Defendant-Appellant. | LC No. 07-029974-FH |

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of arson of other real property. MCL 750.73. The trial court sentenced defendant as a habitual offender second offense to 47 to 180 months. MCL 769.11; MCL 777.21. Defendant now appeals and we affirm in part and remand in part.

A fire was set in the basement of a vacant house next door to defendant's home. No one was living at the house at the time. The owner testified that the house had been damaged in a previous fire, and the owner had decided to raze it instead of repair it. The windows were boarded up and the utilities had been shut off. Because the utilities had been shut off, the fire marshal testified that the fire could not have been started by a utility problem and it was intentionally set.

There is conflicting testimony on what happened the night of the fire. Earlier in the day, defendant had suffered a seizure and was taken to the hospital. He returned to his home very late at night. Only one witness, defendant's neighbor from across the street, testified that he saw defendant start the fire by throwing something into the house's basement window. Several other witnesses were with defendant at his home that night, including his wife and another couple. None of these witnesses actually saw defendant start the fire, but these witnesses did all testify that they lost sight of defendant at about the same time on the night of the fire.

Defendant burned his hand on the night of the fire, which required a hospital visit. Defendant maintains that he burned his hand while cooking with grease. But, none of the witnesses who were with him that night saw him injure his hand while cooking. And, at least one witness testified that no one was cooking on the night of the fire. All of the witnesses who were with defendant on the night of the fire testified that defendant told them what to tell the police, and that he threatened them if they did not tell the police the same story: that he burned his hand while cooking.

Defendant argues that the trial court erred when it did not grant defendant's motion for a directed verdict on the basis that the burned house was not a dwelling. But the trial court concluded that the issue of whether the house was a dwelling was an issue of fact for the jury. The jury instructions included the higher charge of arson of a dwelling, as well as arson of other property.

The house was not a dwelling. "[W]here a building originally used as a dwelling house has been abandoned for such purposes or where such a building has been without tenant or occupant for a prolonged period, it will not be regarded as a 'dwelling.'" *People v Reed*, 13 Mich App 75, 78; 163 NW2d 704 (1969). The purpose for differentiating between a dwelling and other property is to prevent harm to or loss of human life. *Reed*, 13 Mich App at 78-79. Here, the evidence showed that the house had been abandoned: the windows were boarded up, the utilities were shut off, and it had been razed. The house was not a dwelling at the time of the fire.

Even though the house was not a dwelling, defendant must show that it was more probable than not that the error was outcome determinative. MCL 769.26; *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). Even though the trial court did not grant defendant's motion for directed verdict, the jury acquitted defendant of the charge of arson of a dwelling, and found him guilty of the lesser charge of arson of other property. Any error is cured when the jury acquits the defendant of the unwarranted charge. *People v Graves*, 458 Mich 476, 486; 518 NW2d 229 (1998). Therefore, the error was harmless and it was cured. Defendant cannot show that the trial court's error was outcome determinative.

Next, defendant argues that the evidence against defendant was not enough to convince the jury beyond a reasonable doubt that defendant set the fire. In a criminal case, the sufficiency of the evidence is reviewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288496, issued April 15, 2010), slip op at 1-2. Here, the jury found defendant guilty of arson of real property. A jury does not need direct evidence that defendant started the fire to find beyond a reasonable doubt that defendant set it; circumstantial evidence is sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Even though only one witness claims that he actually saw defendant set the fire, the other witnesses all lost sight of defendant for a while. There is also evidence that defendant told witnesses what to say. The jury can infer from testimony and other evidence that defendant did indeed set the fire.

Defendant also argues that he received ineffective counsel during the trial because counsel did not move for a mistrial when plaintiff's best witness, a jailhouse snitch, decided not to testify; did not obtain defendant's medical records; counseled a witness not to testify; and did not object to the victim's statements at sentencing. To prove ineffective counsel, defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Smith v Spisak*, ___ US ___; 130 S Ct 676, 685; 175 L Ed 2d 595 (2010); *Strickland v Washington*, 466 US 668, 688; 104 S Ct 676; 175 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant first alleges that trial counsel failed to move for a mistrial when a prosecution witness decided not to testify. Defendant, however, fails to demonstrate why such a motion would have been granted or how an acquittal would have been likely had the witness testified.

Second, defendant argues that trial counsel was ineffective when he failed to offer defendant's medical records as evidence of a defense. Failing to call a witness or present other evidence can be ineffective counsel, but only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is a defense that would have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Therefore, when a defendant alleges deprivation of a substantial defense, he must show how that defense could have affected the outcome of the trial. See *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1991); *People v Shively*, 230 Mich App 626; 584 NW2d 740 (1998). In both *Kelly* and *Shively*, whether the defendant was denied a substantial defense hinged on the defendant showing what the allegedly missing evidence would have shown and how it would have affected the outcome of the case. Here, defendant alleges that the medical records would show that the medication he was prescribed for the seizures, combined with the alcohol he drank that night, would have affected him, and that the medical records could have been used to suppress the statement that defendant made to police on the night of the fire. But, defendant does not say what was written in the medical records, or how they would have specifically affected the outcome of the trial. Defendant has not shown that he was denied a substantial defense because he has not shown that the failure to obtain or offer the medical records as evidence was prejudicial to him at the trial.

Third, defendant also alleges that trial counsel was ineffective because he failed to call defendant as a witness. The decision on whether to call a defendant to testify is a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). This Court stated that the failure to call a defendant as a witness is only ineffective counsel when it is proven to be prejudicial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has the burden of proving that the decision not to call defendant as a witness was prejudicial. *Shively*, 230 Mich App at 629. Here, defendant says that because the trial was a credibility contest, not allowing him to testify was prejudicial. But, again, defendant does not show how his testimony would be any more effective than the testimony of the other witnesses for the defense. Defendant's own affidavit states that he had a "sketchy memory" of what happened the night of the fire. Defendant has not shown that he was prejudiced when trial counsel advised him not to testify.

And, fourth, defendant alleges that counsel was ineffective because he did not object to the victim's statements at sentencing. But, victims have the right to make a statement at sentencing under the Victims' Rights Act. MCL 780.7631(1)(c). Defendant cannot show that counsel was ineffective because he failed to object to a victim's statement because it is the victim's right to make a statement at sentencing.

Next, defendant claims that he was incorrectly scored on both Offense Variable (OV) 13 and OV 16. Under OV 13, the trial court will give a defendant ten points if the offense was "part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(1)(g). Section (2)(a) clarifies this by adding that "all crimes

within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." Contrary to defendant's claim in his brief on appeal, he failed to preserve this issue with regard to OV 13 by raising the issue at sentencing, in a motion for resentencing, or by a motion for remand in this Court. MCL 769.34(10); MCR 6.429(C). Defendant only objected at sentencing to the scoring of Prior Record Variable (PRV) 5 and OV 16. And his motion to remand in this Court, which was denied, only raised the issue of ineffective assistance of counsel.

But, if OV 13 was misscored, defendant's sentence would fall outside the properly scored guidelines, and we will review the issue for plain error. See *People v Kimble*, 470 Mich 305, 312; 684 WN2d 669 (2004). The PSIR references several arson charges that had been nolle prossed. And, as noted above, criminal offenses may be considered in scoring OV 13 even if they did not result in conviction. Therefore, because defendant may have, in fact, committed those arsons, it is not clear or obvious that OV 13 was misscored. Accordingly, defendant is not entitled to have the scoring of OV 13 reviewed.

Turning to OV 16, a defendant is scored ten points if "the property had a value of more than $20,000.00." MCL 777.46. The only evidence on the worth of the property is the $178,926.08 that the insurance company paid to the victim. There is no other evidence on the worth of the damage caused. OV 16 also states that a defendant can be scored ten points if the property had "significant historical, social, or sentimental value." MCL 777.46(1)(b). In her statement, the victim said that she had grown up visiting her grandmother in this house and that there were still family mementos in the house at the time of the fire. The trial court may consider a victim's statement in sentencing, even though the victim's statement is often emotional. *People v Steele*, 173 Mich App 502, 505; 434 NW2d 175 (1988). Either way, defendant was properly scored ten points under OV 16.

And, finally, defendant argues that the PSIR should be corrected. At the sentencing hearing, defense counsel noted that defendant's PSIR incorrectly stated that Raquel Manning saw defendant in the basement of the house where the fire was started. Manning never testified that she had seen defendant in the basement. The trial court agreed to correct the PSIR. However, the PSIR still incorrectly states that Manning saw defendant in the basement. The trial court must on remand make the agreed-upon change to the incorrect statement in the PSIR.

We affirm defendant's conviction and sentence but remand to correct the incorrect statement in the PSIR. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad