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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-1215**

State of Minnesota,
Respondent,

vs.

Thomas John Rassmussen, Jr.,
Appellant.

**Filed July 17, 2017**
**Affirmed; motion granted**
**Hooten, Judge**
**Concurring specially, Kirk, Judge**

Wright County District Court
File No. 86-CR-15-563

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Tom Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Kirk, Judge.

**UNPUBLISHED OPINION**

**HOOTEN**, Judge

On appeal from his conviction of first-degree arson, appellant argues that the state's evidence was insufficient to prove beyond a reasonable doubt that he intentionally started

the fire that damaged his residence. Appellant also argues, in a pro se supplemental brief, that his trial attorney was ineffective. We affirm.

## FACTS

In November 2014, there was a fire in appellant Thomas John Rassmussen, Jr.'s townhouse. Rassmussen was charged with one count of first-degree arson.[1] In January 2016, a jury found Rassmussen guilty of first-degree arson, and the district court sentenced him to 48 months. This appeal follows.

## D E C I S I O N

### I.

Rassmussen argues that the evidence presented by the state was insufficient to support the jury's guilty verdict because the state presented no direct evidence that he intentionally set the fire in his townhouse and the circumstantial evidence presented did not rule out the reasonable hypothesis that he did not set the fire. We disagree.

In evaluating a claim of insufficiency of the evidence, we conduct "a painstaking review of the record to ascertain whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (alteration omitted) (citation and quotation omitted). The jury's verdict will stand "if the jury, acting with due regard for the presumption of innocence and for the

[1] Rassmussen was originally charged with a second count of arson, but this count was dismissed before trial.

necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that the defendant was proven guilty of the offense charged." *Id.* (alterations omitted).

When evaluating a conviction based on circumstantial evidence, the first task is to identify the circumstances proved. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). In so doing, we view the evidence presented in a light most favorable to the verdict and presume the jury accepted the evidence consistent with the circumstances proved and rejected conflicting evidence. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). We then "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved," including those inferences inconsistent with guilt. *Andersen*, 784 N.W.2d at 329 (quotation omitted). Ultimately, a conviction based on circumstantial evidence will be upheld if the inferences drawn from the entire constellation of circumstances proved are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330, 332.

During trial, the state proved the following circumstances specific to Rassmussen's personal and financial situation at the time of the fire: Rassmussen was separated from his wife, and she moved out of the townhouse in April 2014. Rassmussen was in the process of a divorce, had hired an attorney to assist with the divorce, and his financial situation was "stressful." Rassmussen was behind on the mortgage and utilities for the townhouse and was not current with his homeowner's association fees. The townhouse was scheduled for a forced foreclosure sale in December 2014. Rassmussen had been several months behind on the homeowner's insurance for the townhouse, but on the day before the fire, he made

a payment of his arrears to the insurer so that he was current on his payments at the time of the fire.

The state proved the following circumstances specific to the day of the fire: Rassmussen told investigators that he left his home between 6:00 a.m. and 6:15 a.m., but two neighbors testified that they saw Rassmussen in his driveway at 7:45 a.m. Rassmussen's neighbor, who lived in a townhouse that shared a common wall with Rassmussen's townhouse, testified that she began to smell something strange and "sour" around 8:00 a.m. She later discovered her basement filled with smoke, and called 911. Rassmussen arrived at the scene of the fire and spoke with first responders who testified that Rassmussen was "very calm." After firefighters extinguished the fire, investigators discovered all of the smoke detectors in the townhouse were disconnected.

The state proved the following circumstances specific to the cause of the fire: All of the potential causes offered by Rassmussen to investigators, including flammable material left in his kitchen and a wire under the stairs, were ruled out as the cause of the fire. The fire started at the top of the stairs leading from the kitchen to the basement. A single wire ran under the stairs, but that wire was eliminated as a possible ignition source. The only possible ignition sources that could not be eliminated were a match or open flame lit by the last person in the house.

Rassmussen argues that because the state offered only circumstantial evidence as to the cause of the fire and the state's experts only reached the conclusion that the fire was intentionally set through a process of elimination method known as "negative corpus," the evidence is insufficient as a matter of law to convict him of first-degree arson. Negative

corpus is defined by the National Fire Protection Association (NFPA) as "[t]he process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin." NFPA, *NFPA 921: Guide for Fire and Explosion Investigations*, § 19.6.5, at 203 (2014).

In support of his argument, Rasmussen emphasizes that the NFPA Guide for Fire and Explosion Investigations disapproves of the use of the negative corpus method as a basis for an investigator to "claim[] such methodology is proof of an ignition source for which there is no supporting evidence." *Id.* But, while the NFPA guidelines prohibit an expert from testifying that a lack of direct evidence of an accidental or natural cause is definitive proof that a fire was intentionally set, an expert may testify to the absence of that direct evidence. From there, the burden is on the state to supplement the expert's testimony by presenting circumstantial evidence to support the inference that the fire was intentionally set.

This interpretation and application of the NFPA guidelines governing expert testimony comports with traditional means of proving arson, which often force the state to rely on circumstantial evidence to prove intentional ignition, particularly in cases where there is no evidence of an accelerant. *See State v. Jacobson*, 326 N.W.2d 663, 665 (Minn. 1982) ("In most arson cases, it is necessary for the state to prove its case with circumstantial evidence, since usually no one is on the premises at the time the fire is discovered.").

The absence of an accidental or natural cause of a fire has long been permissible as one piece of circumstantial evidence of intentional ignition in arson cases. *See Somnis v. Country Mut. Ins. Co.*, 840 F. Supp. 2d 1166, 1171 (D. Minn. 2012) (citing cases). Indeed,

to accept Rassmussen's argument would mean that "no jury could find arson unless an investigator actually located physical evidence (such as an accelerant) indicating a fire was intentionally set. Such a requirement has no foundation in the law. . . ." *Id.* at 1171.

Here, the circumstances proved demonstrate that Rassmussen was at home 15 minutes before his neighbor began smelling the strange, "sour" smell. Opportunity to start the fire is evidence properly considered in arson cases. *See State v. McGill*, 324 N.W.2d 378, 379 (Minn. 1982) ("Defendant admittedly was the last person in the house, leaving it within one-half hour before the fire was discovered.").

The circumstances proved also demonstrate that Rassmussen was in the process of a potentially costly divorce, he was behind on his mortgage and utility payments, the townhouse was in foreclosure and scheduled for a forced sale, and his overall financial position was "stressful." A defendant's financial situation is evidence properly considered in arson cases. *See State v. Conklin*, 406 N.W.2d 84, 87 (Minn. App. 1987) ("The evidence suggested [defendant's] difficult financial situation . . . as a basis for motive."); *State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987) ("The prosecution's case showed that [defendant] had experienced financial difficulties.").

Despite these financial difficulties, Rassmussen paid his outstanding balance on his homeowner's insurance the day before the fire. A potential insurance payout is evidence properly considered in arson cases. *See State v. Mathews*, 425 N.W.2d 593, 596 (Minn. App. 1988) (stating that jury could reasonably infer that "appellant had a motive to burn down the financially troubled [business] to use the insurance proceeds to pay off the bulk of his debts.").

Rassmussen lied to investigators about what time he left the townhouse, investigators discovered the smoke detectors in the townhouse had been disconnected before the fire, and Rassmussen was "very calm" when he arrived at the townhouse and spoke with first responders. The defendant's conduct and demeanor is evidence properly considered in arson cases. *See State v. Lytle*, 214 Minn. 171, 179, 7 N.W.2d 305, 309 (1943) (considering evidence of defendant's false statements about his location at time of fire); *State v. Gilles*, 322 N.W.2d 755, 756 (Minn. 1982) (considering evidence of defendant's demeanor); *Conklin*, 406 N.W.2d at 86 (physical evidence at scene considered to establish intent to commit arson).

Rassmussen argues that none of these circumstances is sufficient to rule out the possibility that the wire below the stairs was the ignition source, noting that his expert witness testified that it is possible the wire was the cause of the fire. However, the state presented expert witnesses who testified that the fire could not have been caused by the wire.

When there is competing expert testimony, it is the function of the jury to reconcile that testimony. *State v. Schneider*, 597 N.W.2d 889, 895 (Minn. 1999). We assume that testimony consistent with the verdict was accepted by the jury, and testimony inconsistent with the verdict was rejected. *State v. Hawes*, 801 N.W.2d 659, 670 (Minn. 2011). When evaluating convictions based on circumstantial evidence, appellate courts do not consider testimony rejected by the jury. *Id*. at 670–71.

In applying these principles to this case, we assume that the jury, in finding Rasmussen guilty of arson, accepted the testimony of the state's experts that the wire was

not the source of the fire and that it rejected the testimony of Rasmussen's expert that the wire was the source of the fire. In sum, the entire constellation of circumstances proved, taken as a whole, is consistent with Rassmussen intentionally setting fire to his townhouse, and insufficient to support any other rational hypothesis as to the cause of the fire.

## II.

In his pro se supplemental brief, Rassmussen argues that his trial attorney failed to provide him with effective assistance of counsel.[2] We disagree.

"An appellant arguing that he or she received ineffective assistance of counsel must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quotation omitted). Rassmussen must overcome a "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Id.* (quotation omitted).

All of Rassmussen's allegations of ineffective assistance of counsel stem from decisions made by his trial counsel about whether to present evidence and witnesses that

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[2] Rassmussen's pro se brief also contains evidence not offered at trial. The state moved this court to strike the appendix of Rassmussen's pro se supplemental brief which contains evidence not a part of the district court record. The general rule is that "an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered." *State v. Anderson*, 733 N.W.2d 128, 139 n.4 (Minn. 2007). Although there are limited exceptions to this general rule, "production of such evidence is never allowed in an appellate court for the purpose of reversing a judgment." *Id.* (quotation omitted). We therefore grant the state's motion to strike the appendix of Rassmussen's pro se supplemental brief that contains evidence not offered at trial. We also, sua sponte, strike the addendum to Rassmussen's pro se supplemental reply brief, which also contains evidence not offered at trial. *See Merle's Const. Co., Inc. v. Berg*, 442 N.W.2d 300, 303 (Minn. 1989) (appellate court may on its own motion strike material which is introduced in attempt to change record).

could confirm Rassmussen's alibi or could rebut the state's evidence about his financial situation at the time of the fire. Decisions of "[w]hich witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). These trial decisions "should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *Id*. We therefore decline to pass judgment on the appropriateness of those trial decisions here.

**Affirmed; motion granted.**

**KIRK**, Judge (concurring specially)

I write separately to express my concern with the way the "negative corpus" method or process was used in this case. If it is to be used in future arson cases in this state, I would urge caution. Given the National Fire Protection Association's (NFPA's) disapproval of this methodology as definitive proof of an ignition source where "there is no [other] supporting evidence of its existence," negative corpus should have been limited to the experts' testimony that all known and accidental ignition sources had been eliminated. *See* NFPA, *NFPA 921: Guide for Fire and Explosion Investigations* (NFPA 921), § 19.6.5, at 203 (2014) ("[The negative corpus] process is not consistent with the scientific method, is inappropriate, and should not be used because it generates untestable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited."). Here, one of respondent's fire-investigation experts testified that all natural and accidental causes had been eliminated as competent ignition sources and opined that "[t]he only ignition source we couldn't eliminate was an open flame or a match from whoever was last in the house . . . ." But in addition, respondent was allowed to have two of his experts opine that the fire had been intentionally set in a garbage can. And one of respondent's experts speculated at length about a hypothetical fire started in a plastic garbage can in the area of the point of origin that could have been entirely consumed in the fire, leaving no trace. That expert hypothesized that appellant lit a fire in the garbage can and walked out of the house. While an expert is allowed under rule 704 of the Minnesota Rules of Evidence to offer an opinion on ultimate issues, given the facts presented about this fire, this expert's testimony as to negative corpus should have been limited by the district court as the NFPA directs. NFPA

921, § 19.6.5.1, at 203 (2014) ("[I]t is improper to opine a specific fire cause ignition source, fuel or cause classification that has no evidence to support it even though all other such hypothesized elements were eliminated.").

The use of negative corpus poses great concern in this case because there was electrical wiring in close proximity to the source of origin of the fire and the wiring system in this unit had a history of shorting. Experts that testified agreed that electrical wiring, appliances, etc., can be the cause of a fire. Respondent's forensic electrical engineering expert testified that the wiring could not have caused this fire because there was no evidence of arcing. Appellant's experts agreed that arcing would be evidence that the wiring had started the fire, but also testified that they were aware of electrical fires where there had not been arcing.

*Somnis v. Country Mutual Insurance Company*, a Minnesota federal district court case relied upon by the majority, involved a civil arson case between an insured and the insurer where the burden of proof was lower than that used in criminal cases. 840 F. Supp. 2d 1166 (D. Minn. 2012). Even in civil cases, as indicated by the majority, *Somnis* only stands for the proposition that expert testimony can be used to eliminate alternate causes, and from that testimony a jury can reasonably infer that a fire was incendiary. *Id.* at 1171. It does not allow an expert to testify that a fire was intentionally set. I find the observation in appellant's brief interesting that the method of negative corpus could as easily be used to prove that a fire was accidental by establishing that there was no evidence of an intentional origin of the fire.

Arson investigations have too often led to wrongful convictions with horrible consequences. *See Folklore and Forensics: The Challenges of Arson Investigation and Innocence Claims*, 119 W. Va. L. Rev. 549 (2016) (discussing the substantial risk of wrongful convictions posed by arson investigations). In August 2015, the Minnesota Criminal Justice Institute devoted a plenary session to this topic entitled "Beyond Willingham: Mistaking Accident for Arson and Its Horrible Consequences," which was presented by Paul Bieber.

Despite my concerns in allowing negative corpus testimony generally, in this case the testimony that an "open flame" was the only ignition source not eliminated, and thus, that in the expert's opinion the fire was intentionally set, was harmless error in light of the overwhelming nature of the other circumstantial evidence. In most arson cases, there is some evidence of a financial motive and opportunity to commit the crime. *See, e.g.*, *State v. McGill*, 324 N.W.2d 378, 379 (Minn. 1982); *State v. Conklin*, 406 N.W.2d 84, 85-86 (Minn. App. 1987); *State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987) (discussed supra). Here, there was much more. Appellant was in ongoing financial distress, he was divorcing, he was the last person to leave the house before the fire started, he lied about the time he left the house, he disarmed the smoke detectors, and on the day before the fire, he paid up a homeowner's policy that had been in arrears. I concur that this was harmless error.