[Cite as *State v. Newton*, 2010-Ohio-6438.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-137**
- vs -	:	
MICHELLE G. NEWTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000145.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Leo J. Talikka, Leo J. Talikka Co., L.P.A., The Midland Building, 10 West Erie Street, #106, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Michelle G. Newton appeals from her convictions of two counts of attempted aggravated arson. She was charged with burning down her house to collect insurance money, and also with two attempts to do so on prior occasions. The jury acquitted her of aggravated arson but convicted her of attempted aggravated arson. Upon review of the record, we affirm her convictions.

{¶2} **Substantive Facts and Procedural History**

{¶3} On July 26, 2008, the Madison Fire Department responded to a house fire around 8:30 a.m. A neighbor had seen smoke coming from a window of the house and called 911. The homeowners, the Newtons, were not home at the time. They left the house around 6:30 a.m. that morning to pick up their daughter, who had been away at a summer camp.

{¶4} The fire department did not find any accelerant at the house, and ruled the fire "undetermined." However, during the subsequent investigation, the police learned from Howard Shannon, a friend of Ms. Newton, that she had expressed a desire to burn down the house to obtain insurance money because of her financial troubles. The police later arranged for Mr. Shannon to wear a recording device on several occasions to record his conversations with Ms. Newton, during which she talked about prior attempts days before the day of the fire to burn down the house by filling the house with gas from the stove. Her neighbors told the police they saw her air out the house on those days, and investigators learned of a storage unit she rented containing tax documents, guns, family photos, and other valuable items.

{¶5} Based on the investigation, the state charged Ms. Newton with two counts of attempted aggravated arson, which related to the two alleged arson attempts on July 24 and July 25, 2008, and one count of aggravated arson, which related to the fire on July 26, 2008.

{¶6} At trial, Ms. Newton's next-door neighbor, Kimmey Williams, testified that she saw the Newtons leaving their house around 6:30 a.m. on the day of the fire. Later that morning she saw smoke coming out of the window of the house. She called 911, ran over frantically to the house to bang on the door thinking the Newtons' daughter was

still sleeping inside, and then learned from another neighbor that the daughter was away at camp. Ms. Williams noticed the Newtons' dog was in the yard that morning. The dog is usually kept in the house.

{¶7} Lieutenant Sopko, a certified fire investigator with the Madison Fire Department, responded to the house fire. When he arrived, he saw heavy smoke coming out of the eaves on the right side of the house. The heaviest fire conditions occurred in the bedroom, and it took between ten and 15 minutes to extinguish the fire in the bedroom. He was able to determine the fire originated on a shelf in the closet of the master bedroom, but he left the cause of the fire as "undetermined" in his initial report.

{¶8} Detective Doyle, from the Madison Township Police Department, was in charge of the investigation of the fire. He met with Ms. Newton's friend, Mr. Shannon, and arranged for him to wear a wire to record his conversations with Ms. Newton on several occasions. During these recorded conversations, Ms. Newton talked about her attempts to burn down the house with gas from the stove days before the day of the fire, but expressed surprise at the actual fire.

{¶9} When Detective Doyle later interviewed Ms. Newton, she denied ever talking to anyone about trying to burn down the house. She also denied ever making such attempts. When asked why she aired out her house a couple of days before the fire, as a neighbor had observed, she explained that the cat accidentally turned on the stove.

{¶10} Regarding the storage unit she rented, she referred to its content as "junk," even though Detective Doyle observed family photos, crystals, guns, and tax

returns in the unit. She explained the items were in storage because the roof of the house leaked and she did not want any valuable items to get wet.

{¶11} Detective Doyle also spoke with Larry Newton, Ms. Newton's husband. He denied having any knowledge of the arson, but did relate that the day before the fire, he detected gas when he returned home.

{¶12} The state's expert, Ralph Dolence, a specialist in fire investigations, described how he was able to rule out all other causes such as faulty electrical wiring or appliance malfunction. As a part of his investigation he tested the stove, which had been removed from the Newtons' home, to determine if the stove leaked gas on its own, and whether its "push and turn" knobs could be accidentally turned on by a cat.

{¶13} It was his opinion, based upon a reasonable degree of scientific certainty, that the physical evidence and the fire burn pattern pointed to a deliberately set fire through the use of a candle on the shelf in the closet, which spread through the closet up into the attic.

{¶14} The state's star witness was Howard Shannon, a felon with a criminal record including convictions for receiving stolen property, marijuana trafficking, and unlawful sexual conduct with a minor. He became friends with Ms. Newton in June 2008 when his son dated her daughter. She confided in him about her marital and financial problems, including being months behind on the mortgage payments. As their friendship progressed, he visited her daily in her house. The house required a lot of repairs, and Ms. Newton began to talk about her desire to "get[] rid of the whole thing, getting a new place." She asked him if he knew of any ways to "blow the house up without getting in trouble, getting caught." She mentioned her gas stove was broken

and it would leak even after she turned off the stove. She decided she might "just accidentally leav[e] the stove on and leav[e] some candles burning. That way, you know, [gas would] eventually fill up, eventually fill up and blow up the house." Her goal was to "level the house."

{¶15} Mr. Shannon gave her some suggestions such as to close all her doors so that gas would fill up the house. He initially did not take her seriously, but toward the end he knew "she was for real" because she was making plans for the insurance money she had yet to receive.

{¶16} Mr. Shannon testified Ms. Newton rented a storage unit to "keep what she wanted, lose what she didn't," and he purchased plastic containers and helped her load her truck. His son helped her transport the items to the storage unit.

{¶17} Mr. Shannon was out of town on the day of the fire and he described a voicemail from Ms. Newton left the day after the house fire: "You'll never guess what happened yesterday. You know what's going on in your hometown right now? My F-ing house just burned down." She later put a thousand dollars on his credit card, in anticipation of money from the insurance company.

{¶18} When he returned to Madison in late August, Ms. Newton walked him through the remains of the house, explaining to him "the original plan [using gas] didn't work," and "twice she had to air the place out." She pointed to the bedroom closet area, saying that was where the fire started.

{¶19} Mr. Shannon agreed to wear a recording device when he met with Ms. Newton on two occasions. Portions of the recorded conversations were played for the jury:

{¶20} “Ms. Newton: The shit I tried didn’t work.

{¶21} “Mr. Shannon: Yeah, why in the f*** wouldn’t that have worked?

{¶22} “Ms. Newton: I have no idea – I don’t –

{¶23} “Mr. Shannon: Did you do what I – did you –

{¶24} “Ms. Newton: Yes.

{¶25} “Mr. Shannon: You f-ing made –

{¶26} “Ms. Newton: Yes, I did.

{¶27} “Mr. Shannon: -- that solid?

{¶28} “Ms. Newton: Yes, I did.

{¶29} “Mr. Shannon: And then you made the front – the front solid?

{¶30} “Ms. Newton: Yes, I did.

{¶31} “Mr. Shannon: I don’t get that.

{¶32} “Ms. Newton: And it didn’t f-ing work.

{¶33} “Mr. Shannon: When you turned on the stove all the way and it goes sh-sh-sh and it keeps going out and pouring out, did you blow out your pilot?

{¶34} “Ms. Newton: Yes.

{¶35} “Mr. Shannon: Then there ain’t no way that shouldn’t have f-ing worked.

{¶36} “Ms. Newton: It didn’t work. I am telling you. It didn’t work. It was the craziest, most f-ed up two days. [Twice] I tried it. Twice. And twice I had to air my f-ing house out.”

{¶37} The jury also heard the following exchange:

{¶38} “Mr. Shannon: Well, all the issue of the drug deal, you know?

{¶39} “Ms. Newton: Yeah, I know. That’s when you sent me out, knew it, discussed it, blowing the whole goddamn thing, mother f-ing foundation, exactly what I wanted to do. It would have blasted the ceiling which is what I wanted. ***

{¶40} “***

{¶41} “Ms. Newton: No, it didn’t work. No damage. It didn’t work, I know that. ‘Cause I’ve been trying to figure it out, ‘cause what we tried should have worked. Filling the house with gas, lighting the candle, should have worked.

{¶42} “***

{¶43} “Ms Newton: *** What we wanted to do was [for the house] to basically implode [] on itself and just be rubble.

{¶44} “Mr. Shannon: Right. Where they had no choice of saying –

{¶45} “Ms. Newton: But to rebuild.

{¶46} “Mr. Shannon: -- rebuild.

{¶47} “Ms. Newton: But including the foundation.

{¶48} “Mr. Shannon: Right.

{¶49} “Ms. Newton: Because you know we have a cracked foundation.”

{¶50} The defense presented two witnesses. A 14-year-old boy, who is Mr. Shannon’s son’s best friend, testified that Mr. Shannon provided him with drugs, and he had heard Mr. Shannon talking about blowing up his own house to collect insurance money.

{¶51} Larry Newton, Ms. Newton’s husband, a truck driver who is often on the road for his job, stated that he and his wife had marital problems. On the day of the fire, he and his wife left the house at 6:30 a.m. to pick up their daughter. At 8:15 a.m. they

received a phone call from a neighbor informing them their house was on fire. He stated nothing unusual took place the night before.

{¶52} After trial, the jury found Ms. Newton not guilty of aggravated arson but guilty of two counts of attempted aggravated arson. The trial court sentenced her to two concurrent three-year prison terms for her convictions.

{¶53} Ms. Newton now appeals, raising the following assignments of error for our review:

{¶54} "[1.] The trial court committed prejudicial error when it allowed the testimony of state's witness Ralph Dolence.

{¶55} "[2.] The court committed prejudicial error in failure to dismiss the indictment against the appellant at the conclusion of the state's care and also at the conclusion of the trial pursuant to Rule 29.

{¶56} "[3.] The court committed prejudicial error in not dismissing the charge of two counts of attempted arson when it was not supported by evidence."

{¶57} **Expert Testimony**

{¶58} In the first assignment of error, Ms. Newton maintains the state's expert, Ralph Dolence, should not have been allowed to testify because the state violated Crim.R.16(B)(1)(d), in that (1) the state had not provided her with an expert report before trial, and (2) her counsel should have been present when Mr. Dolence conducted tests as a part of the investigation.

{¶59} The determination to admit or exclude evidence is within the sound discretion of the trial court and will not be reversed by an appellate court absent an abuse of discretion. *State v. Sledge*, 11th Dist. No. 2001-T-0123, 2003-Ohio-4100, ¶20.

{¶60} Crim.R. 16 was very recently revamped, and the new version went into effect on July 1, 2010. The prior version of Crim.R. 16(B)(1)(d) stated:

{¶61} "Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examination, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney."

{¶62} Here, the record reflects the state's expert did not prepare a written report. The state, however, provided Ms. Newton with a PowerPoint presentation to be used by the expert at trial, which summarized his trial testimony and included his conclusion that the fire was deliberately set.

{¶63} Unlike the new version of Crim.R. 16, the prior version of the rule, which was in effect at the time of the instant trial, did not require an expert to prepare a written report. An expert is permitted to testify without having prepared a written report.[1] See, e.g., *State v. Marshall*, 5th Dist. No. CT2005-0054, 2007-Ohio-1686, ¶14-15 (there was no violation of Crim.R. 16(B)(1)(d) when there was no written report to provide to the defendant).

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1. Under the new Crim.R.16, an expert is required to prepare a written report before he or she is permitted to testify. Crim.R.16(K) states: "An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial."

{¶64} As to the presence of counsel during tests or experiments, nothing in Crim.R. 16(B)(1)(d) requires a defendant's counsel to be present when an expert conducts tests or experiments. The record reflects that prior to the trial, the state, in a written correspondence, provided defense counsel with a copy of the expert's resume, a summary of his expected testimony, and a copy of a PowerPoint presentation consisting of photographs to be used during the expert's testimony. The state also invited defense counsel to contact the expert for any questions regarding his investigation and findings. The defense did not avail itself of this opportunity.

{¶65} Finally, Ms. Newton's counsel was free to cross-examine the expert regarding any tests conducted in the lab and to expose any weaknesses in his methodology. Therefore, the trial court did not abuse its discretion in permitting the state's expert to testify. Nor was there any harm demonstrated regarding the testimony about the tests conducted for determining the origin of the July 26, 2008 fire, as Ms. Newton was acquitted of arson.

{¶66} The first assignment of error is without merit.

{¶67} **Sufficiency of Evidence**

{¶68} Under the second and third assignments of error, Ms. Newton raises a claim of insufficient evidence.

{¶69} When reviewing a challenge of the sufficiency of evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶70} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶71} R.C. 2909.02 defines aggravated arson. It provides, in pertinent part: "No person, by means of fire or explosion, shall knowingly do any of the following: *** Cause physical harm to any occupied structure[.]" R.C. 2909.02(A)(2).

{¶72} Attempt is defined in R.C. 2923.02. "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A).

{¶73} The evidence revealed Ms. Newton had financial difficulties and was behind on her mortgage payments. She talked to Mr. Shannon on several occasions about blowing up her house to collect insurance money and rented a storage unit to store valuable items from her house. She was heard on tape telling Mr. Shannon that twice she tried to fill up the house with gas, but it did not work. She was also heard saying: "It was the craziest, most f-ed up two days. [Twice] I tried it. Twice. And twice I had to air my F-ing house out"; "Thursday and Friday we tried it, both days, to blow the house up"; and "I've been trying to figure it out because what we tried should have worked. Filling that house with gas, lighting the candle should have worked."

{¶74} Furthermore, a neighbor saw her airing out her house on the two days before the day of the fire. She claimed her cat had accidentally turned on the gas stove, yet the state's expert determined a cat could not have turned on the stove, because the "push and turn" feature of the knobs required a simultaneous action to turn on the stove. The expert provided testimony regarding the force necessary to push each knob down and the degree the knob had to be turned before the gas would flow.

{¶75} We recognize that no one actually witnessed Ms. Newton attempting to set her house on fire and the state's evidence is mostly circumstantial. We note, however, "[o]ften, in arson cases, there is no eyewitness to the arson. Courts in this state have consistently found that circumstantial evidence can be sufficient to sustain an arson conviction." *State v. Pahlau*, 5th Dist. No. 2006-CA-00010, 2006-Ohio-4051, ¶30, quoting *State v. Zayed* (Aug. 17, 1997), 8th Dis. No. 71039, 1997 Ohio App. LEXIS 3518. See, also, *State v. Worthy*, 11th Dist No. 2004-L-137, 2005-Ohio-5871, ¶35. "Of necessity, proof of arson must often rely heavily on circumstantial evidence because of the nature of the crime. But, as in all crimes, circumstantial evidence may establish any given element of the offense. Motive and opportunity are facts which can weigh heavily in establishing arson." *State v. Hoak*, 9th Dist. No. 94CA005917, 1995 Ohio App. LEXIS 3335, *10, quoting *State v. Shaver* (Dec. 20, 1989), 9th Dist. No. 89CA004505, 1989 Ohio App. LEXIS 4806. "[W]hether considering circumstantial or direct evidence, 'a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous evidence inference.' In both instances, 'the jury must use its experience with people and events in weighing the probabilities.'"

State v. Hall, 5th Dist. No. 2004-CA-0093, 2005-Ohio-4403, ¶32 (internal citations and quotations omitted).

{¶76} Our review of the evidence presented at trial shows that the state has produced sufficient evidence, which, if believed, would convince the average mind of Ms. Newton's guilt regarding two counts of attempted aggravated arson beyond a reasonable doubt. The second and third assignments of error are without merit.

{¶77} For all the foregoing reasons, we affirm the judgment of the Lake County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.