STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

BRAIN CERDA,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 181201
LC No. 93-002691

Before: Reilly, P.J, and White and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of arson of a dwelling house. MCL 750.72; MSA 28.267. We affirm.

Defendant first argues that the prosecutor failed to produce sufficient evidence to establish that the fire in question was intentionally set. We disagree. In order to establish the corpus delicti of the crime of arson of a dwelling house, the prosecutor must show that there was a burning of a dwelling house and that it was the result of an intentional act by defendant. *People v Williams,* 114 Mich App 186, 193; 318 NW2d 671 (1982). The prosecutor may establish that the fire was intentionally set through the use of circumstantial evidence and reasonable inferences arising from the evidence. *People v Wolford,* 189 Mich App 478, 480; 473 NW2d 767 (1991).

Reviewing the evidence in a light most favorable to the prosecutor, we conclude that a reasonable trier of fact could infer that the fire was intentionally set by defendant. Two witnesses testified that at approximately 11:00 p.m. they saw defendant walk up the driveway of the house carrying a gasoline can. Defendant disappeared behind the house for approximately ten minutes. Shortly thereafter, the witnesses saw flames coming from the house, as defendant walked down the driveway of the house. Detroit Fire investigator Terry Barker provided detailed testimony as to the findings of his investigation, and opined that the fire was incendiary in nature and was caused by a liquid accelerant.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant, however, argues that the trial court erred in admitting the expert testimony of Barker because he was not qualified as an expert by the trial court, and without his testimony, the evidence presented was insufficient to establish the incendiary nature of the fire. We disagree. A witness may be qualified as an expert by virtue of his knowledge, skill, experience, training, or education. MRE 702. Barker's testimony established that he had over twenty years experience as a fire fighter and eight years experience as a fire investigator. Thus, although not expressly qualified as an expert at trial, the prosecutor presented sufficient evidence as to Barker's training and experience to qualify Barker as an expert. Additionally, at the *Ginther* hearing held in this matter following trial, the trial court expressly qualified Barker as an arson expert nunc pro tunc. Moreover, contrary to defendant's position, the testimony of the eyewitnesses was itself sufficient to establish that the fire in question was intentionally set by defendant. *See Peterson v Oceana Circuit Judge,* 243 Mich 215, 218; 219 NW 934 (1928).

Next, defendant argues that he was denied effective assistance of counsel. In support of this claim, defendant asserts that his trial counsel made three errors in representing him. First, defendant asserts that counsel erred in failing to move for a directed verdict following the close of the prosecution's case because the prosecutor failed to establish that the property was a dwelling house. We disagree. The prosecutor presented sufficient evidence to establish that the property burned was a dwelling house, although not occupied at the time of the burning. Thus, a motion for directed verdict would have been futile. *See People v Viaene*, 119 Mich App 690, 694; 326 NW2d 607 (1982) Because trial counsel is not required to make useless or meritless motions, *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), counsel's failure to bring a motion for directed verdict does not constitute deficient representation sufficient to support defendant's ineffective assistance of counsel claim.

Defendant next argues that counsel was deficient for calling witnesses whose testimony did not exculpate him. Again, we disagree. The testimony of the witnesses tended to establish that defendant was not at the scene of the fire on the night in question and to suggest that the area was dark at the time the fire started. This testimony directly contradicted the testimony of the purported eyewitnesses and questioned their ability to have clearly seen the events to which they testified. Thus, these witnesses did present evidence tending to exculpate defendant. Moreover, the decision to call a particular witness is a matter of trial strategy, *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994), which this Court will not second-guess on appeal. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Lastly, defendant argues that counsel's representation was deficient because he failed to present an alibi defense on defendant's behalf. Again, we disagree. In order to establish a claim of ineffective assistance of counsel for failure to present an alibi defense the defendant must provide evidentiary support that "his counsel was aware that an alibi defense was being claimed but failed to file the required notice and failed to present crucial witnesses who would have supported defendant's alibi defense." *People v Armstrong*, 124 Mich App 766; 335 NW2d 687 (1983). At the *Ginther* hearing, defendant's trial counsel testified that defendant did not tell him who he was with on the night of the fire. Although defendant testified otherwise, the trial court concluded that counsel was not ineffective. Given the conflicting testimony, the court did not abuse its discretion.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D. Schaefer