STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

UNPUBLISHED
March 7, 1997

v

No. 176918
Oakland County Circuit
LC No. 92-117847-FH

ROBERT W. FLATH,

Defendant-Appellant.

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Defendant was convicted by a jury of burning real property, MCL 750.73; MSA 28.268, and attempted false pretenses with intent to defraud over $100, MCL 750.218; MSA 28.415. He was sentenced to two-years' probation and ordered to pay $34,737.00 towards restitution. Defendant appeals as of right. We affirm.

The first issue on appeal is whether defendant was denied a fair trial when the trial court refused the jury's request that the court read back portions of a witness' testimony. Although we agree that the court's refusal constituted error, it was harmless. MCLA 769.26; MSA 28.1096; *People v Mateo*, 453 Mich 203, 206-207, 214-215, 221; 551 NW2d 891 (1996).

After the jury began deliberating, the foreman sent the trial court a note requesting the transcript of the testimony of the Fire Marshall, who testified for the prosecution that the fire started in the camera room of defendant's business and was caused by the ignition of flammable liquid that was poured on the floor.[1] The trial court declined the foreman's request. In so doing, the trial court stated "Ladies and gentlemen, we do not make copies of the testimony as it's being transcribed. It takes a very long time to make a copy of the testimony. It's not prepared. All right. You may resume your deliberations." The trial court made no other comments in this regard, nor were there any other requests from the jury.

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

In considering such a request, a trial court has discretion in determining whether to read the testimony. MCR 6.414(H). Such requests should normally be granted absent unusual circumstances. *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974). A trial court abuses its discretion when it denies a request to rehear testimony and forecloses the possibility that the jury's request will be subsequently granted. *Id.; People v Robbins*, 132 Mich App 616, 620-621; 347 NW2d 765 (1984).

A trial court does not foreclose the possibility that the jury's request will later be granted where the court, after denying the request, also informs the jury that its request would again be reviewed if the jury members continue to find it necessary to rehear the testimony. *Robbins, supra*. On the other hand, where the trial court denies the request without telling the jury that its request would be reconsidered at a later time, this Court has found an abuse of discretion. *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976); *Howe, supra* at 677; *People v Bloom*, 76 Mich App 405, 406-409; 257 NW2d 105 (1977).

In light of the foregoing, we find that the trial court precluded the possibility that the jury's request would later be considered when it unconditionally declined the jury's request. See MCR 6.414(H). The trial court refused to read the Fire Marshall's testimony and did not request that the jury continue deliberating without hearing the testimony. Accordingly, the trial court abused its discretion in denying the jury's request to review trial testimony.

Although we find that the trial court erred, we further find that such error was harmless in light of the overwhelming evidence against defendant and the fact that jury wanted to reexamine the Fire Marshall's testimony, which indicated that the fire was deliberately set. Although the Michigan Supreme Court in *Howe, supra* at 678, concluded that the error in refusing to give the jury the trial testimony it requested was not harmless error "beyond a reasonable doubt," our Supreme Court has recently observed that for preserved, nonconstitutional error, the "beyond a reasonable doubt" standard is inapplicable. *Mateo, supra* at 206. Rather, where a preserved, nonconstitutional error exists, such as in the exclusion of evidence, we must examine the record as a whole and the actual prejudicial effect of the error on the fact finder, considering the likely effect of the error in light of the other evidence. *Id.* at 206-207, 214-215. "Simply stated, and employed in both federal rule and case law and state statute and court rule, reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id.* at 215 (citations omitted).

Here, although defendant did not object to the court's refusal to reread the Fire Marshall's testimony to the jury**,** the issue is nevertheless preserved because the trial court effectively bypassed the adversary function of defendant's counsel by rejecting the request as soon as it received the request. *Howe, supra* at 678. Given that the error complained of does not involve a constitutional right,[2] such as the right to testify on one's own behalf at a criminal trial,[3] we believe that the weight and strength of the evidence requires us to concluded that this error was harmless. *Mateo, supra* at 214-215. Indeed, defendant can show no prejudice resulting from the court's refusal to reread the Fire Marshall's inculpatory testimony to the jury. In light of the other inculpatory testimony presented at trial, the jury's inability to review the Fire Marshall's testimony did not prejudice defendant. Thus, the error was harmless. *Mateo, supra*.

Next, defendant challenges this Court's previous decision reversing the district court's decision to not bind over defendant. Under the law of the case doctrine, however, this Court may not reexamine its initial ruling issued pursuant to defendant's first appeal[4] with respect to the decision to bind over defendant. *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). Here, the facts of this appeal are identical to the first appeal and involve the same parties. *Id.* Defendant's sole redress of the initial decision was an application for rehearing or a successful appeal to the Michigan Supreme Court. *People v Russell*, 149 Mich App 110, 115; 502 NW2d 613 (1985). Thus, we will not review this issue for the second time on appeal.

Third, upon reviewing the evidence in a light most favorable to the prosecution, we believe that a rational trier of fact could have found that the essential elements of the arson offense with which defendant was charged were proven beyond a reasonable doubt.[5][6] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Defendant correctly argues that where the facts only establish the burning, without more, a presumption arises that the fire was set accidentally. *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982). Nevertheless, the prosecution provided several witnesses who testified that defendant's property was burned and the burning resulted from an intentional criminal act, i.e., someone started the fire in the camera room by igniting an accelerant that was poured onto the floor. *Id.* Accordingly, the trial court properly denied defendant's motion for a directed verdict based upon the sufficiency of the evidence. *Jolly, supra*.

We further find that the trial court did not err in denying defendant's motion for a new trial because the great weight of the evidence supported the verdict. When reviewing the denial of a new trial motion, we must decide whether the court abused its discretion in determining that the overwhelming weight of the evidence favored the prevailing party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). We give substantial deference to the court's finding that the verdict was not against the great weight of the evidence. *Id.* Upon reviewing the evidence, we find that defendant's evidence merely presented a plausible theory that the fire started in the furnace, but the prosecution also presented evidence supporting the theory that the fire was intentionally set in the camera room. Indeed, an unbiased person reviewing the evidence would likely conclude that the trial court had sufficient justification for determining that the great weight of the evidence supported the verdict. See, generally, *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Finally, in the absence of "cumulative error," we find that defendant is not entitled to a new trial on this basis. Cf. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] The Fire Marshall also testified that he ruled out electrical problems, furnace problems and other accidental causes before concluding that the fire was deliberately set.

[2] Although our Supreme Court in *Howe*, *supra* at 678, determined that the error in that case was not harmless "beyond a reasonable doubt," which is the standard applied when reviewing constitutional errors, *People v Solomon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 181158, issued December 20, 1996), slip op at 4-6, the Supreme Court in *Howe* did not affirmatively state that the error in that case was a constitutional error. See also *Smith*, *supra* at 111, where our Supreme Court again stated that it could not consider this error to be harmless without discussing its rationale. Nevertheless, we will not extrapolate from our Supreme Court's use of the "beyond reasonable doubt" language to the conclusion that refusing to honor the jury's request for a review of trial testimony is a constitutional error.

[3] *People v Solomon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 181158, issued December 20, 1996), slip op at 3.

[4] See *People v Flath*, Docket No. 142661, order entered September 18, 1991.

[5] While defendant acknowledged that he was convicted of both arson of real property and attempted false pretenses over $100, none of defendant's arguments address the second charge. This is also true for the fourth issue. Because defendant did not raise arguments with respect to this charge, we will only review the evidence and the trial court's rulings regarding the arson offense.