# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD RICHARD COWDEN,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 194677
Kalamazoo Circuit Court
LC No. E94-0779FH

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Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of arson of a dwelling house, MCL 750.72; MSA 28.267. On March 13, 1996, defendant was sentenced to two to twenty years' imprisonment with ten days' credit for time served. Defendant was also ordered to pay restitution in the amount of $17,572. Defendant appeals his conviction as of right. We affirm.

I.

Defendant first claims on appeal that the trial court erred when it failed to direct a verdict of acquittal. When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). If evidence is insufficient to support a conviction, the trial court must direct a verdict of acquittal. MCR 6.419(A); *People v Vincent*, 215 Mich App 458, 469-470; 546 NW2d 662 (1996). This Court applies the same standard on review of a ruling on such a motion. *People v Daniels*, 192 Mich App 658, 665; 482 NW 176 (1992). Defendant was charged with arson of a dwelling house with regard to the fire that occurred in the victim's bathroom. MCL 750.72; MSA 28.267 provides:

> Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be

> guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years.

Therefore, the prosecutor must have established that defendant started the fire in the bathroom and that he did so "willfully or maliciously."

The victim resided on the first floor of a two-story building located at 615 Davis Street in Kalamazoo. The victim became acquainted with defendant about a year before the incident, when defendant moved into a house with the victim's friends Gloria and Garret Bolhuis and Karen Morris. Defendant's residence was only about two blocks from the victim's apartment. The victim testified that on the evening of June 19, 1994, he and defendant sat on the side porch of the victim's apartment, which was just outside of the only door into the apartment, drinking a twelve-pack of beer and smoking cigarettes. Two fires occurred at the victim's apartment that evening. The first fire was discovered at about 9:20 p.m. in a back room of the detached garage. The fire department responded and put out the fire. Defendant was not charged in connection with that fire.

The victim testified that later that evening, they were back on the porch and defendant told him that he was going to use the bathroom, and he went into the victim's apartment. The victim stated that when defendant came back out of the victim's apartment, defendant proposed that they go over to his house. The victim first said "no," but then said that he might go after he went to the bathroom. The victim testified that defendant's demeanor changed when he told defendant that he was not going to leave with him immediately. The victim went into his apartment to go to the bathroom and found smoke pouring out of the bathroom into the living room/bedroom area; his smoke detector also started to sound. The victim testified that he ran back outside, but defendant was gone. There was also testimony from the victim that he kept a can of Zippo lighter fluid, which he used for refilling his cigarette lighter, on the dresser just outside the bathroom door.

Jamey Swift, who resided in the apartment adjacent to the victim's, testified that she saw the victim and defendant on the victim's porch drinking beer after the first fire was over. Swift testified that she saw the victim and defendant arguing just before defendant went into the victim's apartment and then left. She could tell that they were arguing because they were yelling and cussing at each other, but she did not know what they were arguing about. Swift heard defendant say, "F--- it then. If you're gonna be like that I'm gonna take a piss and I'm goin' home," and then she saw him get up and go into the victim's apartment. Three or four minutes later, Swift saw defendant walk away down Davis Street toward Lovell mumbling to himself under his breath. No more than five minutes after defendant left, the victim alerted her that there was a fire in his apartment.

Deputy Fire Marshal Meyers was unable to pinpoint the exact location where the fire began, nor could he determine how the fire was started. However, Meyers ruled out all of the major accidental causes such as ignition through spontaneous combustion, the electrical/wiring, or a heat source (e.g., furnace or space heater). Meyers also considered whether the fire was started by the accidental dropping of a lit cigarette onto the floor or into the trash can. Meyers did not believe that the fire was caused by the accidental dropping of a cigarette on the floor because there was no evidence of an

extended period of smoldering that is generally present when a cigarette is dropped and causes a fire. Nor did he believe that the fire started in the garbage can because it was melted primarily on one side, which indicated that it was exposed to heat and melted toward the fire. Although the garbage can was heavily sooted and partially melted, the contents were not burned. In addition, no cigarette butts were found in the trash can.

Based on the lack of deep charring, Meyers believed that the fire had a relatively quick start. Meyers stated that several things can cause a quick fire, such as a flammable liquid. Meyers believed that there was a strong possibility that some of the Zippo lighter fluid was sprayed in the bathroom and ignited by an outside source (e.g., matches or a cigarette lighter), because the fire spread over the entire bathroom relatively quickly, rather than starting in one spot and slowly moving up the walls. No residue from a flammable liquid was found in the bathroom floor; however, Meyers stated that the use of a flammable liquid may not have been readily detectable due to the amount of debris that was on the floor. Meyers also testified that the lighter fluid was a light liquid that may not leave a residue, or may have been totally destroyed by the fire.

The evidence in this case concerning how defendant set the fire was circumstantial. However, viewing the evidence in the light most favorable to the prosecution, the trier of fact could have reasonably inferred that defendant sprayed lighter fluid into the bathroom and then ignited it with a match or cigarette lighter. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *Jolly, supra*.

With regard to the requirement that defendant acted "willfully or maliciously," Swift saw the victim and defendant arguing just before defendant went in to use the bathroom and left. Swift could tell that they were arguing because they were yelling and cussing at each other, but she did not know what they were arguing about. Viewing the evidence in the light most favorable to the prosecutor, the trier of fact could have inferred defendant's willful or malicious intent from Swift's testimony that defendant had an argument with the victim. Although the victim gave inconsistent testimony, questions of the credibility of the witnesses are for the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence illustrating that an actor possessed the requisite intent is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Therefore, the trial court did not err in denying defendant's motion for a directed verdict of acquittal.

Defendant also claims on appeal that there was insufficient evidence to support his conviction. The standard for sufficiency of the evidence is the same as that for review of a directed verdict. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996), lv gtd 454 Mich 877 (1997). While this Court considers only the evidence presented in the prosecution's case-in-chief in reviewing the denial of defendant's motion for a directed verdict, sufficiency of the evidence looks at all of the evidence presented at trial to determine whether the prosecution established the essential

elements of the crime beyond a reasonable doubt. However, because this Court concluded that there was sufficient evidence of defendant's guilt at the close of the prosecution's case, there must also have been sufficient evidence at the end of the trial.

Moreover, although defendant denied starting the fire, his testimony strengthened the prosecution's case in many respects. Defendant testified that he was drinking beer and smoking with the victim out on the victim's porch. Defendant testified that an argument developed between himself and the victim over the victim's ex-girlfriend, Karen Morris. Defendant stated that when the victim got drunk, he frequently accused defendant of having an affair with Morris because she and defendant lived in the same house. Defendant admitted that he told the victim that he was tired of hearing it, and he was going to go home. Defendant further admitted that he went into the victim's apartment to use the bathroom a few minutes before he left. Therefore, defendant's own testimony confirmed that the two men had an argument, and that defendant went in to use the victim's bathroom just before he left.

II

Defendant claims on appeal that People's Exhibit 1, the can of Zippo lighter fluid, should not have been admitted by the trial court because it was not relevant, and even if it was relevant, the probative value was substantially outweighed by the danger of unfair prejudice. Defense counsel did not object to the admission of the exhibit when it was initially introduced by the prosecution. Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, defense counsel later moved to strike the exhibit on the ground that the evidence was not relevant because the prosecutor failed to establish any connection between the lighter fluid and the fire. The trial court found that the evidence was relevant and denied defendant's motion. The purpose of the appellate preservation requirement is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. *Id*. at 551. Although defense counsel did not object to the exhibit's initial admission, an objection was ultimately raised and addressed by the court; therefore, the issue is adequately preserved for appeal.

Generally, all relevant evidence is admissible. MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *VanderVliet*, *supra* at 60. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). The can of lighter fluid was relevant to how defendant may have started the fire. As discussed above, Deputy Fire Marshal Meyers believed that there was a strong possibility that that some of the lighter fluid could have been sprayed in the bathroom and ignited by an outside source. Officer Apelgren testified that there were no fingerprints on the can of lighter fluid, but stated that they could have been destroyed by heat, by the formation of water vapor, or if the can was sprayed by water in the fire-fighting process. In addition, the evidence showed that defendant had access to and the opportunity to use the lighter fluid.

Furthermore, the probative value of the evidence was not outweighed by the danger of unfair prejudice. Although the suggestion that the fire was started with the lighter fluid is damaging to defendant because he was alone in the victim's apartment, where he had access to the lighter fluid just before the fire was discovered, "unfair prejudice" does not mean "damaging." *Mills*, *supra*. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists where there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. at 75-76. There is no indication that the jury gave the lighter fluid preemptive weight or that it was inequitable to allow the evidence. The trial court did not abuse its discretion in admitting the evidence. See *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh