

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN ALLEN COOK,

Defendant-Appellant.

UNPUBLISHED

July 31, 1998

No. 193488

Ionia Circuit Court

LC No. 95-010405 FH

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of malicious destruction of property over \$100, MCL 750.377a; MSA 28.609(1). Defendant was sentenced to four years' probation, the first nine months of which were to be served in the county jail.¹ We affirm.

Defendant was a truck driver for Eldridge Trucking, a company based in Ionia County, pursuant to an arrangement whereby defendant's employer, Driver Resources Incorporated, a company also based in Ionia County, leased defendant's services to Eldridge Trucking. On Tuesday, July 11, 1994, defendant left on a trucking run from Michigan to Arizona. Defendant arrived in Arizona on Friday, July 14, and was then dispatched to pick up a load of produce in California. Defendant arrived in California on Saturday, July 15, picked up the produce, and began his return run to Michigan, where he was due to arrive approximately on the night of Tuesday, July 18.

At approximately 2:00 a.m., Sunday morning, July 16, defendant arrived in Reno, Nevada, where he pulled off the interstate, stopped at a truck stop, "hung around," and then went to bed. When defendant awoke the next morning, he filled the truck's "reefer tank,"² got back on the interstate, and drove one mile west to a truck stop called Sierra Sids in Sparks, Nevada. Defendant parked the truck in a fenced, secured parking lot at Sierra Sids and then checked into a nearby motel where he stayed the rest of the week.

On the morning of Monday, July 17, John Eldridge, the owner of Eldridge Trucking, listened to a message from defendant on the company's telephone answering machine indicating that defendant was

in Reno, Nevada, and that defendant would call “Monday afternoon when he got up.” However, defendant did not thereafter call Eldridge Trucking.

Eldridge did not locate the truck until Friday, July 21. On Saturday, July 22, Phillip Hewitt, the president of Drivers Resources, flew to Nevada for the purpose of driving the truck to Michigan. Hewitt arrived in Michigan on Monday, July 24. Because the produce was not delivered by the previous Tuesday night deadline, it was properly rejected by the original wholesaler who had contracted to purchase the produce and who would have paid Eldridge Trucking’s freight charges. Hewitt thus took the produce to another wholesaler who purchased that part of the produce that was salvageable. The produce that was not salvageable was dumped.

On appeal, defendant contends that the Ionia Circuit Court improperly exercised extraterritorial jurisdiction in this case where all of the acts that constituted the basis for the charge of malicious destruction of property over \$100 occurred in Nevada.³

We review de novo the circuit court’s assumption of jurisdiction. *People v Blume*, 443 Mich 476, 487, n 17; 505 NW2d 843 (1993). The general rule is that jurisdiction is proper only over offenses that are committed in Michigan. *Id.* at 480. However, an exception to the general rule has developed whereby extraterritorial jurisdiction may be exercised over acts that occur outside Michigan if the prosecution presents evidence sufficient to permit the court to conclude that the actor intended a detrimental effect to occur in Michigan. *Id.* at 477-478, 480, 486-487. In addition, the acts must actually have a detrimental effect in Michigan. *Id.* Regardless of when jurisdiction is challenged, this test must be met. *Id.* at 481, n 9. The two key elements of the first requirement are “specific intent to act and the intent that the crime occur in Michigan.” *Id.* at 480-481, 487, n 16. The proper analysis for this Court is to first determine whether the charged crime can be established by the evidence. *Id.* at 481. Then, this Court must determine whether the charged crime was intended to occur in Michigan. *Id.* at 481, 486. The exercise of jurisdiction over an actor who commits a crime outside Michigan is improper when Michigan cannot establish that the actor intended the crime to occur in this state. *Id.* at 487.

The statutory crime of malicious destruction of property over \$100 requires proof that (1) personal property of another was either destroyed or injured; (2) the damage resulting from such injury exceeded \$100, and; (3) the defendant specifically intended either to injure or destroy the property or to injure the owner of the property. MCL 750.377a; MSA 28.609(1); *People v Ewing*, 127 Mich App 582, 585; 339 NW2d 228 (1983); *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981). Specific intent is defined as either subjective desire or knowledge that the prohibited result will occur. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).⁴ Because of the difficulty in proving a defendant’s state of mind, intent may be proven by circumstantial evidence. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997).

In this case, there is little dispute that the produce, while in transit from California to Michigan, was the property of John Eldridge. There is likewise little dispute that the produce suffered actual damage in excess of \$100. Thus, the critical questions on appeal are whether defendant specifically intended to injure or destroy the produce and whether defendant intended to produce this detrimental

effect in Michigan. See *Blume, supra* at 486. With respect to the question of defendant's intent, we note that the record provided to this Court does not contain certain prosecutorial exhibits admitted into evidence at trial, specifically two tape recordings

played for the jury, or the transcripts thereof, of certain statements made by defendant to John Eldridge and a police officer concerning defendant's abandonment of the truck and trailer. As indicated by the prosecutor's closing arguments, defendant's taped statements were indicative of and, therefore, relevant to the dispositive issue now under consideration.⁵ The court rules provide that on an appeal to this Court the "record" includes any exhibits that were introduced. MCR 7.210(A)(1). This Court has further stated that the appellant, here defendant, bears the burden of providing this Court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). However, the court rules also provide that once a claim of appeal is filed, the party possessing any exhibits offered into evidence, here apparently the prosecution, must file them with the trial court absent a stipulation or order to the contrary. MCR 7.210(C). Thus, a preliminary question arises concerning whether the absence of the tape recordings from the record on appeal constitutes a waiver by defendant of the issue of the circuit court's exercise of extraterritorial jurisdiction over defendant. However, we conclude that we need not address this issue because our review of even the incomplete record presented to this Court discloses evidence sufficient to permit this Court to conclude that defendant specifically intended to damage or destroy the produce and that defendant intended this detrimental effect to occur in Michigan. *Id.* at 486-487.

At trial, defendant testified that he abruptly quit his job because he had "simply had enough." Defendant testified that he decided to leave the truck in a secured parking lot because he liked John and Ed Eldridge. Defendant testified that he filled the reefer tank to make sure that the load would not spoil. Defendant testified that he had believed the truck would be located by Eldridge Trucking by at least Tuesday morning because he thought he had paid for the reefer tank fuel with a "CCIS" check. The evidence indicated that a CCIS check is a means of providing expense money to truck drivers and that the location of where a driver cashes a CCIS check can be traced. Defendant testified that he "never intended to hurt the truck, the load, Mr. Eldridge, anybody in any way."

However, the evidence also established that defendant actually paid for the reefer tank fuel with cash, which could not be traced. The evidence established that except for the message left with Eldridge Trucking defendant made no other effort to inform either Eldridge Trucking or Drivers Resources of his whereabouts. The evidence indicated that after parking the truck at Sierra Sids defendant did not thereafter check on the truck. The evidence indicated that defendant quit his job because he was angry with Phillip Hewitt and decided that he was "not going to take it anymore."

Further, the evidence indicated that in hauling produce "time is of the essence" because the shelf life of any produce is "not that long." The evidence indicated that the normal delivery time for loads of perishable produce in transit from California to Michigan was seventy-two hours. The evidence indicated that defendant was experienced in hauling loads of perishable produce for Eldridge Trucking. Defendant agreed that a load of produce may perish if it is not delivered within a reasonable time and that seventy-two hours was a reasonable time. The evidence indicated when the produce at issue in this case finally arrived in Michigan it was considered a "distressed load," part of which was unsalvageable because it had been "just too long in transit."

In light of the evidence concerning the perishable nature of produce if not delivered in a timely manner and the evidence of the delay engendered by defendant when he abandoned the truck and trailer and did not disclose his whereabouts, we conclude that there was a showing sufficient to permit this Court to conclude that defendant intended to produce a detrimental effect in Michigan, i.e., that defendant intended the produce to arrive in Michigan in a spoiled condition. *Blume, supra* at 486. Moreover, we further conclude that there was a showing sufficient to permit this Court to conclude that defendant's acts actually had a detrimental effect in Michigan. *Id.* at 480. Accordingly, we conclude that the evidence was sufficient to support exercising extraterritorial jurisdiction over defendant.

Defendant also argues that the trial court's instructions did not require the jury to find that defendant intended the harm to occur in Michigan. However, defendant did not request such an instruction below or object to the instructions as given. Thus, we review only for manifest injustice. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). We find no manifest injustice. First, we note that defendant has cited no authority indicating that the question of extraterritorial jurisdiction is a question for the jury. In *Blume, supra* at 487, our Supreme Court indicated that the question was whether evidence sufficient to support exercising extraterritorial jurisdiction over the defendant was presented. In this case, we have already concluded that such evidence was presented during trial. Second, even assuming that the question of extraterritorial jurisdiction is a question for the jury,⁶ we conclude that the omission of such an instruction did not result in manifest injustice because the jury instructions as a whole adequately covered the substance of the omitted instruction.⁷ *Messenger, supra*.

Next, defendant contends that he was denied effective assistance of counsel because his trial attorney did not introduce psychological evidence that he was suffering from "post-traumatic stress disorder" at the time of the offense. Because defendant did not raise this issue in a motion for new trial, or request a *Ginther*⁸ hearing, appellate review is foreclosed unless the record contains sufficient detail to support defendant's claim.⁹ *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Counsel's failure to call witnesses is presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). To establish ineffective assistance of counsel, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, defendant has not met this burden. It is not apparent from the record that defense counsel's failure to present the alleged psychological evidence constituted unsound strategy. Accordingly, ineffective assistance of counsel has not been established.

Affirmed.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski

¹ Defendant's judgment of sentence and order of probation provided that defendant's jail sentence would be suspended if defendant successfully completed the terms of his probation.

² The “reefer tank” is a separate fuel tank that holds the fuel for the trailer’s refrigeration unit.

³ During his preliminary examination, defendant raised this issue before the district court. The district court denied defendant’s motion to dismiss. On appeal, defendant does not take issue with the district court’s ruling.

With respect to proceedings in the circuit court, we note that the record in this case indicates that on December 4, 1995, defendant filed in circuit court a motion to dismiss based on the improper exercise of extraterritorial jurisdiction. The record further indicates that a hearing on this motion was set for December 11, 1995. However, the record does not indicate whether the hearing was in fact held and, if so, the result of such hearing. Moreover, the transcript of Defendant’s December 12, 1995, jury trial reveals that defendant did not raise this issue before the circuit court during his trial. However, we assume without deciding that defendant did not need to take any specific action before the circuit court in order to preserve this issue for review.

⁴ “Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.” LaFave & Scott, *Criminal Law* (2d ed), § 3.5, p 216.

⁵ The transcript of defendant’s jury trial simply indicates that the tape recordings were played for the jury.

⁶ See *Blume, supra* at 498, n 7 (Boyle, J., with Riley and Mallett, JJ., dissenting).

⁷ Specifically, the trial court instructed the jury that it must find that “defendant intended to destroy or damage the property of John Eldridge.”

⁸ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁹ This Court denied defendant’s motion to remand on this issue “for failure to submit affidavits or reports from the two psychologists and for failure to cite any legal authority that being ‘stressed out and burned out’ is a legal defense to malicious destruction of property.”