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S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PARIS NICOLE SMITH,

Defendant-Appellant.

UNPUBLISHED
February 18, 2021

No. 351615
Wayne Circuit Court
LC No. 12-000894-01-FC

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

Defendant pleaded guilty to larceny over $1,000 and less than $20,000, MCL 750.356(3)(a), and stealing—financial transaction, MCL 750.157(n)(1), and was found guilty following a bench trial of attempted murder, MCL 750.91, and arson—preparation to burn property $20,000 or more, MCL 750.77(1)(d)(*i*). She was sentenced to concurrent prison terms of three to five years on the larceny conviction, two to six years on the stealing conviction, 6½ to 10 years on the arson conviction, and 18 to 40 years on the attempted murder conviction. Her convictions and sentences were affirmed. *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 312481). She now appeals by delayed leave granted[1] from an opinion and order denying her motion for relief from judgment. We reverse defendant's arson conviction and otherwise affirm.

I. PERTINENT FACTS

On January 6, 2011, defendant, who had been stealing money from her great-grandparents, Nancy and Harvard (Harvey) Gardner, was at their home after they had discovered that money was missing from a bank account. With their daughter, Sheila Black Miller, the Gardners were shredding financial documents that had been laying around the house. Miller left the home about 8:00 or 9:00 p.m., and defendant left about 10:00 p.m. Nancy walked defendant to the front door,

[1] *People v Smith*, unpublished order of the Court of Appeals, entered March 19, 2020 (Docket No. 351615).

and locked that door and the back door. She did not realize that her keys, which she had left on her bed, were missing. Nancy woke up at about 5:00 a.m. on January 7, 2011, because of a strange smell. She got up and saw that her keys were in the back door, which was open, that the light was on at the landing by the back door, and that there was fluid on the kitchen floor. She called for Harvey, at which point someone ran up the basement steps, reached up and turned out the light, and ran out the door. Nancy did not get a good look at the person, who was about the same height as defendant. Nancy tried to call the police from the house telephone, and later learned that the wall telephone in the basement had been taken off the hook. She used her cell phone to call the police and Miller.

The responding officer noted a very strong odor of accelerants, which appeared to be lighter fluid. The kitchen floor was drenched with fluid, and a chair by the front door and the front door were saturated. By the back door, there was a lighter fluid-filled bottle with a paper wick shoved into the top. A similar bottle was discovered halfway down the stairs. There was lighter fluid on the stairs, and the whole basement was saturated in lighter fluid. A mat at the bottom of the stairs was smoldering.

Defendant, who appeared at the home about an hour after the responding officer's arrival, was taken to the police station to be interviewed. She allowed the officer to look at her cell phone, which had pictures of the Gardners' driver's licenses, bank statements, and social security cards, as well as pictures of Miller's driver's license and credit card information. Those pictures were taken the same day that about $1,400 was stolen from Miller's account.

Sometime later, a warrant was obtained to arrest defendant, and it was leaked to the media. Defendant was watching TV when she learned of the warrant. She fled to Canada. She was extradited back to Michigan.

II. RELIEF FROM JUDGMENT

Because this is defendant's first motion for relief from judgment, she "has the burden of establishing entitlement to the relief requested." MCR 6.508(D). The motion cannot be granted if it "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence" unless defendant demonstrates actual prejudice and good cause for having failed to raise the issue previously. MCR 6.508(D)(3)(a)-(b). Here, all of the issues raised on appeal could have been raised on direct appeal, and thus, even if meritorious, defendant must establish good cause. MCR 6.508(D)(3)(a). Good cause may be established by showing that appellate counsel was ineffective for failing to raise the issue or issues on direct appeal. *People v Swain*, 288 Mich App 609, 631; 794 NW2d 92 (2010).

III. ARSON—MCL 750.77(1)(d)(*i*)

Defendant first argues that there was insufficient evidence to support her conviction of arson of property valued at $20,000 or more because there was no evidence of the value of the house.

When reviewing an argument of insufficient evidence, this Court reviews the record de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). 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 Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

MCL 750.77(1)(d)(*i*),[2] at the time of defendant's conviction, provided in pertinent part:

> (1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building or property . . . with intent to willfully and maliciously set fire to or burn the building or property or who aids, counsels, induces, persuades, or procures another to do so is guilty of a crime as follows:
>
> * * *
>
> (d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00 or 3 times the combined value of the property intended to be burned, whichever is greater, or both imprisonment and a fine:
>
> (*i*) The property is personal or real property, or both, with a combined value of $20,000.00 or more.

"It is well settled that criminal statutes are to be strictly construed, absent a legislative statement to the contrary." *People v Boscaglia*, 419 Mich 556, 563; 357 NW2d 648 (1984). Each word must be "interpreted according to its ordinary usage and common meaning." *People v McCullough*, 221 Mich App 253, 255; 561 NW2d 114 (1997), citing *People v Gilbert*, 414 Mich 191, 210-213; 324 NW2d 834 (1982).

At the bench trial, the court read the elements of the crime into the record. However, while stating its findings regarding the arson charge, the trial court made no mention of the value of the property. The record shows, and all parties agree, that there was no evidence presented on the value of the property. However, in denying defendant's motion for relief from judgment, the trial court held that it was "reasonable for a trial court to infer that a habitable home in Wayne County was worth at least $20,000." The trial court relied, in part, on *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003), for the proposition that a court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." While that proposition correctly states the law, in *Hill* the Court noted that there was no evidence presented concerning the value of the property at issue, a Citgo gas station, and rejected the prosecutor's argument that the value could be inferred as it "was clearly over $20,000." *Id.* at 142. This Court agreed "that in all likelihood such was the case," but stated that "our agreement would be mere speculation," stating:

> The value of the threatened property was an element of the crime charged, yet there was no evidence of value or even a reference to value, which could have been

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[2] Now, MCL 750.79(1)(d)(*i*) (Amended by 2014 PA 111; effective July 9, 2014).

> established easily through testimony, real-estate or tax documents, or by stipulation. The prosecutor is required to prove each and every element of the crime beyond a reasonable doubt. *People v Eason*, 435 Mich 228, 233, 238; 458 NW2d 17 (1990). [*Hill*, 257 Mich App at 142.]

The Court held that, because there was no proof of value presented by the prosecutor, the conviction had to be reversed. *Id*. at 143.

"While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption." *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985). See also *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). "It is also well established in Michigan that a judge in a bench trial must arrive at his or her decision based upon the evidence in the case. The judge may not go outside the record in determining guilt." *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). While a fact-finder "may and should use their own common sense and everyday experience in evaluating evidence," a judge may not rely on his or her own specialized knowledge in finding a defendant guilty. *Id*. at 567.

The prosecutor relies on *People v Toodle*, 155 Mich App 539, 553; 400 NW2d 670 (1986), for the proposition that the value could be inferred. In *Toodle*, the defendant was convicted of receiving and concealing stolen property over the value of $100. *Id*. at 550. The stolen goods were the seats, wheels, tires, roof, and glass top of a stolen Corvette. *Id*. at 553. A police officer had specifically seen the defendant loosen all four tires and carry one tire into the house. *Id*. at 541. At trial, it was stipulated that the owner of the stolen Corvette had just bought it for $21,000. *Id*. at 553. This Court held that "the fact that the defendant was seen carrying only one tire back to the house after he and his four friends had gone to the vehicle that had been moved from the driveway into the alley does not preclude him from being guilty as an aider or abettor for receiving and concealing all the stolen parts." *Id*. at 552-553.

The prosecutor argues, based on *Toodle*, that it was "reasonable for the trial court to infer that a habitable home in Wayne County was worth at least $20,000, especially when defendant never contested that fact." However, *Toodle* is distinguishable because there was evidence on the record in *Toodle* concerning the value of the total property and the police officer's testimony to allow the court to "draw reasonable inferences from facts of record." *Petrella*, 424 Mich at 275. The trial court was required to rely on *evidence* presented in order to make any inferences. Here, there was absolutely no evidence concerning the value of the property. Therefore, there was no evidence from which to infer any value. Accordingly, there was not sufficient evidence to support a conviction under MCL 750.77(1)(d)(*i*).

Where there is insufficient evidence to prove that a defendant is guilty, acquittal is the proper remedy. *People v Mitchell*, 301 Mich App 282, 294; 835 NW2d 615 (2013); *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010) ("The lack of such proof [of an element of the crime] invalidates the conviction. Acquittal, not retrial, is the proper remedy, as dictated by double jeopardy principles."); *People v Thompson*, 424 Mich 118, 130; 379 NW2d 49 (1985).

IV. ATTEMPTED MURDER—MCL 750.91

Defendant also contends that the evidence was not sufficient to support a conviction of attempted murder, MCL 750.91. She contends that the evidence only showed that she was arranging to burn the home, and that there was no evidence to support a finding that she attempted to murder her great-grandparents. We disagree.

The elements of attempted murder are (1) an attempt to commit the crime of murder, (2) by any means not constituting the crime of assault with intent to murder, and (3) the defendant intended to bring about a death. *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). A defendant's intent may be inferred from his acts, *People v Love*, 127 Mich App 596, 605-606; 339 NW2d 493 (1983), rev'd on other grounds, 425 Mich 691 (1986), and "generally may be inferred from the facts and circumstances of a case," *People v Jor*y, 443 Mich 403, 419; 505 NW2d 228 (1993).

Defendant entered her great-grandparents' home while they were sleeping and dispersed lighter fluid all over the basement and upstairs floors, over some of the furniture, and at both exits from the house. She also placed lighter fluid-filled bottle bombs by the back door and halfway down the basement stairs. She apparently attempted to ignite the mat at the bottom of the stairs. Had the fire been allowed to spread, the Gardners likely would not have been able to escape. The land line telephone had been taken off the hook, complicating the ability to call for help. The saturation of the home with lighter fluid and the smoldering mat established "an act in furtherance of the alleged crime" because they indicated that there were "direct movement[s] toward commission of the crime." *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002). The evidence was sufficient to establish beyond a reasonable doubt that defendant intended to murder. If Nancy had not smelled the lighter fluid, had not awakened and gone into the kitchen, and had not started to call for her husband, defendant presumably would have finished igniting the fluid and likely murdered the Gardners. Accordingly, the evidence was sufficient to support a conviction of attempted murder.

V. JURY INSTRUCTIONS

We also reject defendant's argument that she was denied a fair trial because the trial court relied on the jury instruction for murder to reach its verdict that she was guilty of attempted murder.

"There are three elements to an attempt: (1) intent to commit a crime, (2) an overt act necessary to the commission of the crime, and (3) failure to consummate the crime." *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986). A defendant's intent may be inferred from his acts. *Id*. "A conviction of attempted murder requires a showing that the defendant intended to bring about a death." *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996), citing *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989).

While reciting the elements of attempted murder, the trial court stated that, with regard to intent, the prosecutor had to prove that "the defendant intended to commit the crime Murder, which was deliberate and premeditated," or "*to do Great Bodily Harm to* Nancy Gardner or Harvey Gardner," or "that she knowingly *created a high risk, very high risk of death or great bodily harm*, knowing that the death or such harm would be the likely result of her actions while committing the crime of Arson." (Emphasis added.) However, under MCL 750.91, a conviction must rest on

proof of intent to murder. The parties and the trial court agree that the trial judge stated an erroneous instruction. However, when the judge made findings, she stated, in pertinent part:

> Here I find that the fact that the lighter fluid was dosed near both entrances to the house, and it would have prevent[ed] Harvard and Nancy Gardner from escaping from the fire, had the arsonist been successful in setting the fire, *shows an intent to murder. A deliberate intent to murder, in that the arson was planned, had to have been planned ahead of time.*
>
> But the actions were obviously taken to commit murder. But the crime was not completed because Nancy Gardner smelled the lighter fluid and foiled the crime. [Emphasis added.]

In denying relief from judgment, the judge noted that she had previously "specified that Defendant underwent specific actions in furtherance of committing attempted murder to show the intent for arson." The judge concluded:

> Therefore, while the Judge stated the incorrect jury instruction on the record, her findings were based on the Defendant's intent rather than reckless or negligent behavior. Therefore, this error is harmless as it did not have any impact on the verdict.

We agree with the trial court's conclusion. If the court had sent the jury out for deliberations under this instruction, this would likely have resulted in an improper conviction. However, this was a bench trial, and when the court stated its findings it found a specific "intent to murder. A deliberate intent to murder in that the arson was planned, had to have been planned ahead of time." Therefore, the error was harmless, because it did not result in a conviction based on the error.

VI. OFFENSE VARIABLES

Next, defendant contends that 10 points were erroneously assigned for Offense Variable (OV) 3, and 50 points were erroneously assigned for OV 6. We conclude that neither was erroneously scored.

MCL 777.33 provides, in pertinent part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (d) Bodily injury requiring medical treatment occurred to a victim ....10 points

Defendant argues that 10 points should not have been assigned because the prosecutor failed to offer any medical records or testimony from Harvey to support the claim that he received medical care and treatment as a direct result of defendant's arson activities. However, MCL 777.33

does not state that medical records are required to support a score, *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007) (the Court stated that MCL 777.33(1)(c) "does not require the prosecution to specifically present medical testimony to prove a '[l]ife threatening or permanent incapacitation injury . . . .' "), and defendant has not supported her argument with any case or statutory law, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). It follows that medical records would also not be required in this instance so long as a basis for the score could be established.

Here, Harvey was incapacitated by illness and unable to come to court to testify on his own behalf. However, there was testimony from his daughter describing how he had been overcome by the smoke and fumes in the house and had been taken to the hospital, where they kept him for a period of two or three days for treatment. Given this evidence, the trial court did not clearly err in finding that a preponderance of the evidence supported the score of 10 points for OV 3. *People v Carter*, 503 Mich 221, 226; 931 NW2d 566 (2019).

Defendant also contends that 50 points were erroneously assigned for OV 6 because there was no killing and no evidence of premedicated intent, and that only 10 points would have been proper based on evidence of intent to injure.

MCL 777.36, provides in pertinent part:

> (1) Offense variable 6 is the offender's intent to kill or injure another individual. Score offense variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer ....50 points

There is no requirement of a "killing" in MCL 777.36(1)(a). A "premeditated intent to kill" is sufficient, and the evidence clearly shows such intent. Defendant stole the keys to the house earlier in the day, returned in the early hours of the morning when she knew her great-grandparents would be sleeping, had an ample supply of lighter fluid and bottles with wicks, and spread lighter fluid throughout the house, including at both exits. She also took the telephone off the hook, and appears to have attempted to start a fire on a mat at the base of the basement steps. She was thwarted in her plot only when her great-grandmother was awakened by the fumes of the lighter fluid. There was no error in the scoring of OV 6. The preponderance of the evidence supported an assignment of 50 points. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, we conclude that defendant has established good cause by successfully establishing that she was denied the effective assistance of both trial counsel and appellate counsel.

In order to prove a case of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

We conclude that trial counsel was ineffective in failing to move for a directed verdict on the arson charge, and that on direct appeal, appellate counsel was ineffective for failing to raise this issue. But for these errors, "the result of the proceeding would have been different," *Carbin*, 463 Mich at 600, i.e., that defendant would not have been convicted of arson or her conviction would have been vacated at an earlier point. In *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995), the Court held that the remedy for ineffective assistance of counsel may be tailored to the circumstances. In *People v Gridiron (On Rehearing)*, 190 Mich App 366, 370; 475 NW2d 879 (1991), amended 439 Mich 880 (1991), the Court held:

> [W]e conclude that defendant was denied the effective assistance of counsel . . . . Normally, the remedy for ineffective assistance of counsel is a new trial. However, in the case at bar, that remedy would be inappropriate.
>
> Defendant cannot be retried on the charge of possession with intent to deliver inasmuch as he has been acquitted of that offense . . . . Rather, we conclude that the only possible remedy to fashion in the case at bar is to vacate defendant's conviction entirely and prohibit retrial.

Here, defendant cannot be retried on the arson charge because, as noted above, she must be acquitted of that offense based on the insufficiency of the evidence. The only possible remedy for the denial of the effective assistance of counsel is the remedy already compelled by the insufficiency of the evidence—to vacate defendant's conviction entirely and prohibit retrial. *Id.*

Remanded with instructions to vacate defendant's arson conviction and enter an acquittal. Because defendant's sentences run concurrently, this will not affect sentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens