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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
v	No. 251710 Berrien Circuit Court
CLARENCE HERBERT NOREM, JR., Defendant-Appellant.	LC No. 2002-406946-FH

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of arson, MCL 750.72. Defendant was sentenced to a prison term of eighteen to 240 months and ordered to pay $5,750 in restitution and $120 in fees. He appeals as of right. We affirm.

This case arises from a December 31, 1996, arson of a dwelling house. Defendant challenges the sufficiency of the identification evidence presented at trial. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000). The standard for reviewing a claim of insufficient evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*.; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

This Court must grant the jury considerable deference. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Therefore, defendant's arguments about other logical conclusions that the jury might have drawn from the evidence are inadequate as a matter of law to warrant reversal. Similarly, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Accordingly, defendant's arguments about the background, incredibility, and motives of witnesses who testified against him are also infirm because those arguments must be made by and left with the trier of fact. This Court should also not interfere with the jury's role of determining the weight of evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

"It is the nature of the offense of arson that it is usually committed surreptitiously. . . . By necessity, proofs will normally be circumstantial." *People v Horowitz,* 37 Mich App 151, 154; 194 NW2d 372 (1971). Circumstantial evidence and reasonable inferences based on that evidence may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *Nowack, supra* at 400. The circumstantial evidence against defendant was more than sufficient to establish defendant's identity as the perpetrator of the crime. First, defendant threatened the resident of the burned residence over the telephone and identified himself as the man with the red and white Blazer. A red and white Blazer was seen at the residence near the time of the arson. Tire tracks matching the type of tires on defendant's vehicle were found at the scene of the crime. Shortly after defendant first encountered police, who questioned him about what vehicle he owned, he took the vehicle to his cousin in Indiana and traded it for a truck worth considerably less money. He backdated the transfer. At trial, he claimed that "it was just a mistake" when confronted with evidence that he drove the Blazer and filled it with gas near his home after the purported transfer date and that the truck contained mail addressed to him and postmarked well after the purported transfer date. There was also testimony from defendant's cousin and wife that the transfer happened after the fire. A search of the Blazer revealed gas-stained gloves and carpeting and a cigarette lighter. An arson investigator testified that a liquid accelerant was involved in the fire and debris from the burned house contained gasoline. Finally, the jury heard testimony that defendant drove a witness to the residence and admitted the crime to the witness. This evidence, viewed in a light most favorable to the prosecution, was sufficient to establish defendant's identity as the perpetrator of the crime. *Fletcher, supra* at 562.[1]

Defendant also challenges two of the trial court's evidentiary rulings. First, defendant argues that testimony was improperly admitted as a prior consistent statement. However, nowhere in his brief where he argues against admitting the evidence does defendant cite to the record identifying the testimony he finds objectionable. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Second, defendant argues that an officer's testimony regarding a non-testifying witness's statement to police that she was with defendant at the house of an unnamed friend from December 30, 1996, until about January 3 or 4, 1997, was hearsay and irrelevant and therefore improperly admitted. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003).

The statement was not hearsay because it was not offered to prove the truth of the matter asserted. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The evidence was clearly not offered to prove the truth of what the witness told

[1] Contrary to defendant's suggestion, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *Nowack, supra* at 400.

the officer – that is, that defendant was with her at a friend's house when the fire started. Indeed, that would not be consistent with the prosecutor's theory. Rather, the evidence contradicted the witness's later statements to police, as well as the alibi defense that defendant presented through his testimony and that of his wife and his neighbor. Thus, the evidence was relevant to the witness's credibility. Because the statement was not offered to prove the truth of the matter asserted, it was not inadmissible hearsay.

Defendant next asserts that he was denied a fair trial as a result of several instances of prosecutorial misconduct. Because defendant did not timely and specifically object to any of the alleged misconduct, we review these arguments for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct is decided case by case, and the reviewing court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273.

Defendant argues that the prosecutor deliberately elicited irrelevant and highly prejudicial information. Each of defendant's arguments is without merit. Testimony about the out-of-court alibi statement was relevant and proper for the reasons cited above. Similarly, testimony about the letter the prosecutor offered to write for a prisoner witness was relevant to his credibility as a witness because it showed that the letter was the idea of the prosecutor and not essential to the witness's allegedly self-serving reasons for testifying.

Defendant's remaining examples of what he characterizes as irrelevant and highly prejudicial information concern the testimony of the victim about his personal history, defendant's threat to him, and the fact that the victim recovered no money for his burned property. Other than identifying these items and baldly asserting irrelevance and prejudice in blanket statements applying to his full list of items, defendant makes no argument. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *People v Jones,* 201 Mich App 449, 455; 506 NW2d 542 (1993). Those claims are therefore abandoned.

Defendant also argues that the prosecutor improperly offered testimony about the religious conversion of the prisoner witness. This argument is also unpersuasive. Because one exchange about spirituality came at the behest of defense counsel on cross-examination, it does not factor into whether the prosecutor somehow violated defendant's due process rights. In neither of the other two exchanges did the prosecutor dwell on the witness's spirituality or attempt during the exchanges or later in argument to insinuate that his spirituality in some way bolstered his credibility. Nor did he offer the testimony to show his competence as a witness. For this reason, defendant's reliance on MCL 600.1436 and *People v Hall*, 391 Mich 175, 179-183; 215 NW2d 166 (1974), is misplaced. The testimony about spirituality was volunteered and concerned tangential background matters, not the credibility of the witness as a spiritual man. A simple objection or a timely instruction would have remedied any negative impact on defendant's trial. Reversal is accordingly unwarranted. *Rodriguez, supra* at 32.

Defendant's arguments that the prosecutor offered facts not in evidence and improperly expressed his personal beliefs may be considered and dismissed together. A prosecutor may not

make a statement of fact to the jury that is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The remarks that defendant now challenges were merely permissible inferences based on the evidence. Witness testimony and the tire track forensic evidence supported the prosecutor's claim that defendant's red and white Blazer was at the fire. The statement about the flame retardant hat as something that no hunter would use or leave in a car is a logical inference based on the nature of the cap and the function of hunting. Flame retardant items of any kind are unusual for a hunter to use because hunters do not go to the woods to fight fires. Statements about witnesses' lack of a motive to lie were based on their testimony and credibility inferences that may be argued before a jury. The prosecutor's assertion that the jury was in court because defendant burned a house down six years ago was not an improper statement of belief. It was a conclusion based on evidence that proved defendant's guilt beyond a reasonable doubt, as set out under the sufficiency of the evidence analysis. Because each of the prosecutor's statements was grounded in evidence presented to the jury, defendant's arguments that the prosecutor improperly implied special knowledge or wrongly supported his assertions with the prestige of his office are without merit.

Defendant's argument that the prosecutor improperly invoked a civic duty argument during jury selection when he stated that society has an interest in prosecuting this arson even though it was a few years old is also without merit. The question was aimed at whether prospective jurors would be inclined to acquit simply because the case in their opinion was stale. It bears no resemblance to a civic duty argument to convict. It is distinguishable from the cases defendant cites, which concerned improper closing statements, not voir dire questions aimed at disqualifying prospective jurors.

The prosecutor also did not misstate the law. Defendant argues that the prosecutor impermissibly lowered and shifted the burden of proof by stating that defendant's explanations were not "the likely scenario" and by stating that defendant could "show his case if he wants to." Even if the comments were improper, they were amenable to correction by jury instructions. The jury in fact received instructions about reasonable doubt as the standard of proof and that the burden of proof rested on the prosecution. Absent a contrary showing, jurors are presumed to follow their instructions. See, e.g., *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Defendant claims that the prosecutor denigrated his counsel with remarks that counsel was playing a game with evidence. These remarks did not denigrate defense counsel. The prosecutor's remarks were isolated and amenable to correction by jury instruction. The statement the prosecutor made in this case about defense counsel was but one barb in a lengthy trial. It was not so egregious as to warrant reversal from this Court now or even objection from defense counsel at the time. It was only an isolated moment in a lengthy and otherwise above the board adversarial proceeding. It does not constitute plain error affecting defendant's substantial rights. *Rodriguez*, *supra* at 32. A prosecutor need not confine his arguments to the blandest possible terms. See, e.g., *People v Aldrich,* 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant's reliance on *People v Wise*, 134 Mich App 82; 351 NW2d 255 (1988), is misplaced. The prosecutor in *Wise* flatly stated that defense counsel intentionally misled the jury. *Id.* at 101. Even if the prosecutor's statement about playing games insinuated any

impropriety on the part of defense counsel, it did not directly and unequivocally state that defense counsel was trying to intentionally mislead the jury. Moreover, the prosecutor stated that the game was one in which he took part himself, which takes the sting out of whatever accusation his words leveled at defense counsel. The accusation, if any, was that he and defense counsel play the game of arguing and characterizing the evidence, not attempting to intentionally mislead the jury.

Defendant also argues that the prosecutor improperly impeached him with evidence that he was charged with a drug possession offense and pleaded guilty.[2] Defendant testified in his own defense; therefore, his credibility may be impeached like any other witness. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Defendant testified that he "never committed a crime in his life." A defendant's broad denial of criminal involvement on direct examination may subsequently be refuted by the prosecution during cross-examination by the use of specific instances when the defendant was involved in such criminal activities. As this Court explained in *People v Edmonds*, 93 Mich App 129, 134-135; 285 NW2d 802 (1979), "matters which may not be admissible on direct examination may be used to impeach a defendant." *People v Brown*, 399 Mich 350, 356; 249 NW2d 693 (1976). The prosecutor was not bound to refrain from attacking defendant's statement, even though disproving the statement required evidence of another crime that defendant had committed. The prosecutor's questions regarding defendant's possession of drugs were properly within the scope of impeachment. *Edmonds, supra*. Because the remaining evidence was so overwhelming against defendant, even if the questioning was erroneous it was not decisive of the outcome.

The weight of the evidence against defendant forecloses any argument by defendant that the alleged errors individually or cumulatively made his trial unfair. In addition, timely objections and jury instructions would have alleviated whatever harm the alleged errors caused.

Finally, defendant challenges his sentence as disproportionately high. Provided permissible factors are considered, appellate review of a sentence is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Babcock*, 469 Mich 247, 254; 666 NW2d 231 (2003).

Defendant's sentence fell within the judicial guidelines.[3] It is therefore presumptively proportional. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew,* 220 Mich App 601, 609; 560 NW2d 354 (1996). A sentence within a guidelines

[2] Defendant apparently pleaded guilty of possession of less than twenty five grams of cocaine in exchange for the prosecutor's agreement to recommend that he be placed on probation with conditions pursuant to MCL 333.7411. The trial court sentenced defendant to one year of probation, and the charge was disposed of as a § 7411 dismissal.

[3] The legislative guidelines apply to offenses committed after January 1, 1999. MCL 769.34(2). Defendant's offense occurred on December 31, 1996. Therefore, the judicial guidelines apply.

range can conceivably violate proportionality in unusual circumstances. *Milbourn, supra* at 661; *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993).

Defendant has not presented unusual circumstances warranting a reversal or remand from this Court on the ground of proportionality. Defendant's arguments at the sentencing hearing do not amount to unusual circumstances supporting a finding of abuse of discretion by the trial court. His employment and lack of criminal history are not unusual circumstances that overcome the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra