

## **“Breaking Legal Developments in Fire Investigation.”**

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**EXECUTIVE SUMMARY:** This weekly newsletter covers:

- (1) MICHIGAN COURT RECOGNIZES RULE THAT ARSON CASES CAN BE PROVEN SOLELY BY CIRCUMSTANTIAL EVIDENCE

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- (1) **Michigan Court Recognizes Rule That Arson Cases Can Be Proven Solely By Circumstantial Evidence**

### **Case Summary**

In People v. Smith, 2007 Mich. App. Lexis 2460, the court upheld Defendant's arson/felony murder convictions based solely on circumstantial evidence that the fire was caused by arson. In this case, the circumstantial evidence consisted of the arson investigator's testimony that the fire had: two areas of origin in the basement, burning patterns consistent with the use of a flammable liquid accelerant, and evidence of a rag with an odor of gasoline. The court recognized that "there is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial."

### **Detailed Facts**

Following a bench trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), and arson of a dwelling house, MCL 750.72. The trial court subsequently vacated the arson conviction and sentenced defendant to two concurrent

terms of life imprisonment for the felony-murder convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a fire at a two-story, four-unit apartment building in Detroit. The fire occurred in the middle of the night and an elderly couple who lived in an upstairs unit were killed in the fire.

Defendant first argues that there was insufficient evidence to prove that the fire was caused by arson. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich. App. 92, 94-95; 617 N.W.2d 721 (2000).

A person who willfully and maliciously [\*2] burns a dwelling house is guilty of arson. MCL 750.72. At defendant's trial, the trial court applied CJI2d 31.1, which provides, in pertinent part, that "when there is a fire, the law assumes that it had natural or accidental causes. The prosecutor must overcome this assumption and prove beyond a reasonable doubt that the fire was intentionally set." But as our Supreme Court explained in *People v Nowack*, 462 Mich. 392, 402; 614 N.W.2d 78 (2000):

In arson cases, the trier of fact usually draws inferences from circumstantial evidence:

"There is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause." [Id., quoting *Fox v State*, 179 Ind App 267, 277; 384 N.E.2d 1159 (1979.)]

In this case, Winston Farrow, a police arson investigator, testified that he personally investigated the fire scene and found two locations of origin, in two separate areas of the basement. He found a low burning pattern in the north central area [\*3] of the basement, which was consistent with the use of a flammable liquid accelerant. He also observed an area on the east wall, where mattresses and furniture were consumed by the fire. He was able to smell accelerants in both places, most strongly from the north central area of the basement, where he found a rag with odor of an accelerant comparable to gasoline. Farrow also testified that he investigated other possible sources of ignition, such as the furnace and electrical items in the house, but eliminated those sources as a possible cause of the fire. Farrow concluded that the fire "was incendiary in nature," which meant that it was deliberately set using an open flame device with a flammable liquid accelerant.

We disagree with defendant's claim that Farrow's testimony must be disregarded because it violated MRE 703. Because defendant did not object to Farrow's testimony at trial, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich. 750, 763-764; 597 N.W.2d 130 (1999). As defendant observes, MRE 703 requires that "[t]he facts or data . . . upon which an expert bases an opinion or inference shall be in evidence." Farrow relied on facts he personally [\*4] observed during his investigation of the fire and he testified regarding those facts at trial. Although defendant asserts that the accelerant-soaked rag that Farrow allegedly observed was never produced at trial, Farrow testified that he detected an odor of accelerant "comparable to gasoline" when he examined the rag. Additionally, the rag was analyzed by the state police laboratory and tested positive for gasoline, and the laboratory report was admitted into evidence at trial without objection. Because the facts or data on which Farrow based his opinion were in evidence, his testimony did not violate MRE 703. There was no plain error.

Viewed in a light most favorable to the prosecution, Farrow's testimony was sufficient to enable the trial court to find beyond a reasonable doubt that the fire did not result from natural or accidental causes, but rather, was intentionally and willfully set.

Defendant also argues that even if there was sufficient evidence that he started the fire, the evidence was insufficient to show that he acted with the requisite malice to support a conviction for first-degree felony murder. The elements of felony murder include (1) the killing of a human being, [\*5] (2) "with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e. malice]," (3) during the commission or attempted commission of an enumerated felony, including arson. Nowack, supra at 401. The facts and circumstances of a killing may give rise to an inference of malice, and a jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Id. In this case, there was evidence that defendant intentionally set fire to a residential apartment building in the middle of the night, knowing that there were other tenants, including the elderly victims, in the building. From this evidence a rational trier of fact could reasonably find that defendant intentionally set in motion a force likely to cause death or great bodily harm. Thus, there was sufficient evidence of malice to support defendant's felony-murder conviction.

[remaining unrelated portions of opinion omitted].

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