STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2009
v	No. 282505 Jackson Circuit Court
JACK EDWARD SMITH, Defendant-Appellant.	LC No. 07-003775-FC

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of arson of real property, MCL 750.73, and possession of a Molotov cocktail/explosive or incendiary device, MCL 750.211a(1)(a)(b). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with arson of real property, possession of a Molotov cocktail/explosive or incendiary device, assault and battery, MCL 750.81, and two counts of attempted murder, MCL 750.91.[1] The prosecution's theory was that defendant set a fire at the Odyssey Show Bar, an adult bookstore, where Jennifer Delazzer, defendant's former girlfriend, and Stewart Szczepanski were present. The evidence showed that defendant entered the bookstore, poured gasoline from a milk jug onto the floor, lit a towel stuffed into a water bottle filled with gasoline, and tossed the bottle onto the spilled gasoline. A surveillance videotape from the bookstore showed defendant entering the building, and showed flames erupting. A police officer who responded to the bookstore observed charring on the floor in the store.

Defendant testified that he was intoxicated when the incident occurred. He stated that he obtained gasoline, poured some gasoline into the smaller bottle, and placed a rag in the mouth of the bottle. Defendant stated that he intended to pour out the gasoline from the milk jug, and then light the rag in the bottle and throw the bottle onto the gasoline. Defendant acknowledged that he poured gasoline on the floor inside the bookstore, but denied that he lit the rag in the smaller

[1] Defendant was acquitted of the charges of attempted murder.

bottle or threw the bottle onto the gasoline. Defendant denied that he threatened to kill either Delazzer or Szczepanski.

Defendant requested that the trial court instruct the jury on attempted arson. The trial court denied the request on the ground that the evidence did not support an attempt instruction.

On appeal, defendant argues that the trial court abused its discretion by denying his request that the jury be instructed on the offense of attempted arson. We disagree.

We review the question of the applicability of jury instructions de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). An instruction on a cognate lesser offense is not permitted. *Id*. at 359. Michigan jurisprudence holds that an attempt is a cognate lesser included offense of the underlying greater offense. *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982); *People v Johnson*, 195 Mich App 571, 574; 491 NW2d 622 (1992).

The trial court properly denied defendant's request for an instruction on attempted arson is without merit. Such an instruction is not permitted under current law. *Cornell*, *supra* at 359; *Adams*, *supra* at 57; *Johnson*, *supra* at 574.

Next, defendant argues that the evidence presented at trial was insufficient to convict him of the charged offense of possession of a Molotov cocktail/explosive or incendiary device. We disagree.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

MCL 750.211a provides in pertinent part:

> (1) A person shall not do either of the following:
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> (a) Except as provided in subdivision (b), manufacture, sell, furnish, or possess a Molotov cocktail or other similar device.
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> (b) Manufacture, sell, furnish, or possess any device that is designed to explode or that will explode upon impact or with the application of heat or a flame or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if

> the property is public property, without the permission of the governmental agency having authority over that property.
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> * * * *
>
> (3) As used in this section, "Molotov cocktail" means an improvised incendiary device that is constructed from a bottle or other container filled with a flammable or combustible material or substance and that has a wick, fuse, or other device designed or intended to ignite the contents of the device when it is thrown or placed near a target.

Defendant asserts that neither the water bottle nor the milk jug that he carried into the bookstore met the definition of a Molotov cocktail or the type of incendiary device described in MCL 750.211a(1)(b). Defendant notes that no evidence showed that a "wick, fuse, or other device designed or intended to ignite the contents" was placed in the milk jug. Defendant acknowledges that the evidence showed that a towel was placed in the mouth of the water bottle, but contends that no evidence showed that the towel was designed or intended to ignite the contents of the bottle. Moreover, defendant claims that no evidence showed that either the milk jug or the water bottle was designed to explode or ignite.

The evidence showed, and defendant does not dispute, that he put gasoline into the milk jug and the water bottle. Defendant does not contend that gasoline is not flammable. Moreover, defendant testified that he went to the bookstore with the intent to pour gasoline from the milk jug onto the floor, and then light the rag in the water bottle and throw the bottle onto the poured gasoline. Defendant denied that he lit the rag; however, Delazzer testified that defendant did so. Szczepanski testified that defendant threw the bottle onto the spilled gasoline. The jury was entitled to accept the testimony of Delazzer and Szczepanski as true, *Milstead*, *supra* at 404, and to infer from this evidence that defendant lit the rag in the water bottle and threw the bottle onto the spilled gasoline with the intent of igniting the gasoline on the floor and in the water bottle. *Vaughn*, *supra* at 379-380.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood