2011 IL App (2d) 100546-U
No. 2—10—0546
Order filed July 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 06—CF—891
JOHN T. KRAWEC,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: (1) The defendant was proven guilty beyond a reasonable doubt of residential arson and insurance fraud; and (2) the defendant was not deprived of the effective assistance of counsel.

¶ 1 Following a bench trial, the defendant, John Krawec, was convicted of residential arson (720 ILCS 5/20—1.2 (West 2006)) and insurance fraud (720 ILCS 5/46—1 (West 2006)) and was sentenced to a total of four years' imprisonment. On appeal, the defendant argues that (1) he was

not proven guilty beyond a reasonable doubt and (2) he was deprived of the effective assistance of counsel. We affirm.

¶ 2 On October 12, 2006, the defendant was charged by indictment with residential arson (720 ILCS 5/20—1.2 (West 2006)), insurance fraud (720 ILCS 5/46—1 (West 2006)), arson (720 ILCS 5/20—1(b) (West 2006)), conspiracy to commit insurance fraud (720 ILCS 5/46—1, 5—46/3 (West 2006)) and conspiracy to commit arson (720 ILCS 5/20—1, 5/8—2(a) (West 2006)). The charges alleged that the defendant gave money to Philip Brakefield to start a fire in a building that housed both a business and a dwelling place where the defendant and four other people lived. The charges further alleged that, following the fire, the defendant made a false claim on an insurance policy, seeking over $100,000.

¶ 3 On October 31, 2008, the defendant signed a jury waiver. The trial court questioned the defendant if he was freely and voluntarily giving up his right to a jury trial. After the defendant indicated that he was, the trial court accepted the defendant's jury waiver.

¶ 4 Between June 17 and November 20, 2009, the trial court conducted a bench trial on the charges against the defendant. The evidence showed that, in April 2006, the defendant owned a building at 3021 Elm Street in McHenry where he operated the All Truck Shop. Above the business were apartments where the defendant lived along with his girlfriend Anna Julecki, Julecki's two children, and Frank Amelio, who was one of the defendant's employees. The defendant had the building insured for $750,000, the personal property of the business for $150,000, and the business insured for $1 million (for a total of $1.9 million) through Pekin Insurance.

¶ 5 On April 24, 2006, there was a fire at the defendant's building. A certified fire investigator subsequently determined that the cause of the fire was arson. It was determined that someone had started the fire by using gasoline in various parts of the building.

¶ 6 Thomas Messer, a property supervisor with Pekin Insurance, testified that he met with the defendant in May 2006. The defendant submitted a sworn statement and proof of loss totaling $524,140.56 for the fire damage at his building and for the personal property of the business. Messer testified that the defendant had not calculated at that time the amount of lost business income he would be seeking. He also explained that insurance coverage was not provided for arson that the insured solicits.

¶ 7 Brian Trusky testified that he rented a portion of the defendant's building and operated a business called Best Way Storage and Repair. The week before the fire he moved some of his boats and cars away from the building because the defendant requested that he do so.

¶ 8 Jeff Stark testified that he had worked with the defendant at the All Truck Stop. Eighteen months before the fire he had loaned the defendant $66,000. At the time of the fire, the defendant still owed him $15,000.

¶ 9 Jeff Leair testified that his company provided financing to the defendant that allowed him to purchase used cars for his business. The defendant's line of credit was for $400,000. The defendant had financial difficulties resulting in delinquencies in June 2005, which he was able to make current by the fall of 2005. In April 2006, the defendant owed him about $130,000. Leair was having difficulty communicating with the defendant in order to collect that debt. After the fire, his company repossessed some of the defendant's vehicles.

¶ 10 Suzanne Conrad, the operations director for Wonder Lake Bank, testified that the defendant was a past customer. His accounts frequently had a negative balance. At the end of April 2006, he was overdrawn by $450.

¶ 11 Brian Nash, an employee of McHenry Savings Bank, testified that, as of April 2006, the defendant's account had a negative balance of $10,032.44. On cross-examination, Nash

acknowledged that the defendant's account balance varied between negative and positive balances at various times.

¶ 12 Frank Amelio testified that he was a truck mechanic who worked for the defendant at the All Truck Stop. He also did repossessions for the defendant. He lived in an apartment above the business. Amelio testified that on April 20, 2006, the defendant directed him to repossess a vehicle in Pennsylvania. Amelio explained that was unusual for several reasons. First, although the defendant had previously sent him out of state to pick up a car that the defendant had purchased, the defendant never sent him out of the state—other than to Wisconsin—to repossess a vehicle. The defendant would instead use a company in the foreign state to repossess the vehicle. Second, the defendant gave him a box of repossession files to take with him. Usually, Amelio would only take the file that was related to the vehicle he was repossessing. Third, the defendant told Amelio to take his time and sightsee with Amelio's girlfriend. The defendant had never previously told him to sightsee. Rather, he told Amelio "to get there and get back." Amelio was in Ohio with the repossessed vehicle when the fire occurred.

¶ 13 Philip Brakefield testified that he had previously been convicted of possession of a stolen vehicle, possession of a controlled substance, and felony driving while license revoked. He testified that he had previously worked for the defendant at All Truck Stop as a mechanic. He further testified that he started a fire at the All Truck Stop on April 24, 2006, because the defendant requested that he do so. Brakefield explained that the defendant had asked him in approximately March 2006 to start a fire at the All Truck Stop. Brakefield told the defendant that he had reservations about starting the fire because people lived in the building. The defendant responded that he should not worry about that because nobody would be there. After discussing how much he would be paid for starting the fire, the defendant gave him $1,000 and told him that he would take care of him when

the defendant got the insurance money. Brakefield further testified that, prior to April 22, the defendant gave Brakefield some of the defendant's clothes and photos and a set of golf clubs to keep at Brakefield's house.

¶ 14 Brakefield planned to start the fire on Saturday April 22, but did not because he found Trusky working in the building. On the morning of April 23, Brakefield went to see the defendant in Elkhorn, Wisconsin. The defendant was using the trip as an alibi so that the fire could not be linked to him. Brakefield told him he was having concerns about starting the fire because he thought someone might be in the building. The defendant told him that he "had to do it" because "he couldn't open the doors on Monday." The defendant called Amelio and confirmed that he was still in Pennsylvania. The defendant also gave Brakefield an additional $300 to buy more gasoline.

¶ 15 Brakefield testified that he started the fire at 2 a.m. on April 24. Pursuant to the defendant's directions, he knocked a hole in the gas tank of Julecki's car so that it would burn up. He also pulled out the file cabinets and doused the records with gasoline to make sure that they would be destroyed during the fire. He did that because the defendant had told him to make sure that everything was destroyed.

¶ 16 In July or August 2006, Brakefield agreed to cooperate with the police in exchange for immunity from prosecution for his involvement in the fire. He agreed to "wear a wire" and have conversations with the defendant. During one of those conversations, the defendant and Brakefield discussed whether Brakefield was wearing a wire. The defendant gave him a hug and patted him down, which Brakefield described as very unusual. The defendant also handed him a note which indicated that he thought his house was bugged.

¶ 17 On cross-examination, Brakefield acknowledged that he had previously committed arson. He admitted that he had lied to the police when he was interrogated by the police in May 2006 and he told them that he was not involved with the fire at the All Truck Stop.

¶ 18 John Birk, a detective with the McHenry police department, testified that he interviewed Brakefield as part of his investigation of the arson at the defendant's business. On July 28, 2006, Brakefield agreed to wear an overhear recording device during his conversations with the defendant. Conversations that Brakefield had with the defendant on August 3, 5, 28, and 31, 2006, were subsequently recorded. The tapes of the four conversations were admitted into evidence.

¶ 19 The State indicated that it was going to play just a specific section of the tapes. The trial court indicated that it would listen to the entire tapes later. The State played part of the tape from August 28 and then questioned Birk regarding that recording. Birk testified that, on the tape, Brakefield told the defendant that the McHenry police supposedly had a picture of Brakefield at the scene at 2 a.m. on the night of the fire. The defendant responded "no, they don't." Brakefield later asked the defendant "if they arrest me, you'll take care of [my girlfriend]," to which the defendant responded "yeah." The defendant then asked "how did they get a picture of you" and Brakefield stated "they said the Jeep Eagle dealership." The defendant followed up with "did you go out the Jeep Eagle way" and Brakefield replied "no."

¶ 20 The State then played part of the tape from August 3. Birk testified that, on the tape, Brakefield said "I burned myself out of a job." The defendant replied "We would have been out of business. You wouldn't have had a job."

¶ 21 Birk further testified that as of August 2006, Brakefield was still working for the defendant. He would collect money or cars that had payments owed on them. Birk indicated that Brakefield would collect the money in an "illegal manner." Because the police did not want Brakefield to be

doing anything illegal while he was working for them, the police gave Brakefield money out of its investigation fund so that Brakefield could continue paying the defendant for his supposed "collection" work.

¶ 22 On cross-examination, Birk testified that he did not recall any of the recordings other than what was played in court. He did not recall the defendant saying on one of the tapes: "I wish the police would go out and find the S.O.B. that burned down my business."

¶ 23 After the State rested, the defense called Attorney Richard Short, who had handled the defendant's civil matters. In 2005, he initiated proceedings to evict Brakefield from one of the defendant's properties. Brakefield subsequently left a very angry and profane message on the defendant's cell phone.

¶ 24 Following Short's testimony, defense counsel informed the trial court that the defendant had decided not to testify. After the trial court admonished the defendant of his right to testify and the defendant indicated that he was willingly giving up that right, the defense rested.

¶ 25 At the close of the trial, the court found the defendant guilty of all charges. In so ruling, the trial court explained that it had reviewed all of the exhibits and listened to the tapes that had been admitted into evidence. The trial court found that Brakefield's testimony established the defendant's involvement in the arson and insurance fraud scheme. It noted that Brakefield was a convicted felon and "not the most reputable person." The trial court found however that the other evidence presented corroborated Brakefield's testimony. In particular, the trial court found that the tapes showed the defendant's knowledge of and complicity in the arson and his consciousness of guilt.

¶ 26 On December 15, 2009, substitute counsel filed an appearance on the defendant's behalf. On February 9, 2010, substitute counsel filed a posttrial motion arguing that the defendant was deprived of the effective assistance of counsel at trial. Specifically, the motion alleged that defense

counsel (1) improperly informed the defendant that he could not get a fair jury trial; (2) never discussed the facts of the case in depth with the defendant; (3) failed to move to exclude the overhear tapes; and (4) failed to try to limit evidence of the defendant's financial condition. On March 19, 2010, the trial court conducted a hearing on the defendant's posttrial motion.

¶ 27 At the hearing, the defendant testified that, between the time he hired counsel Michael Johnson and the trial date, they never met in his office nor discussed the case in depth. His communication with Johnson consisted of 5 or 10 minutes at most court appearances and a few times over the phone. He was never able to discuss his financial situation with Johnson. The defendant further testified that he wanted a jury trial but was pressured by Johnson to choose a bench trial. The defendant's lack of money to finance a jury trial seemed to be the main basis of Johnson's pressure. The defendant also wanted to testify but did not because Johnson told him in various ways that his testimony was unnecessary as the case was won.

¶ 28 Michael Johnson testified that he served as the defendant's defense counsel at trial. He discussed the case with the defendant 25 or 30 times, which he believed was adequate to defend the defendant. He also discussed with the defendant the documents that the State provided him. He never told the defendant that the case was won or "in the bag." He explained the difference to the defendant between a bench and jury trial. He told the defendant that he preferred a bench trial because of the publicity surrounding the case and because the trial judge had a reputation of fairness. He told the defendant he would be "glad" to take the trial to a jury. He talked extensively to the defendant about testifying, and it was strictly the defendant's decision not to testify.

¶ 29 On cross-examination, Johnson testified that he did not try to limit testimony about the defendant's finances because he believed he lacked proper grounds, and he did not believe that the testimony portrayed the defendant to be in dire straits. He was aware of the statute that provides any

evidence gathered by an investigator who is compensated on a "basis other than time" may not be used at trial (5 ILCS 305/1 (West 2006)), but he did not seek to keep out Brakefield's testimony on that basis.

¶ 30 Following Johnson's testimony, defense counsel recalled the defendant as a witness. He testified that he told Johnson that the property which was burned was up for sale. He testified that he had received an offer of $879,000 for the property, which he rejected.

¶ 31 On April 30, 2010, the trial court entered a written order denying the defendant's posttrial motion. The trial court subsequently sentenced the defendant to four year's imprisonment for residential arson and insurance fraud, with each sentence running concurrently. Following the denial of his motion to reconsider sentence, the defendant filed a timely notice of appeal.

¶ 32 The defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt. Specifically, the defendant argues that the State's case was based primarily on Brakefield's testimony, which was "so self-serving as to be worthless." The defendant insists that the trial court "failed to properly assess the evidentiary weight of Brakefield's testimony." The defendant argues that Brakefield's testimony was uncorroborated and inconsistent with the fact that the defendant had a recent offer to purchase the property that was worth more than he would have received through an insurance claim.

¶ 33 It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, <u>any</u> rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.*, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact

finder. *People v. Smeathers*, 297 Ill. App. 3d 711, 717 (1998). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *People v. Isunza*, 396 Ill. App. 3d 127, 130 (2009).

¶ 34 We believe that the evidence was sufficient to convict the defendant of residential arson and insurance fraud. Brakefield testified that the defendant paid him to intentionally start the fire at the building the defendant owned where several people lived. Brakefield's testimony by itself was sufficient to convict the defendant of residential arson. See *People v. Reed*, 324 Ill. App. 3d 671, 678 (2001) (largely uncorroborated testimony of accomplice witness was sufficient standing alone to support a conviction). Further, the evidence reveals that the defendant committed insurance fraud when he submitted an insurance claim for damages that he intentionally caused.

¶ 35 The defendant insists that the trial court should not have placed any weight on Brakefield's testimony because his testimony was not credible. However, we note that the trial court was well aware that Brakefield was a convicted felon. The trial court was also aware that Brakefield was receiving immunity from prosecution for his involvement in the arson of the defendant's building. Nonetheless, the trial court still found Brakesfield's testimony credible. As set forth above, it is not the role of this court to reweigh the credibility of the witnesses. See *Smeathers*, 297 Ill. App. 3d at 717. We also reject the defendant's assertion that the State failed to present any evidence to corroborate Brakefield's testimony. Stark, Leair, Conrad, and Nash's testimony demonstrated that the defendant was having financial difficulties to the extent that he was over $155,000 in debt when the fire occurred at his building. Their testimony thus indicates that the defendant had a financial incentive to commit arson. Amelio's testimony indicates that the defendant sent him to Pennsylvania a couple of days before the fire. This is consistent with Brakefield's testimony that he told the defendant that he did not want Amelio around when he started the fire. Trusky's testimony—that

the defendant had him move several vehicles away from the building a week before the fire—also suggests that the defendant was trying to limit the damage that the fire would cause.

¶ 36 Further, the recordings admitted into evidence also corroborate Brakefield's testimony. Particularly, the defendant's comments that the police could not have a picture of Brakefield leaving the building after the fire and his comment that he and Brakefield would have been out of business if not for the fire demonstrate that he was aware that Brakefield started the fire at his building. We note that the defendant places great weight on his comments in the tapes that suggest he was not involved in the arson. However, Brakefield testified that when he talked to the defendant, the defendant was concerned that the police had "bugged his home" and that Brakefield was wearing a recording device. Thus, it is plausible that the defendant made certain comments to convey to the police, who he believed were listening to his conversations, that he was not responsible for the arson. Accordingly, the defendant's taped comments denying responsibility, considered in conjunction with the other evidence, do not undermine the trial court's determination that the defendant was guilty of the charges against him.

¶ 37 Moreover, although the defendant contends that a recent offer seeking to purchase the property undercuts any motive he had to burn the property, no evidence of such an offer was introduced at trial. We decline to disturb the trial court's decision based on evidence that was not admitted at trial.

¶ 38 The defendant's second contention on appeal is that he was deprived of the effective assistance of counsel. Specifically, the defendant argues that defense counsel was ineffective for (1) failing to file a motion to exclude the overhear tapes because they were inadmissible pursuant to section 305/1 of the Employment of Detectives by Public Officials Act (the Act) (5 ILCS 305/1 (West 2006)); (2) failing to limit irrelevant financial evidence and failing to offer exculpatory

financial evidence; and (3) failing to communicate with him and depriving him of his right to testify and have a trial by jury.

¶ 39 In order to succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 376-77, (2000). The defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have differed. *People v. Little*, 335 Ill. App. 3d 1046, 1052 (2003). A reviewing court may dispose of an ineffectiveness claim on the prejudice prong alone by determining that the defendant was not prejudiced by counsel's representation. *People v. Munson*, 171 Ill. 2d 158, 184 (1996).

¶ 40 Section 305/1 of the Act provides:

> "No State, county or municipal officer, whose duty is to investigate the commission of any crime or to prosecute persons accused of crime, shall employ any detective or investigator on a compensation basis other than that of time, and in no event shall compensation to such persons be contingent on the success of the investigation or prosecution. Evidence obtained in violation of the act shall be inadmissible in any court in this State for any purpose and any person employed in violation of this act shall be incompetent to testify in any such court as to any information or evidence acquired by him in such employment." 5 ILCS 305/1 (West 2006).

The Act does not prohibit contingent compensation for those who are "informers," only those who are investigators. *People v. Rabe*, 53 Ill. App. 3d 838, 842 (1977). An informer is one who furnishes information of violations of law to officers charged with enforcement of the law. *Id.* An investigator

is one who obtains information and examines and evaluates that information with attention to detail. *Id.*

¶ 41 Here, it is clear that Brakefield was an informer, not an investigator. He was not a police officer but rather a person that the police recruited to gather incriminating information on the defendant. See *People v. Meachum*, 53 Ill. App. 3d 762, 766 (1977) (an individual hired by a law enforcement group to make narcotic buys was an informer and not an investigator), *abrogated on other grounds, People v. Wilk*, 124 Ill. 2d 93, 104 (1988). Although the defendant insists that the Act applies to Brakefield because he evaluated information with attention to detail, he points to nothing in the record to support that assertion. Accordingly, as Brakefield was an informant, the Act did not apply to him. Defense counsel therefore was not ineffective for not seeking to suppress the overhear tapes on the basis of the Act.

¶ 42 We also find without merit the defendant's argument that defense counsel was ineffective for failing to limit irrelevant financial evidence and failing to offer exculpatory financial evidence. Relevant evidence is evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. *People v. Buck*, 361 Ill. App. 3d 923, 938 (2005). Further, while it is not necessary to establish motive in an arson case, motive can be established by evidence pertaining to the defendant's financial condition and the possible effect of insurance thereon. *People v. Mustief*, 201 Ill. App. 3d 872, 877 (1990). In order for evidence of a motive to be competent, it must "at least to a slight degree, tend to establish the existence of the motive relied upon or alleged." *People v. Smith*, 141 Ill. 2d 40, 56 (1990).

¶ 43 Here, the State presented evidence that the defendant's business was approximately $155,000 in debt at the time of the fire. The State also presented evidence that the defendant's business and

building was ensured for $1.9 million. Such evidence was relevant to demonstrate that the defendant had a financial incentive to commit arson and insurance fraud. See *Mustief*, 201 Ill. App. 3d at 877. The defendant insists that that the evidence "did nothing more than show his business bank accounts were at times overdrawn and at other times were not." However, this argument goes to how much weight should have been placed on the financial evidence, not its ultimate admissibility. As set forth above, how much weight should be placed on the evidence was within the exclusive jurisdiction of the trial court. See *Smeathers*, 297 Ill. App. 3d at 717.

¶ 44 Furthermore, we find unpersuasive the defendant's argument that defense counsel was ineffective for not introducing evidence that the defendant had received an offer to purchase his property. At the hearing on his posttrial motion, the defendant did not question his defense counsel regarding the purported offer. Rather, following defense counsel's testimony, the defendant testified for the first time that when he met defense counsel the first time, he told defense counsel that the property that had burned was up for sale. He also indicated that someone had offered to purchase the property for $879,000—an offer that he rejected.

¶ 45 Although it is indeed relevant if the defendant had an outstanding offer to purchase his property as it would undermine his motive to commit arson (see *People v. Taylor*, 162 Ill. App. 3d 253, 254-256 (1987)), we cannot tell from the record when the defendant received the purported offer to purchase his property. Also, although the defendant testified that he informed defense counsel that the property was for sale, he did not testify that he had informed defense counsel that he had received an offer to purchase the property. Absent such evidence, we cannot say that defense counsel was ineffective for failing to bring to the trial court's attention that the defendant had once received an offer to purchase his property.

¶ 46 Finally, we reject the defendant's argument that his counsel was ineffective because he did not communicate with him which therefore "depriv[ed] him the ability to knowingly waive his right to testify or to exercise his right to a jury trial." At the hearing on the posttrial motion, the defendant's and defense counsel's testimony was contradictory. The defendant testified that defense counsel never discussed the case in depth with him. Defense counsel testified, however, that he discussed the case with the defendant 25-30 times, which he believed was adequate to defend him. The defendant testified that he wanted a jury trial but defense counsel pressured him into choosing a bench trial. Defense counsel testified that he told the defendant he preferred a bench trial because of the publicity surrounding the case, but he would be "glad" to take the case to a jury. The defendant also testified that he wanted to testify at trial but did not because defense counsel indicated that his case was already won and his testimony was unnecessary. In response, defense counsel testified that he never told the defendant that the case was won; he talked extensively to the defendant about testifying, and it was the defendant's decision not to testify.

¶ 47 In denying the defendant's posttrial motion, the trial court necessarily found that defense counsel's testimony was more credible than that of the defendant. We defer to that determination. *Smeathers*, 297 Ill. App. 3d at 717. We further note that, upon questioning by the trial court, the defendant indicated that he was both freely and voluntarily giving up his right to a jury trial and to his right to testify. As defense counsel's testimony demonstrates that he did confer with the defendant as to the defendant's right to a jury trial and the right to testify—and because the defendant indicated to the trial court that he was freely giving up those rights—the defendant's arguments to the contrary on appeal are without merit.

¶ 48 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 49 Affirmed.