STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2000
v GARY LEE MARTIN, Defendant-Appellant.	No. 213719 Clinton Circuit Court LC Nos. 97-006298-300 FH 97-006302-307 FH; 97-006309 FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KATHRYN MARY COOK, Defendant-Appellant.	No. 213720 Clinton Circuit Court LC Nos. 97-006310-312 FH 97-006314-319 FH 97-006321 FH

Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

Codefendants Gary Martin and Kathyrn Cook appeal as of right following a joint trial before a single jury and each defendant's conviction of seven counts of malicious destruction of personal property (MDOP) over $100, MCL 750.377a; MSA 28.609(1), and three counts of arson of personal property over $50, MCL 750.74; MSA 28.269,[1] as charged. Each defendant was sentenced to three years' probation, with Martin to serve his first year in jail, and Cook to serve her first six months in jail. Martin and Cook were both represented by the same attorney throughout their case. They appeal on the issues of conflict of interest of counsel and ineffective assistance of counsel. This Court denied defendants' motions for bond pending appeal. We affirm.

I

This case stems from a series of arson and property destruction incidents over a two-year period to business-related personal property of Cook's former husband, Michael Cook (hereafter, "Michael"). Michael owned a tile drainage business, which laid tile for farms in the Clinton County area. The business operated out of a shop adjacent to the Cooks' home. Martin also owned a drainage business, although his work related to ditch drainage.

As a result of their business association, Martin and his wife socialized with the Cooks. Although initially Martin was friends with both Cook and Michael, at some point, he became very involved with Cook. There was no evidence of a sexual relationship.

In 1994, the Cooks became involved in a bitter divorce. Evidence from the Cooks' divorce trial, admitted in this trial, documented hundreds of phone calls between Cook and Martin in 1994: 93 in May, 114 in June, 105 in July, and 135 in August. In 1995, Cook called Martin long distance on his cellular phone as often as fourteen times a day. Both Martin and Cook admitted to the phone calls, but denied any sexual relationship. These incidents continued throughout 1995 and 1996.

The Cooks' divorce was contentious, with disagreements over property distribution and custody of the Cooks' two children. The divorce issues went to trial and the divorce apparently was finalized in late 1996. The alleged MDOP and arson incidents occurred primarily during the period the Cooks were involved in their divorce proceedings.

Beginning November 1994, Michael experienced a series of incidents of personal harassment and destruction of his tiling business property: signs were posted identifying him as a "wife beater," spools of tile (coiled PVC) at job sites were set afire, and tiling machinery and back-hoe equipment were damaged. Michael told the police he suspected Cook and Martin. These incidents continued throughout 1995 and 1996.

In November 1996, a law enforcement team began surveillance at some of Michael's work sites. On December 17, 1996, the surveillance team saw Martin's vehicle near one of Michael's job sites in Ionia County and later learned that a spool of tile was set afire at the site that same evening. The police obtained search warrants for Martin's and Cook's homes, which were executed the following day. During questioning, Martin admitted setting the tile afire at the Ionia County site and admitted that Cook was with him, but claimed that she never left the vehicle and that she knew nothing about what he had done until afterwards. Cook gave police the same information during questioning. Martin and Cook denied any involvement in the alleged arson, property destruction, and harassment incidents in Clinton County.

Martin pleaded no contest to a charge of MDOP in Ionia County involving the arson of tile on December 17, 1996. Martin and Cook subsequently were charged with ten counts of arson and property destruction in Clinton County in 1995 and 1996 including puncturing back-hoe tires, burning rolls of drainage tile (various incidents), damaging a back-hoe, damaging a tiling machine, destroying tractor tires, and destroying a building (shooting out the windows of Michael's home), and destroying

trees and shrubs. Following a five-day jury trial on June 10-12 and June 17-18, 1998, each defendant was convicted of all ten counts.

II

Defendants first claim that their defenses were prejudiced by their joint representation by the same attorney. We disagree and find that defendants waived their right to separate counsel, but that even if they did not, their claims of prejudice are without merit.

Multiple representation of codefendants by one attorney can lead to a conflict of interest sufficiently serious to constitute ineffective assistance of counsel. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). Such a conflict is not presumed or implied; the defendant has the burden of proving a prima facie case of ineffective assistance of counsel. *Id*. The defendant must show the existence of an actual conflict of interest that adversely affected his representation. *Id*. The defendant need not show actual prejudice. *People v Rhinehart*, 149 Mich App 172, 176; 385 NW2d 640 (1986).

MCR 6.005(F) establishes a procedure to protect a defendant's right to the effective assistance of counsel in multiple representation situations. *Lafay, supra* at 531; *People v Kirk*, 119 Mich App 599, 603; 326 NW2d 145 (1982). The court's failure to follow the procedures of MCR 6.005(F) is not, in itself, error requiring reversal. *Lafay, supra* at 531. A defendant must show a conflict of interest that actually affected the adequacy of counsel's representation. *Kirk, supra* at 603.

The first issue in this case is whether defendants waived their right to separate counsel. Defendants contend that the court failed to state on the record, its findings or reasons that there was no conflict of interest, as required by MCR 6.005(F)(3), and, therefore, there was not a valid waiver. MCR 6.005(F) provides in relevant part:

> The court may not permit the joint representation unless:
>
> (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
>
> (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and
>
> (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

In this case, the record reflects two separate inquiries into the issue of conflict of interest. While these inquires may not follow the sequence of the inquiry set forth in the court rule, we conclude that the substance of the inquiry met the requirements of MCR 6.005(F). In the first inquiry, eight months before trial, defendants' attorney stated on the record:

> I've covered [the conflict of interest] with my clients. I've given it to them in *writing, orally, every time we meet*. They've indicated, *in no uncertain terms*, they believe

their defenses are compatible and they want me to represent both of them. They don't see the conflict. [Emphasis added.]

Cook and Martin each stated on the record that they agreed with the above statement. The court then confirmed that defendants' attorney had explained the conflict of interest situation, probing further and again explaining to defendants that if they had "conflicting interest[s]" it would be a potential conflict of interest for the same attorney to represent them both. Each defendant answered that their attorney had explained the conflict of interest situation—according to Martin, "very thoroughly".

In the second inquiry, the court indicated that the conflict of interest had been covered in conferences in chambers and that defense counsel did not see a conflict of interest. Counsel stated that he had spoken with defendants since the inception of the case about conflict of interest and that he *advised them of the preference for separate counsel*. Further, he had discussed this with defendants and he did not see any inconsistent theories of defense. As in the first inquiry, the defendants separately stated that they nevertheless wanted him to represent them both. Counsel stated on the record his reasons that he did not perceive a conflict of interest, i.e., there were no inconsistent theories of defense. See MCR 6.005(F)(1). Both defendants stated that they wanted him to represent them. See MCR 6.005(F)(2). After the court probed this matter with defendants, the court stated that the parties did not see any conflicts and wanted counsel to continue representing them, and, so, the court was satisfied that the matter had been addressed. See MCR 6.005(F)(3). We conclude that the requirements of MCR 6.005(F) were met.

Defendants' reliance on *People v Villarreal*, 100 Mich App 379; 298 NW2d (1980), lv den 411 Mich 899 (1981), does not convince us otherwise. In this case, because trial counsel apprised defendants of the risks of multiple representation, any duty on the part of the trial court implicated by *Villarreal* was obviated.

Even if defendants did not waive their right to separate counsel, there is no error requiring reversal. Defendants have not shown an actual conflict of interest that adversely affected their representation.

Defendants contend that the same three factors cited in *Villarreal, supra* at 390, exist in this case and denied defendants the effective assistance of counsel: (1) counsel could not argue each defendant's specific link to the evidence, (2) cross examination of witnesses was inhibited, and (3) counsel could not demarcate each defendant's relative culpability.

First, defendants' argument that their representation was adversely affected by the different degrees of culpability and counsel's inability to point out that Cook was merely present at one or two of these incidents is without basis. Both defendants denied involvement in any of the charged incidents, as well as nearly all the uncharged incidents; thus, there was no issue of relative culpability from defendants' point of view.

With regard to the one similar incident in which defendants admitted involvement, the evidence and counsel's argument clearly indicated that Cook was less culpable. Martin admitted that he set the

fire. Both prosecution and defense witnesses, including each defendant, indicated that Cook was "merely present" at this incident and did not participate.

Second, defendants' argument that counsel could not argue their specific links to the evidence is likewise without merit. In closing argument, counsel addressed each defendant separately. Counsel emphasized that there was not the slightest evidence against Cook and none of the seized evidence was from her home, whereas Martin had some items that could be linked to the incidents. Counsel referred to Cook as a "dear [sic] in the headlights" and argued that there was no evidence against her: "She makes no statements, nothing, zero, zip. There is nothing". Counsel distinguished Martin's situation: "What do we have on Gary? He is not her. He had some things at his house that could have done this". Counsel pointed out each defendant's specific links to the evidence, but argued that there was no case against either of them.

Third, there is no merit in defendants' claim that their representation was inadequate because the cross-examination of witnesses was inhibited by the multiple representation and because numerous "admissions" would not have been admissible in separate trials. Defendants have not shown how cross-examination was inhibited and defendants' blanket assertion that the various "admissions" would not have come in, in separate trials, is unsupported. Some of the challenged statements were ruled admissible by the trial court, e.g., statements to the police. Further, these statements are generally taken out of context to establish defendants' claim on appeal, without relating them to the charged incidents. Some of the "admissions" related to uncharged incidents and to the arson to which Martin had pleaded no contest. The trial court denied defendants' motion to suppress evidence relating to the one incident Martin admitted committing, finding that the evidence was "relevant to the issues of scheme, plan and identity". The fact that these statements were admitted does not establish that defendants' representation was inadequate.

For the most part, this trial was a credibility contest. Defense counsel's strategy apparently was two-fold (1) to attack the credibility of law enforcement and establish that the police work in this case was substandard; and (2) to present defendants as open and honest, admitting to acts they had committed, but denying any involvement in other incidents, positing that Michael Cook, the victim, may have committed the charged acts himself. Counsel made few objections during the prosecution witnesses' testimony. However, he filed pretrial motions to suppress evidence, including Martin's admissions to police, which the court denied for the most part. The trial court specifically ruled that Martin's admissions to the police were admissible. Counsel cannot be faulted for failing to object to these admissions at trial.

Although seemingly incriminating testimony and other evidence was admitted in the prosecution's case, it was "explained" by defendants, which was in keeping with the defense strategy. Cook and Martin contradicted the police testimony, claiming that the police reports were inaccurate, that the police had twisted the facts, and that defendants never made the majority of the admissions attributed to them. There is nothing to suggest that the defense strategy, or the court's evidentiary rulings, would have changed had there been separate trials and juries such that the challenged testimony and evidence would not have been admitted. Defendants have not shown that their representation was inadequate because of a conflict of interest.

III

Defendants next argue ineffective assistance of counsel on four separate grounds, none of which has merit. We first note that this claim was not advanced before the trial court thus, this Court will consider the claim only to the extent that claimed mistakes of counsel are apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842, lv den 449 Mich 900 (1995). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens (On Remand)*, 446 Mich 298, 302-303; 521 NW2d 797, reh den sub nom *People v Wallace*, 447 Mich 1202 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendants were not denied the effective assistance of counsel on any of four bases claimed. Additionally, counsel was not ineffective for failing to pursue a mere presence defense and jury instruction on behalf of Cook.

Defendants first contend that counsel was ineffective for failing to question or challenge a juror regarding her knowledge of the case. A criminal defendant has a right to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Budzyn*, 456 Mich 77, 566 NW2d 229 (1997); *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), lv den 459 Mich 938 (1999). Under MCR 2.511(D)(3) and (4), a juror may be challenged for cause if that "person is biased for or against a party" or "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." There is no indication that there was a basis for a challenge for cause in this instance. Although the juror indicated during voir dire by the court that she may have had some prior knowledge of the case, she stated that nothing she had read would influence her decision. Counsel did not err in failing to further question or challenge this juror. Moreover, defendants have not shown that they suffered any prejudice as a result of counsel's failure to challenge this juror.

Next, defendants contend that they were denied the effective assistance of counsel because of the cumulative effect of counsel's failure to object to inadmissible or otherwise objectionable testimony. Defendants contend that counsel should have objected to testimony from various witnesses that Martin and Cook were "suspects," and that Michael was not suspected, because much of this testimony involved speculation and hearsay. However, this testimony primarily referenced Michael's suspicion that Martin and Cook were involved, which Michael indicated in his own testimony. The erroneous admission of hearsay evidence is not prejudicial error where other competent testimony corroborated the hearsay. *People v Petrov*, 75 Mich App 532, 534-535; 255 NW2d 673 (1977).

Defendants also object to a witness' reference to an "arson" because evidence had not been admitted to establish that the fire was incendiary in nature. In fact, the prosecutor asked the witness if he was "dispatched to a report of a fire, an arson," and the witness responded, "Yes". Defendants have failed to show how they were prejudiced by this passing reference.

Defendants also allege error in counsel's failure to object to a witness' testimony that his wife first noticed the words "wife beater" on some tile and so he called Michael. Again, defendants have failed to show that they were prejudiced by these brief remarks, which merely prefaced the witness' description of the "wife-beater" writing on the tile, which he testified that he himself observed later with the sheriff.

Defendants also object to testimony that the police matched a boot print to Martin's boots on the basis that there was no foundation for the testimony and the witness was not qualified as a footwear impression expert. Defendants neglect to note that in his rebuttal argument, the prosecutor indicated that he was not contending that Martin's boots were the boots that matched the print and that that was never part of their case.

Likewise, defendants were not prejudiced by any alleged hearsay or violation of the spousal testimonial privilege with regard to testimony about the age of a BB gun. Martin later testified that the gun was old and that he never told police that he had just purchased it.

Defendants have not shown prejudice with regard to their remaining claims of objectionable testimony: reference to Martin's invocation of right to remain silent, testimony vouching for witnesses' credibility, defendants' testimony that other witnesses were lying. Where the prosecutor asks a defendant to comment on the truthfulness of prosecution witnesses, the questions are improper but do not require reversal absent unfair prejudice which could not have been cured by a limiting instruction. *People v Messenger*, 221 Mich App 171, 180 & n 4; 561 NW2d 463 (1997), lv den 456 Mich 955 (1998). In this case, defendants' theory was that the police investigation was substandard. Most of the challenged testimony merely coincided with testimony elicited by the defense that police had twisted defendants' statements. Regardless, any prejudice could have been cured by an instruction.

Moreover, with regard to counsel's failure to object to the challenged testimony, defendants have not shown that this was not a matter of trial strategy. Defense counsel objected to certain testimony on various grounds, i.e., leading question, speculation, no training or experience regarding the subject matter, hearsay. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721, reh den 448 Mich 1231 (1995); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendants have failed to overcome the presumption of effective assistance or that counsel's failure to object in these instances was not a matter of trial strategy. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

Defendants' next claim of ineffective assistance is based on counsel's failure to advance particular arguments that expert testimony about police techniques was relevant for reasons other than those set forth by counsel during trial. This is a matter of assessing counsel's competence in hindsight,

which this Court has declined to do. *LaVearn, supra* at 216; *Kvam, supra* at 200. This claim is without merit.

Defendants' fourth basis for claiming ineffective assistance is that counsel was not allowed the opportunity to argue his motion for a directed verdict. Defense counsel is not obligated to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475, lv den 439 Mich 891(1991). In this case, the trial court stated that it had anticipated the motions, had already carefully considered the evidence, and had determined that there was sufficient evidence for the case to go to the jury. The court further indicated that any additional argument would be futile. Counsel's performance was not deficient merely because he failed to impose further argument on the Court.

Finally, with regard to Cook's claim that counsel was ineffective for failing to pursue a mere presence defense and request a mere presence jury instruction, this claim is also without merit. Counsel did not ignore this defense. The mere presence instruction, CJI2d 8.5 provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.

Cook's defense was that she was not present at any incident charged in this case. There was no reason for counsel to request the mere presence instruction. Further, as noted *supra*, counsel did point out that Cook did not participate in those incidents in which Martin admitted involvement; however, those incidents were not charged in this case.

In fact, at the conclusion of the trial, the prosecutor requested an aider and abettor instruction, noting the possibility that Martin may be viewed as a principal and Cook as "a look-out person, a person who arranged times and places". Although there was no direct evidence that Cook committed the alleged acts, there was ample circumstantial evidence implicating her. There was evidence of an extremely close relationship between Cook and Martin, with more than one hundred phone calls between them per month at times. Cook could not remember what the two discussed during these calls. There was evidence that Cook was with Martin when he committed the arson offense to which he pleaded no contest. There was witness testimony that Cook was seen in Martin's truck with him near the sites of some of these incidents. Most of the incidents took place at times when Michael had the Cooks' children for visitation.

Even if counsel should have requested the mere presence instruction, we conclude that Cook has not shown that she was so prejudiced that she was denied a fair trial. Defendants were not denied the effective assistance of counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Janet T. Neff

[1] These acts have since been amended; however, the amendments are not at issue in this appeal. See 1998 PA 311.