

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN WESLEY RICHARDSON,

Defendant-Appellant.

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UNPUBLISHED

February 13, 2001

No. 214344

Genesee Circuit Court

LC No. 97-001623-FH

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

The jury convicted defendant of conspiracy to commit arson of a dwelling house, MCL 750.157(a); MSA 28.354(1); MCL 750.72; MSA 28.267, two counts of arson of a dwelling house, MCL 750.72; MSA 28.267, and placing explosives with intent to cause injury, MCL 750.207; MSA 28.508. The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent prison terms of fifteen to forty years each for the arson and conspiracy convictions and life imprisonment for the placing explosives conviction. Defendant appeals as of right, and we affirm.

**I. Facts and Proceedings**

This case arises out of the firebombings of two residential homes in the City of Flint during the early morning hours of October 21, 1997. At 3:04 a.m., firefighters were called to a house at 313 East Russell to investigate a fire in progress. While extinguishing the flames, investigators concluded that the fire occurred in the living room at the front of the house. An inspection of the living room carpet revealed marks made by a flammable liquid and investigators found two Molotov cocktails at the scene. After the fire crew doused the fire and left the house, they received another call about a fire at 309 East Russell, the house next door to the earlier fire. Investigators again determined that someone threw a Molotov cocktail through the front bedroom window of the house.

Sabrina Thompson lived at 309 East Russell with her three children, Nakita, Ramon and Rashad. Defendant, Nakita's boyfriend, often spent the night with Nakita at the Thompson house. On October 20, 1997, the day before the firebombings, defendant and Nakita argued about Nakita's relationship with an old boyfriend, Alonzo Jones. Defendant confronted Nakita about some threats she made to Stacey, a woman who informed defendant about Nakita's

relationship with Jones. Sabrina Thompson asked defendant to leave the house after he began yelling and using vulgar language.

That night, Nakita stayed at a friend's house and Ramon slept in Nakita's bedroom located at the front of the house. The Thompson family awoke when a neighbor alerted them to the fire next door, but went back to sleep after watching the firefighters extinguish the flames. Sabrina woke up again at approximately 6:00 a.m. when she heard something crash through the window in Nakita's bedroom. Sabrina heard Ramon shouting and, when he ran out of the bedroom, she saw that he was badly burned. Paramedics took Ramon to the hospital where doctors determined that he suffered third-degree burns over fifty percent of his body.

At trial, Robert Steele testified that, on October 20, 1997, defendant promised him drugs and money to firebomb a house. According to Steele, defendant made the firebombs, but Darion "PJ" McDaniel drove to the first house and Steele and Tyrone Jones hurled the firebombs during the early morning of October 21, 1997. Steele further testified that, later that morning, defendant informed Steele that he firebombed the wrong house and promised Steele more money and drugs to firebomb the house next door. Steele stated that defendant then made two more firebombs and then drove Steele and McDaniel to the Thompson house. Defendant instructed Steele to throw the firebomb through the front bedroom window and Steele complied.

On October 23, 1997, defendant admitted to police in a recorded statement that he paid "a man" with cocaine to scare someone by firebombing a house. However, defendant maintained that he told the man to throw rocks at the windows of the house before bombing it, to make sure the people inside would wake up and avoid injury from the firebombs. Moreover, defendant told the police that when the man firebombed the wrong house, defendant told him that he need not correct the mistake, but that the man took it upon himself to return to East Russell and firebomb the Thompson home.

## II. Analysis - Evidentiary Issues

### A. Defendant's Prior Threats

Defendant contends that he was denied a fair trial because the prosecutor introduced improper character evidence when Nakita Thompson testified that defendant threatened to kill her on prior occasions.

Defendant forfeited this issue by failing to object to the challenged testimony pursuant to MRE 103(a)(1). *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Accordingly, relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Id*; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court will not reverse a defendant's conviction on this basis unless (1) an error occurred, (2) the error was plain, that is, clear or obvious, and (3) the plain error "resulted in the conviction of an actually innocent defendant or ... the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

Nakita testified that defendant confronted her about Alonzo Jones at her house on the afternoon of October 20, 1997, the day before the firebombing. She further testified that

defendant said that “no one else was gonna be with” her. Nakita explained that defendant threatened her “all the time” and said he would kill her if she dated someone else. The prosecutor asked if defendant threatened to kill her on the day before the firebombings and Nakita replied that he did not, but that he had on prior occasions. Further, Nakita testified that, during their argument that afternoon, defendant stated that no other man would “have her” and warned her that no other man could sleep in her bed.

Defendant claims that Nakita’s testimony violated MRE 404(b), which prohibits the introduction of a defendant’s other acts if they are offered to prove the defendant’s character or propensity to commit the offense. However, Nakita’s testimony described defendant’s prior *statements*, not his prior *acts*. Contrary to defendant’s assertion, MRE 404(b) is not applicable because “[a] statement of general intent is not a prior act for purposes of MRE 404(b).” *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Rather, defendant’s threats are statements of a party-opponent pursuant to MRE 801(d)(2) and “admissibility is determined by the statement’s relevancy and by whether its probative value is outweighed by its possible prejudicial effect.” *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990), citing *Goddard*, *supra*, 429 Mich 514-515.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Evidence of a defendant’s intent to harm a victim “is of the utmost relevance” in a criminal trial. *People v Amos*, 453 Mich 885; 552 NW2d 917 (1996). Here, defendant’s prior threats were highly probative of defendant’s intent to harm Nakita and her family, making it more probable that defendant made the firebombs and recruited Steele to throw them at the houses. This supported Steele’s version of events and his credibility, both of which defendant vigorously attacked throughout trial.

Moreover, the threats to kill Nakita were relevant to rebut defendant’s claim that he did not intend to harm anyone and that he instructed Steele to first throw rocks at the windows so any occupants could flee. Defendant’s warning that no one else could sleep in Nakita’s bed had particular significance because, according to Steele, defendant instructed him to throw the firebomb through Nakita’s bedroom window and Ramon was injured while sleeping in Nakita’s bed. Finally, the threats were relevant to show defendant’s motive to order the firebombings and to persuade Steele to return to East Russell to firebomb Nakita’s house after the initial mistake. Defendant’s statements revealed his ongoing jealousy about Nakita’s relationship with Alonzo Jones, the subject of their heated argument shortly before the firebombings occurred. In sum, the disputed evidence was highly probative of material issues at trial.

We also find that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice pursuant to MRE 403. As discussed above, the evidence was very relevant to the issue of defendant’s intent and motive. While the evidence was adverse to defendant’s position, it did not have “an undue tendency to move the tribunal to decide on an improper basis” the issues before it. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Accordingly, the significant probative value of the evidence outweighed any danger of unfair prejudice and defendant has not shown an error requiring further review.

Defendant also contends he was denied a fair trial because Ramon testified that defendant threatened him in the past. Defense counsel elicited this testimony asking Ramon directly whether defendant ever threatened him. On redirect, the prosecutor asked Ramon when and how defendant threatened him and Ramon responded. Defendant cannot claim error on evidence he introduced himself. See *People v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). Absent a showing of plain error, relief is precluded and we need not review the issue further. *Carines, supra*, 460 Mich 763-764. In any case, the evidence was relevant to show defendant's intent and motive as were the threats to Nakita. Moreover, for the reasons articulated above, the probative value of the threats was not substantially outweighed by the risk of unfair prejudice. Accordingly, the evidence was admissible as a statement of a party opponent pursuant to MRE 801(d)(2).

Defendant also complains that defense counsel was ineffective for not objecting to the foregoing testimony or for introducing it himself. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Because we conclude that evidence of defendant's threats was admissible under MRE 801(d)(2), defense counsel was not ineffective for failing to object to the introduction of this testimony. Moreover, defendant has not overcome the presumption that defense counsel's inquiry of Ramon about whether defendant threatened him was sound trial strategy. *Hoag, supra*, 460 Mich 6. Defense counsel appears to have been attempting to establish that defendant meant no harm to Ramon, a strategy we will not reassess with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

#### B. Defendant's Drug Activity

During the prosecutor's direct examination, Nakita testified that defendant and McDaniel knew each other "in the drug business." Steele testified that defendant gave him crack cocaine on the night of the firebombings and that defendant promised him more if Steele returned to East Russell to firebomb the Thompson house. Further, Steele and his girlfriend, LeVaughn Marve, both testified that defendant was Steele's drug dealer. Finally, the prosecutor played a tape of defendant's formal interview with police, during which defendant admitted that he paid for the first firebombing with cocaine.

Defendant contends that the introduction of this evidence violated MRE 404(b)(1). Defendant failed to object to the testimony as provided by MRE 103(a)(1) and, therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*, 460 Mich 763-764. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other “bad acts” is admissible under MRE 404(b) if: (1) it is offered for a proper purpose and not to prove the defendant's character or propensity to commit the offense; (2) it is relevant; and (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Defendant argues that evidence of his involvement with drugs was impermissible character evidence that, “[w]hile arguably relevant to fully describe the transaction,” was not probative of defendant's guilt.

The record reflects that the disputed evidence was not offered to prove that defendant had a bad character, but to show opportunity, plan or scheme. Evidence of defendant's drug activity supported the prosecutor's theory that defendant ordered the firebombings and paid for them with drugs. The evidence also helped “put the charged activity in context by enabling the jury to better understand the dynamics of the relationship between defendant” and Steele. See *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998). These were all proper purposes for which to introduce the evidence other than for character or propensity as prohibited by MRE 404(b).

Moreover, the evidence of defendant's drug activity was relevant to support the purposes for which it was offered. It is well settled that relevant evidence must be both material to a fact of consequence in the action and must have probative force. *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). However, materiality, does not require that the evidence be directed at an element of the crime, but that the fact be “one that is ‘in issue’ in the sense that it is within the range of litigated matters in controversy.” *Id.* at 57 (citations omitted). Accordingly, to be material, the evidence of defendant's drug activity did not have to prove a specific element of the crime, but merely had to prove a fact “in issue.”

The evidence tended to show that defendant enticed Steele into participating in his scheme by giving him crack on the night he requested Steele's help. Defendant also assured Steele he would pay him \$500 for firebombing the first house. Defendant then promised Steele more drugs and more money if he went back to East Russell to bomb the Thompson house. Defendant used drugs and the promise of drugs throughout the transaction. Accordingly, his drug activity was an integral part of the series of events that led to the firebombings. Moreover, the evidence of defendant's involvement with drugs explained why Steele, an admitted drug addict, would agree to perform the firebombings for defendant. Defendant's ability to get drugs made it more probable that Steele would agree to firebomb two houses at defendant's request because Steele knew defendant had access to the drugs and money he promised. In fact, Steele specifically testified that one reason he agreed to help defendant was because defendant “had drugs.”

Finally, the evidence of defendant's drug activity rebutted defendant's opening argument in which he questioned how a person like defendant could have the power to order someone to burn down a house. As the evidence showed, defendant was able to enlist Steele to carry out the firebombings because Steele wanted drugs and defendant had access to them. In sum, the evidence of defendant's drug activity made facts of consequence at trial more probable by linking defendant to the crimes, by illustrating his plan, and by explaining his ability to carry it out.

Defendant contends, however, that the evidence was more prejudicial than probative and should have been excluded under MRE 403. We disagree. The evidence was highly probative of defendant's connection to the crime and strongly supported Steele's version of events. Moreover, the prosecutor elicited only that testimony that supported that proper purpose. Steele and Marve described the relationship between defendant and Steele to explain how defendant involved Steele in the firebombings and why Steele acquiesced. Defendant himself explained to police that he ordered the firebombing and paid for it with cocaine. In short, the evidence was an integral part of the events at issue and defendant has failed to show that it was "so inflammatory or prejudicial that a jury would give [it] preemptive weight." *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993).

The trial court also gave the jury a limiting instruction admonishing it not to consider the testimony as evidence of defendant's bad character or his propensity to commit crimes. See *VanderVliet*, *supra*, 444 Mich 74-75. The court further instructed the jury that it may not convict defendant based on evidence of other bad conduct. Moreover, in his arguments to the jury, defense counsel emphasized that defendant was not on trial for other crimes. These instructions diminished any prejudice the evidence may have caused defendant.

Accordingly, the disputed evidence more than satisfied the test set out in *VanderVliet*, *supra*, 444 Mich 74-75. Defendant has not shown that the introduction of this evidence constituted plain error and, therefore, further review is precluded.

Defendant again argues that defense counsel was ineffective for failing to object to evidence of defendant's drug dealing activities. However, because the evidence was admissible for a proper purpose under MRE 404(b), we find that defense counsel was not ineffective for failing to object.

### C. Defendant's Possession of a Gun

Defense counsel raised the issue of defendant's possession of a gun when he cross-examined Nakita. Specifically, defense counsel asked Nakita whether defendant had a weapon during their argument on the afternoon before the firebombings. Nakita responded that defendant regularly carried a gun, but admitted that she never told the police that defendant owned or carried a weapon. Review of the admissibility of evidence is generally waived if the complaining party voluntarily injects the issue into the trial during cross-examination. *McMaster*, *supra*, 154 Mich App 570-571; *People v Bates*, 91 Mich App 506, 510; 283 NW2d 785 (1979). Because defendant raised this issue, he waived appellate review of this claim.

Defendant contends, however, that defense counsel's introduction of this evidence constituted ineffective assistance of counsel. We are persuaded that defense counsel's cross-examination of Nakita concerning defendant's possession and ownership of a gun was a matter of trial strategy. The record clearly reveals defense counsel's attempt to undermine Nakita's credibility by questioning her extensively about why she never told anyone about the gun prior to trial. We will not second-guess counsel on matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Further, defendant has failed to demonstrate a reasonable probability that, but for defense counsel's conduct, the result of the trial would have been different. *Hoag*, *supra*, 460 Mich 6.

### III. Juror Misconduct

Defendant argues that he was denied a fair trial because a juror allegedly slept during trial. If a juror slept during a portion of the trial, counsel had a duty to bring this to the court's attention immediately. See *United States v Curry*, 471 F2d 419, 421-422 (CA 5, 1973); *Carter, supra*, 462 Mich 214. Here, defendant did not raise this issue at trial, but instead, raised it for the first time at sentencing. Because defendant did not timely raise this issue before the trial court, it is not preserved for review. Therefore, defendant must demonstrate a plain error affecting his substantial rights. *Carines, supra*, 460 Mich 763-764.

When defendant raised the issue was raised for the first time at sentencing, the judge discussed the matter, and said he too initially thought the juror in question was sleeping. Upon closer inspection, however, the court was satisfied that the juror was not sleeping. Under these circumstances, the record does not disclose plain error. See *United States v Tierney*, 947 F2d 854, 868-869 (CA 8, 1991); *Curry, supra*, 471 F2d 421-422. Further, because it is not apparent from the record that the juror was sleeping, defendant has not shown that defense counsel was ineffective for failing to bring the matter to the court's attention.

### IV. Testimony Regarding Polygraph Examination

Finally, defendant contends that he was denied a fair trial because a witness testified that defendant said that he took a lie detector test. We disagree. Defendant did not object to the testimony in question. It is apparent from the record that the reference was unsolicited. Immediately after the witness referred to the test, the prosecutor cut the witness off and informed the witness not to talk about the test. There were no other references to a lie detector test during trial. The testimony was neither offered nor used in an attempt to bolster the witness' credibility or to undermine defendant's credibility. Further, the results of the test were never disclosed. Under these circumstances, defendant was not prejudiced by the isolated reference to a lie detector test. *People v Yatooma*, 85 Mich App 236; 271 NW2d 184 (1978). Further, defendant has not overcome the presumption that defense counsel's decision not to pursue the matter further constituted sound strategy.

Affirmed.

/s/ Henry William Saad  
/s/ Helene N. White  
/s/ Joel P. Hoekstra