

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 19, 2001

No. 222170

Wayne Circuit Court

LC No. 98-009885

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for burning personal property valued at more than \$50. MCL 750.74.¹ He was sentenced to twelve months to four years' imprisonment. We affirm.

Defendant raises several issues on appeal. He first contends that the trial court erred in admitting other-acts evidence that was not offered for a proper purpose under MRE 404(b) and that portrayed him as a person with a propensity toward violent behavior. We agree.

This Court reviews a trial court's ruling on the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Whether evidence may be properly admitted under a specific rule of evidence is a question of law reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

¹ Prior to 1998 PA 312, MCL 750.74 read as follows:

Any person who wilfully and maliciously burns any personal property, other than that specified in the preceding sections, owned by himself or another shall, if the value of the personal property burned or intended to be so burned be \$50.00 or less, be guilty of a misdemeanor. If the value of the personal property burned or intended to be so burned be more than \$50.00, such person shall be guilty of a felony.

The admissibility of other-acts evidence is determined by a four-part analysis. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 69; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). First, the evidence must be offered for a proper noncharacter purpose that is truly probative of an issue other than the defendant's propensity to commit the crime. MRE 404(b); *Crawford, supra* at 385-386, 390. Second, the other-acts evidence must be relevant and satisfy the criteria for admissibility in MRE 402. *VanderVliet, supra* at 55, 60-64. Evidence is relevant if it has any tendency to make the existence of any fact material to the case more or less probable. MRE 401. Third, other-acts evidence is admissible only if its probative value is not substantially outweighed by the risk of unfair prejudice to the party against whom it is admitted. MRE 403; *VanderVliet, supra* at 55, 74-75. Fourth, if requested, the trial court must give a limiting instruction to the jury with regard to the proper consideration of other-acts evidence admitted for a limited purpose. MRE 105; *VanderVliet, supra* at 55.

The prosecution claimed that the other-acts evidence was offered to establish defendant's motive, as permitted under MRE 404(b). *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997). However, we are not convinced that evidence of defendant's alleged physical violence and abusive behavior toward his girlfriend was relevant to show defendant's motive for setting fire to the house where he resided. In the absence of direct relevance to the instant charges, the other-acts evidence is nothing more than character evidence showing defendant's propensity toward violence.

However, under the harmless error rule, judgments can not be reversed due to evidentiary error unless it is "more probable than not" that such error was prejudicial. *Lukity, supra* at 491, 495-496; see MCL 769.26; *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996). An error is harmless when it has no discernible effect on the reliability of the jury's verdict in light of the other evidence properly admitted at trial. *Mateo, supra* at 215. Here, sufficient evidence was presented at trial to support the jury's verdict without the evidence of defendant's past violent behavior. Indeed, while defendant was charged with: burning personal property valued at more than \$50, arson of a dwelling, assault with intent to do great bodily harm less than murder, and attempted murder; the jury convicted defendant on only one count – a crime against *property*. The jury's verdict clearly supports the conclusion that little, if any, weight was given to the other-acts evidence. Thus, any error in admitting the other-acts evidence in this case was harmless.

Defendant next contends that his conviction resulted from a compromise verdict because insufficient evidence existed to justify submitting the attempted murder, arson, and assault with intent charges to the jury. We disagree.

A criminal charge must be supported by sufficient evidence to justify its submission to a jury. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988). A charge and subsequent conviction is supported by sufficient evidence when a rational trier of fact could reasonably conclude that all elements of a charge were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). However, when unsupported charges are erroneously submitted to a jury for consideration, the error is cured if the jury acquits the defendant of those charges. *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). As such, a defendant has no complaint when he is acquitted of an

unwarranted charge if the charge for which he was convicted was properly submitted to the jury. *Graves, supra* at 486-487.

In the instant case, viewing the evidence in the light most favorable to the prosecution and resolving all conflicts in its favor, we find that a rational trier of fact could have concluded that the elements of each charge were proven beyond a reasonable doubt. *Wolfe, supra* at 515. Moreover, defendant's only conviction was for burning personal property valued at more than \$50, MCL 750.74. The evidence was clearly sufficient to establish beyond a reasonable doubt that defendant deliberately and maliciously set fire to the mattress, which in turn caused the house to burn and caused more than \$50 in damage to personal property.² Thus, we find that any error in submitting the other charges to the jury was harmless.

Defendant next asserts that he was denied the effective assistance of counsel, or alternatively, that the cumulative effect of his counsel's errors requires reversal. We disagree. Because defendant did not request a Ginther³ hearing, this Court's review of defendant's claim of ineffective assistance is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it was a plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

First, defendant claims that his counsel neglected to request a missing witness instruction. However, we find that defendant has failed to establish that this inaction was not sound trial strategy.

Defendant next assigns error to counsel for failure to expressly request an instruction regarding the misdemeanor offense of burning personal property. "A trial court need not give requested instructions that the facts do not warrant." *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Here, the evidence established that the damage done to personal property by the mattress fire far exceeded \$50. Thus, defendant has failed to prove that his counsel was ineffective for failing to request an instruction that the facts did not warrant.

Defendant also proposes that he should only be subject to the consequences of the misdemeanor conviction because the verdict form did not specify whether the charge to be

² We reject defendant's assertion that the record contains persuasive indicia of jury compromise to the extent that a harmless error analysis is not applicable. Defendant meets none of the criteria mentioned in *Graves, supra* at 488, to warrant reversal.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

decided by the jury was the misdemeanor or felony offense of burning personal property. This contention is without merit. Jurors are presumed to follow their instructions. *Graves, supra* at 486. While the trial court first introduced the statute in its entirety, including the dollar distinction between the felony and misdemeanor, it expressly charged the jury with regard to the elements required for conviction of the felony offense. The jury returned a verdict based on those instructions.

Defendant's final claim is that the cumulative effect of these errors deprived him of a fair trial. Notwithstanding the erroneous admission of the other-acts evidence, defendant has failed to identify any errors that may have seriously prejudiced the fairness of his trial and warranted reversal. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Affirmed.

/s/ Jessica R. Cooper

/s/ David H. Sawyer

/s/ Donald S. Owens