STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN THOMAS MERKEL,

Defendant-Appellant.

UNPUBLISHED
December 13, 2002

No. 236041
Antrim Circuit Court
LC No. 01-003445-FH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was convicted by jury of arson of a dwelling, MCL 750.72, and second-degree home invasion, MCL 750.110a(3). He was sentenced to seven to twenty years in prison on the arson conviction and to seven to fifteen years in prison on the home invasion conviction. Defendant appeals as of right. We affirm.

This case stems from an arson fire that completely destroyed the home of Michael Gmoser in Kewadin. A state police expert testified that the fire was deliberately set using gasoline as an accelerant. The prosecution's theory of the case was that defendant set fire to Gmoser's house because of Gmoser's romantic relationship with defendant's estranged (now former) wife, Susan Merkel. Defendant confessed to setting the fire to both his sister and to police. At trial, defendant offered the defense of insanity based on the testimony of an expert who concluded that defendant's prolonged alcoholism caused him to be unable to conform his behavior.

Defendant first argues that the trial court erred in allowing testimony of defendant's prior bad acts including shoplifting, assaultive threats, and stalking at trial. We disagree. Defendant asserts that there were six instances of testimony that were improper. Defendant failed to specifically and timely object on five of those occasions; therefore, only one of the alleged errors was properly preserved. With regard to the unpreserved errors, a defendant pressing an unpreserved claim of error "must show a plain error that affected substantial rights." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We find no such plain error. As for the preserved issue, the decision whether to admit evidence is within the trial court's discretion. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v Gould*, 225 Mich App 79; 570 NW2d 140 (1998).

The test for whether evidence of other wrongs or crimes should be admitted is found in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). First, the evidence must be offered for a proper purpose; second, the evidence must be relevant; third, the probative value of the evidence must not be substantially outweighed by unfair prejudice; and fourth, the trial court may provide a limiting instruction to the jury. *Id*. at 55. The testimony that defendant asserts should not have been admitted was properly admitted.

First, the evidence was offered for a proper purpose. Evidence is offered for a proper purpose if it is "in any way relevant to a fact in issue." *Id.* at 64. Defendant placed his mental condition at issue, and evidence of prior antisocial conduct is admissible where an insanity defense is raised. *People v Simonds*, 135 Mich App 214; 353 NW2d 483 (1984). Second, this evidence was relevant in light of the fact that defendant placed his sanity in issue. Third, the probative value of this evidence was not outweighed by the danger of unfair prejudice. Indeed, not only did defendant place his mental condition at issue, but his own witness testified to many of the past incidences of inappropriate behavior relating to his alcoholism and his estranged wife. Thus, defendant himself introduced many of the instances of past behavior about which he now claims prejudice. Finally, the *VanderVliet* Court merely reiterates that MRE 105 provides that, *upon request*, the trial court may provide a limiting instruction. *VanderVliet*, *supra* at 75. In the present case, defendant requested and received the limiting instruction with regard to his properly preserved issue. The *VanderVliet* test does not require the trial court to provide additional limiting instructions where no objection was taken and no request was made.

Defendant next argues that the trial court committed error requiring reversal when it allowed a juror to serve on the panel who had been represented by defense counsel in unrelated proceedings, and who said he was skeptical of the insanity defense as the product of voluntary intoxication. We disagree. Defense counsel did not object to the empanelling of this juror; therefore, this issue is unpreserved and defendant must show a plain error that affected substantial rights. *Carines, supra* at 774.

This juror acknowledged that he had a small amount of legal work done by defense counsel's office and that he could not remember whether defense counsel or someone else in the office had represented him. The juror stated that this relationship would not affect his judgment in the present case. He also indicated that he had some reservations about using the consumption of alcohol as an excuse for one's actions. However, he affirmed several times that he would be able to "follow the [jury] instructions and follow the law."

Defendant argues that his defense attorney's failure to challenge a clearly biased juror for cause denied defendant his right to effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and was so prejudicial that defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must overcome the presumption that the challenged action was trial strategy and also establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). 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 Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

Defendant has not demonstrated that defense counsel's failure to challenge this juror likely affected the outcome of the case. Because the juror indicated that he could set aside any biases and be fair to both sides in this case, it is unlikely that the trial court would have granted the motion even if raised. As a result, we decline to grant relief on this matter.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot