STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2004
v	No. 244418 Osceola Circuit Court
CHERYL ANN MCNEIL, Defendant-Appellant.	LC No. 02-003401

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction for burning of a dwelling, MCL 750.72. Defendant was sentenced to thirty-two months to twenty years' imprisonment. We affirm.

I. Material Facts

On approximately August 25, 2001, defendant and her husband, David McNeil (McNeil), separated. Defendant subsequently moved from the martial residence to a nearby apartment, and resided there with three of her children. At that point, McNeil resided in the marital residence with two of his children and his girlfriend, Dennia Lees.

On November 18, 2001, defendant and McNeil's children stayed the night with defendant. On the morning of November 19, 2001, defendant awoke, and after taking care of some things for the children, defendant decided to go to the marital residence and confront Lees about unresolved issues. Defendant knew that if she arrived after 6:30 a.m., McNeil would have already left for work and she could confront Lees alone. There was a no-contact order requiring defendant to avoid contact with Lees.

Upon arrival, defendant found no cars in the driveway because both McNeil and Lees had left the marital residence by 6:35 a.m. Defendant entered the house with a key she had obtained. After wandering around the house for a short time, defendant discovered that McNeil and Lees began sharing the former marital bedroom. Defendant then entered the bedroom, took a lighter out of her pocket, and lit the top bed sheet on fire. After watching the bed burn for a short period, defendant could not extinguish the fire. Unable to extinguish the fire, defendant left the marital residence, locked the door upon her departure, and returned to her apartment.

By the time defendant returned to her apartment, she heard sirens coming from the fire station located one block from her apartment. Assuming these sirens were en route to the marital residence, defendant found it unnecessary to report the fire.

The fire department responded to, and extinguished, the fire. Sergeant Gerald Briolat of the Michigan State Police, Fire Marshall Division, conducted an investigation to determine the cause and origin of the fire. Briolat's investigation determined the fire was "humanly set," and the origin of the fire was the marital bed. After conveying these findings to McNeil and Lees, Briolat found it necessary to speak with defendant about her possible involvement.

Briolat conducted two personal conversations with defendant on November 20, 2001. During the first conversation, defendant denied any involvement in the fire. However, during the second conversation, defendant verbally confessed to her involvement, and upon request from Briolat, defendant reduced her confession to writing.

II. Ineffective Assistance of Counsel

Defendant first argues that she was denied the effective assistance of trial counsel. We disagree.

Defendant failed to bring a motion for a new trial, or an evidentiary hearing; therefore, this issue has not been properly preserved for appellate review. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Unpreserved constitutional errors are forfeited unless the defendant demonstrates a plain error occurred, the error was clear and obvious, and the error affected defendant's substantial rights, i.e., affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Further, because defendant failed to make a testimonial record concerning this issue, appellate review of this issue is limited to mistakes apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *Ginther, supra* at 443.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). A defendant can overcome such a presumption by showing counsel failed to meet a minimum level of competence. *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *LeBlanc, supra* at 578. In doing so, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). This Court will neither substitute its judgment for that of trial counsel with respect to matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A. Lesser Included Instruction

Defendant first contends that trial counsel was ineffective because she requested jury instructions under MCL 750.74 and 750.92, instead of jury instructions under MCL 750.77—which expressly excludes personal property covered under MCL 750.72. We find that defendant has not established that trial counsel's performance fell below the objective standard of reasonableness under prevailing professional norms. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Trial counsel's strategy was to show that defendant lacked the requisite intent to burn the dwelling, or in the alternative that her burning the bed was only an attempt to burn the dwelling. Based on the record, defense counsel's strategy was reasonable. The facts were undisputed, and defendant admitted during her testimony that she intentionally set the bed on fire.

The offense of burning of a dwelling house, MCL 750.72, requires (1) that defendant set fire to a building, (2) that building was a dwelling house, and (3) that the burning resulted from a malicious and voluntary or willful act. *People v Nowack,* 462 Mich 392, 402-403; 614 NW2d 78 (2000); *People v Williams,* 114 Mich App 186, 193; 318 NW2d 671 (1982). By intentionally lighting the bed on fire while it was in the house, defendant intentionally committed an act that created a very high risk of burning the marital residence. Further, while committing the act, defendant knew of the risk of burning the dwelling and disregarded it; therefore, defendant's actions were both willful and malicious. *Nowack, supra* at 409.

MCL 750.77, in turn, makes it unlawful to use, arrange, place, devise or distribute any inflammable, combustible or explosive material, liquid or substance, or any device in or around a building or property with the intent to willfully or maliciously set it on fire. Therefore, under MCL 750.77, one necessary element is that the defendant utilizes one of the devices set forth in the statute with the intent to burn property or a building. See, e.g., *People v Davis,* 24 Mich App 304, 305; 180 NW2d 285 (1970) (intent to burn a building using a Molotov cocktail). This element is not required in order to prove the burning of a dwelling. Hence, MCL 750.77 is a lesser included cognate offense of MCL 750.72. *People v Foster,* 103 Mich App 311, 319; 302 NW2d 862 (1981) (holding that preparation to burn is a lesser cognate offense of both arson and burning insured property). A trial court may not instruct a jury on lesser cognate offenses; only necessarily included lesser offense jury instructions are permissible. *People v Cornell,* 466 Mich 335, 349-350; 646 NW2d 127 (2002). Because MCL 750.77 is a lesser included cognate offense that could not be the subject of a jury instruction, trial counsel was not required to make a meritless or frivolous request for such an instruction. *Riley, supra* at 142.

Moreover, the instruction, if requested, would not have changed the outcome of the trial. Defendant testified and admitted intentional acts that satisfied the elements of burning of a dwelling. Trial counsel was extremely limited regarding possible defense theories. Based on the existing record, there is no reasonable probability of a different result. Trial counsel proceeded with a strategy that was reasonable within the confines of the defendant's admissions, while not advocating a meritless defense. A strategy that is unsuccessful does not render its use ineffective. *People v Kevorkian,* 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

B. Cautionary Instruction

Defendant next contends trial counsel was ineffective because she failed to request a cautionary jury instruction under MRE 105 regarding the admitted MRE 404(b) evidence. If trial counsel requests a cautionary instruction, a trial court is required to give that instruction. MRE 105; *People v Ho,* 231 Mich App 178, 189; 585 NW2d 357 (1998). However, even if trial counsel should have requested the instruction, defendant cannot show prejudice on this record. The case against defendant did not rest solely on the admission of other acts evidence; defendant's own testimony admitted her intent to set the bed on fire. It is reasonable that defense counsel elected not to request such an instruction so as to not place unnecessary emphasis upon the other acts evidence for the jury. Accordingly, defendant has failed to demonstrate plain error affecting her substantial rights. *Carines, supra.*

III. Other Acts Evidence

Defendant next argues that she was denied a fair trial based on the trial court's determination that evidence of defendant's prior burning of another marital bed in the backyard of the marital residence in August 2001 was admissible at trial. We disagree. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998).

Use of other acts evidencereflecting on a defendant's character is limited by MRE 404(b) to avoid the danger of conviction based on past conduct. *People v Starr,* 457 Mich 490, 494-495; 577 NW2d 673 (1998). MRE 404(b)(1) provides, in pertinent part:

> 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.

To be admissible, the evidence (1) must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence at trial; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under the balancing test of MRE 403; and (4) the trial court must provide a limiting instruction if requested. *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show her propensity to commit the offense, *Id.*, and other acts evidence is admissible to rebut any claim that the charged act occurred by mistake or accident if such a factor is a material issue in the case. MRE 404(b); *People v Sabin (After Remand),* 463 Mich 43, 69-70; 614 NW2d 888 (2000); *People v Golochowicz,* 413 Mich 298, 316; 319 NW2d 518 (1982).

Here, the prosecution offered the other acts evidence for the proper purpose listed of proving defendant's intent to burn the marital residence. Specifically, the evidence tended to establish that because defendant had the opportunity to remove the bed from the residence, like she did in August 2001, her failure to do so in this instance revealed an intent to burn the

residence. The prosecutor also offered the evidence to show defendant did not mistakenly burn the residence. These are all proper purposes outlined in MRE 404(b)(1)—intent, opportunity, and absence of mistake.

Moreover, even if the trial court failed to conduct a thorough MRE 403 balancing test on the record, or otherwise, such a failure is harmless error. *People v Lukity*, 460 Mich 484, 491-493; 596 NW2d 607 (1999). Under *Lukity,* a criminal conviction cannot be reversed because of preserved nonconstitutional error unless it is more probable than not that, after an examination of the entire cause, the error was outcome determinative. *Id.* at 495-496. As noted above, defendant admitted to intentionally burning the bed. Weighing the strength of defendant's admission within an examination of the entire cause, the jury was presented with ample evidence to return a verdict of guilty beyond a reasonable doubt. Thus, "it does not affirmatively appear that the error complained of has resulted in a miscarriage of justice." *Id.* at 497 (citations omitted).

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey