STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2004
V	No. 245503 Wayne Circuit Court
DAVID WADE JOHNSON, Defendant-Appellant.	LC No. 02-002288

Before: Cooper, P.J., and Griffin and Borello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and arson, MCL 750.72. He was sentenced to fifty-seven months to ten years' imprisonment for each of the three assault convictions, and ninety-six months to twenty years' imprisonment for the arson conviction, the four sentences to run concurrently. We affirm.

Defendant first argues on appeal that the trial court erred in instructing the jury regarding flight, because either the instruction was not supported by the evidence, or the evidence of defendant's flight was used as substantive evidence, which defendant contends is an improper purpose. We disagree.

"Claims of instructional error are reviewed de novo." *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). In doing so, this Court examines the jury instructions as a whole. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *Milton, supra* at 475; *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructions must not be extracted piecemeal to establish error. *Aldrich, supra* at 101. "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Canales, supra* at 574.

In the case at bar, the trial judge gave the jury the following instruction, which paraphrases CJI2d 4.4[1]:

> Now there has been some evidence that the defendant ran away after the allege [sic] offense. That evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. Or the person may run because of consciousness of guilt. You have to decide if it was the defendant and if he ran and if so whether that shows consciousness of guilt.

Though he substituted the phrase "consciousness of guilt" at the end, this was a proper substitution. *People v Coleman,* 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall,* 200 Mich App 396; 504 NW2d 666 (1993).

"It is well established that jurors are presumed to follow their instructions." *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant's bare assertion that "the evidence was used as substantive of his guilt," is insufficient to overcome the presumption that the jurors in the case at bar followed the judge's instruction. *Id.*

Furthermore, there was sufficient evidence to justify giving a jury instruction on flight. A witness who was familiar with defendant testified that within a short time after the fire started in the house in which she was sleeping, she saw defendant "running away from the side window" of the burning house, through which a "firebomb" had just come. That witness further testified that she saw defendant's face. Another witness testified that after the fire she saw nearby the tan van that defendant had been driving for some time. The owner of the firebombed house testified that immediately after the fire, she saw a beige or tan van driving down the street past her home as it burned. Given this evidence, it cannot be said that the trial court erred in instructing the jury.

Defendant next argues that the trial judge demonstrated prejudice and bias against him, and the trial court erred in failing to disqualify the judge. We disagree.

This Court reviews for an abuse of discretion the factual findings made by a chief judge (during his de novo review of the trial judge's decision on a motion for disqualification). However, it reviews de novo the applicability of the facts to the relevant law. *Cain v Michigan Dept of Corrections,* 451 Mich 470, 503; 548 NW2d 210 (1996); *Van Buren Twp v Garter Belt,*

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[1] CJI2d 4.4 reads:

(1) There has been some evidence that the defendant [tried to run away / tried to hide / ran away / hid] after [the alleged crime / (he / she) was accused of the crime / the police arrested (him / her) / the police tried to arrest (him / her)].

(2) This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

(3) You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

Inc, 258 Mich App 594, 598; 673 NW2d 111 (2003). "[A]n abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). The party moving for disqualification bears the burden of proving actual bias or prejudice. *People v Bero*, 168 Mich App 545, 549; 425 NW2d 138 (1988). "[D]isqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain, supra* at 495-496.

Based on the evidence defendant adduced, he did not meet his burden of establishing that the trial judge had a personal bias or prejudice against him originating in events or sources of information gleaned outside the judicial proceeding, and consequently, Chief Judge Kenny did not err in denying defendant's motion for disqualification.

MCR 2.003(B)(1) states that a judge is disqualified when the judge cannot impartially hear a case, including, but not limited to, instances in which the judge is personally biased or prejudiced for or against a party or attorney. Defendant argues on appeal that the trial judge's conduct at the hearing on his motion to appoint new counsel evinced personal bias or prejudice. We disagree.

At the hearing on defendant's motion to disqualify, the trial judge stated that he did not bear defendant any animosity and gave the following explanation of his actions at the earlier hearing:

> My comments to Mr. Johnson were directed to his failure to disclose to the attorney that he was dissatisfied with him and the failure to disclose the grievance, all of which made it appear that if what he was doing was just trying to manipulate that result and there's good precedent for those observations. I don't have anything against Mr. Johnson.

On de novo review of the trial judge's decision, the chief judge noted that that the trial judge had granted defendant's motion for appointment of new counsel at the hearing at which defendant alleged he revealed his bias. The chief judges stated:

> In this particular matter I think it's true that [the trial judge] was less than happy with what I think he viewed as a less than substantial reason being offered by [defendant] in order to get [a new] attorney . . . I think it is clear to me from reading the transcript that [the trial judge] thought that in addition to his knowing [defendant's original attorney] and knowing that [he] is an excellent attorney, felt that the reasons bring [sic]offered were pretty weak, and I think [the trial judge] was very candid in his saying that. . . . I think that [the trial judge] has not demonstrated a bias in fact toward defendant that will impact on this trial.

This Court, relying heavily on *Cain, supra*, stated in *Schellenberg v Rochester Michigan Lodge No 2225, of Benev and Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998):

> Absent actual personal bias or prejudice, a judge will not be disqualified. Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Likewise, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. Moreover, a party who challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. [Citations omitted.]

Defendant has not presented any evidence that the alleged bias or prejudice originated in events or sources of information gleaned outside the judicial proceedings. His allegations are based solely on statements made by the judge during the hearing on defendant's motion to appoint new counsel. The judge's comments appear to be nothing more than remarks "critical or disapproving of, or even hostile to [defendant], . . . or [his] case[ ]," or "expressions of impatience, dissatisfaction, annoyance, and even anger" that are equally ineffective for the purpose of establishing bias or prejudice. *Cain, supra* at 497 n 30. While it is true that events originating in the proceedings can be characterized as "bias" or "prejudice," if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible[,]" *Cain, supra* at 496, in the case at bar, the alleged comments by the trial court judge cannot reasonably be said to do this. On this point, it is significant that defendant does not allege that the trial judge made an unfair decision at the hearing on the motion for appointment of new counsel, which it seems likely he would have done had he actually felt such antagonism.

Given that defendant did not meet his burden of establishing that the trial judge had a personal bias or prejudice against him, it cannot reasonably be said that an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the chief judge's finding that the trial judge was not biased.

Defendant next contends that the trial court erred in granting the prosecution's motion to consolidate in a single trial the assault he committed on December 31, 2001, and the assaults and arson he committed on January 6, 2002. He contends that the offenses were not "related" and therefore had to be tried in separate trials. We disagree.

This Court reviews de novo whether joined offenses are related as a matter of law and subsequently eligible for joinder. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977). A trial court's decision to deny a defendant's motion for severance of related offenses is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 11 (1997). For purposes of MCR 6.120, two offenses are related if they are based on the same conduct, or a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B)(1) and (B)(2); *Tobey, supra* at 153.

MCR 6.120 provides that "An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial." MCR 6.120(B) provides an unqualified right to severance of unrelated offenses: "On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of

this rule, two offenses are related if they are based on (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." MCR 6.120(C) sets out the procedure for joining or severing charges other than those severed pursuant to defendant's right to severance of unrelated offenses. It states: "On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." The remainder of MCR 6.120(C) lists factors relevant to promoting fairness to the parties and a fair determination of the defendant's guilt or innocence.

In granting the prosecution's motion, the trial judge stated: "There's nothing legally prejudicial about it and the offenses are related and you don't have a right to have related offenses severed, but I do have the discretion to join them and I find that they're related and I can consolidate them in a single trial when he could have been charged in the same information." Read in context, this holding appears to be based on finding that the arson was a continuation of the argument that initially erupted during the incident that culminated in the December 31, 2001, assault. The trial judge stated:

> Well, the incidents themselves – it's not the same transaction, but she's saying they're related. What she just said indicates they are related. She's saying there's a felonious assault and an argument and then they moved out and the defendant tracked them down . . . and firebombed the house so that's a relation.

Nowhere does he expressly state on which of the grounds listed in MCR 6.120(B)(2) his determination of "relatedness" was based. However, the offenses were related for the purposes of MCR 6.120 because they were based on "a series of connected acts or acts constituting part of a single scheme or plan." MCR 6.120(B)(2). In the case at bar, it appears possible that less time elapsed between the offenses in the case at bar than between those in *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987), aff'd 186 Mich App 660; 465 NW2d 47 (1991).[2] Testimony was presented to indicate that defendant on December 31, 2001, was planning, at some unspecified future date, to kill everyone present during the assault. One of the witnesses testified that after committing the assault, defendant said: "I'mma kill all of y'all." Defendant's wife was presumably an object of defendant's threat that day, since she was present. She was also present during the arson. The prosecution also presented evidence that the plan to kill continued during the time between December 31, 2001, and January 6, 2002, the date of the later assaults and arson. Defendant's wife testified that on January 2, 2002, "[defendant] said he was going to kill all of us in the house." She also testified that at some unspecified point before the assaults and arson, defendant had told her: "If your family ever cross me any kind of way, I'm gonna kill them and I'm going to blow their house up." The evidence presented demonstrates that defendant committed the arson in fulfillment of a plan to kill his wife, and possibly her sisters as well, and that the plan had existed at least from the time of the December 31, 2001, assault.

[2] "[T]he prosecutor, after conducting a thorough investigation, could not specify the exact date and time of the offenses." *Miller, supra* at 47.

Defendant argues that the offenses were unrelated because the offenses themselves were different, occurred on different dates, at different locations, and involved different victims. Defendant cites no authority for his proposition that these factors are determinative. As noted above, this Court has found offenses related under MRC 6.120 when the victims were different, the locations where they occurred were different, and when they happened at different times. See *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Defendant does not clearly present an argument that, assuming the offenses were related, the trial court abused its discretion in joining them. Consequently, we do not address this argument.

Defendant next argues that the trial court erred in admitting evidence of defendant's actions between the assault on December 31, 2001, and the assaults and arson on January 6, 2002, for the purpose of showing a propensity to commit bad acts. We disagree.

We note at the outset that defendant has not preserved this issue for appeal since he did not object at trial to its introduction. MRE 103(a)(1); *Aldrich, supra* at 113; *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Consequently, this Court's review is for a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994); *Carines, supra* at 763.

Whether evidence of a defendant's other crimes, wrongs, or acts is admissible is governed by MRE 404(b). Evidence is admissible under this rule if it: (1) is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) is relevant to an issue or fact of consequence at trial, and (3) is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). The admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

MRE 404(b)(1) provides a list of "other purposes," for which other acts evidence might be admissible. Among them are: "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." This list of proper purposes is not exclusive. *VanderVliet, supra* at 65.

Relevant evidence is evidence having 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; *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). "Logical relevance is the touchstone of the admissibility of uncharged misconduct evidence." *Id.* (internal citations omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Applying the above criteria to the evidence defendant claims was inadmissible, we find that it was offered for a proper purpose, material, relevant, and more probative than prejudicial. The prosecution claims that it offered the evidence of the January 4, 2002, incident "to show that [sic] the defendant's intent to kill at the time of the firebombing." The record indicates this contention is no mere after-the-fact justification. During its closing, the prosecution, referring to defendant's actions on January 4, 2002, argued: "Those actions of his tell me what is in this man's mind. And this case he was going to get [his wife's] family." Showing intent is one of the proper purposes expressly listed in MRE 404(b)(1).

The evidence was also material, as required by MRE 404(b)(1). "Evidence probative of a matter 'in issue' is material." *Miller, supra*, 186 Mich App 663. The elements of assault with intent to commit murder is are: "(1) an assault, (2) with the specific intent to commit murder, (3) which, if successful, would make the killing murder." *People v Rockwell,* 188 Mich App 405, 411; 470 NW2d 673 (1991). That defendant had the requisite intent to kill was "in issue" in the case at bar because defendant argued in closing that: "There is no showing at all, no evidence at all that [defendant] intended to kill anybody in this case."

The evidence is also relevant, because the fact that defendant unequivocally expressed an intent to kill someone makes the existence of an intent to kill his wife and her sisters more probable than it would be absent such a statement. His violent actions and possession of a crowbar during those visits are also relevant to the issue of whether he intended to kill.

Given the nature of the evidence to which defendant objects – that defendant visited two houses (one of them the very house he later firebombed), armed with what could reasonably be seen as a weapon (a crowbar), shouting out clear statements of an intent to kill someone – has great probative value. Defendant, beyond his contention that the evidence was used only to show his character, does not indicate how its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403.

Because the evidence concerning defendant's acts and statements on January 4, 2002, was offered for a proper purpose and its probative value was not substantially outweighed by the danger of unfair prejudice, it was not plain error for the trial court to admit this evidence.

Finally, defendant contends that his attorney's failure to object to the introduction of evidence concerning his actions between the offenses for which he was convicted constitutes ineffective assistance of counsel. Again, we disagree.

We note as a preliminary issue that defendant has not fully preserved this issue for review, because he did not move for a new trial or for an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Consequently, our Court's review is limited to the mistakes apparent on the record. If the appellate record does not support defendant's assertions, he has waived the issue. *Id*. at 658-659.

We review a trial court's findings of fact for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have

been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *LeBlanc*, *supra* at 578. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

As noted above, the evidence of defendant's actions between December 31, 2001, and January 6, 2002, was admissible to prove defendant's intent. We note also that our Supreme Court has held that, "MRE 404(b) does not apply to a defendant's prior statements of intent." *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Thus, an even stronger case is made for the admissibility of the statements defendant made during this period. Given the likely admissibility of the evidence, his attorney's failure to object to it will not support a claim of ineffective assistance of counsel. See *Snider*, *supra* at 424.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello