

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARGUERITE ANN PAUL,

Defendant-Appellant.

UNPUBLISHED
December 9, 2008

No. 279971
Wayne Circuit Court
LC No. 07-005901-01

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of arson of personal property having a value of \$1,000 or more but less than \$20,000, MCL 750.74(1)(c)(i), and was sentenced to three years' probation. On appeal, defendant argues that her counsel rendered ineffective assistance at trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with setting fire to a van owned by Michele McKee, with whom defendant previously had a two-year relationship. At trial, the prosecution elicited testimony regarding a prior incident in 2005 wherein defendant returned home intoxicated and hit McKee over the head with a chair. Defendant's attorney never objected to the introduction of this evidence, which was initially raised as an issue pursuant to the prosecutor's pretrial notice of intent to offer the evidence.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the

existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The evidence in question was admitted pursuant to MRE 404(b) and MCL 768.27b. We find it unnecessary to determine whether counsel's performance was deficient for failure to object or whether the evidence was admissible. Assuming that the evidence was inadmissible and that counsel should have objected, defendant has failed to establish the requisite prejudice. Indeed, a review of defendant's appellate brief reveals that the prejudice prong of an ineffective assistance claim is not even argued; defendant merely asserts that counsel should have objected. Regardless, on examination of the record we cannot conclude that there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

We first note that this was a bench trial, "and the judge, sitting as factfinder, is presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence." *In re Forfeiture of \$19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). Further, the trial court, in ruling from the bench, made no reference whatsoever to the prior battery, but instead focused exclusively on the facts surrounding the arson in coming to its verdict. Finally, McKee testified to actually witnessing defendant flee from the vehicle at which time the vehicle was ablaze. No prejudice having been established, reversal is unwarranted on the claim of ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski