

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEN STUART SEILER,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 291562

Delta Circuit Court

LC No. 08-008046-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant Ken Seiler appeals as of right his jury conviction of one count of unlawful killing of an animal.¹ The trial court sentenced Seiler to six months in jail, with credit for time served, and 18 months of probation. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In August 2008, Richard Pearson was working inside his garage, and Pups, the Pearsons' 2-1/2-year-old family dog,² was lying on the ground just outside the garage. Richard Pearson then heard Pups barking, so he went to investigate and discovered that his neighbor, Seiler, had arrived home. Richard Pearson then promptly took Pups inside the house, which was where she was routinely kept whenever Seiler was home. Testimony at trial revealed that Seiler had previously filed several complaints regarding Pups barking and wandering onto his property.

About an hour later, Richard Pearson's five-year-old daughter went outside, and Pups snuck out with her. Pups then began barking, which alerted Richard Pearson that she was back outside, so he immediately went outside to bring her into the house.

Richard Pearson testified that Pups was barking near the Pearson-Seiler property line, but came to the garage's service door when he called for her. However, she did not come inside the garage to where Richard Pearson was standing. Instead, Pups went back to the same location

¹ MCL 750.50b.

² Richard Pearson described Pups as a Beagle/Labrador mix.

near the Pearson-Seiler property line and continued barking. Richard Pearson continued to call for her but stopped to race outside the garage when he heard shotgun fire. Within moments, he heard a second shot fired, and by then Richard Pearson could see Seiler standing near the Pearson-Seiler property line holding a shotgun in ready position. Richard Pearson yelled, "Hey," and Seiler looked Richard Pearson in the eye, fired two more shots at Pups, then turned and walked away.

Richard Pearson told Seiler that he was going to call the police, and Seiler replied, "Go ahead. I hope you do." Richard Pearson then walked over to Pups, who was still alive, but down on the ground. He then went inside the house, called 9-1-1 and the veterinarian, and then went back outside to check on Pups. At this point, Seiler was still outside and told Richard Pearson to "go back in the house with your kids and cry over your dead dog." Richard Pearson testified that Seiler then walked toward him and began "speaking some sort of tongues," which Richard Pearson described as "being cursed or something." According to Richard Pearson, Seiler "was just waving his hands and [speaking] some sort of foreign language." Michigan State Police Trooper Jeremy Hauswirth explained that Seiler later told Trooper Hauswirth that he had been speaking "to God in a language that was too complex for myself and my partner; and that Mr. Pearson was now marked . . . for retribution by God."

Before the shooting, Seiler had been in the process of loading his motorcycle onto a trailer to take to a shop in Wisconsin, so, after the shooting, he finished loading motorcycle and left. Seiler was gone before the police arrived. Richard Pearson and his 12-year-old son, Jacob Pearson, tried to load Pups into a box in order to take her to the vet for treatment, but it was clear that Pups was in too much pain to be moved. The police arrived and, after taking Richard Pearson's statement and seeing Pups still alive and suffering, left immediately to locate Seiler. Once police located Seiler, they took him into custody.

After reading Seiler his *Miranda* rights, the officers proceeded to question him about the incident. They asked him why he shot Pups, and Seiler stated that she "had attacked him." However, Seiler failed to provide the officers with any details of the alleged attack. Seiler admitted that Pups had not bitten him, but he told the officers that another dog had previously bitten him. Trooper Hauswirth testified that Seiler stated that Pups had been barking while Seiler was attempting to load up his motorcycle, so Seiler went into his house, got his shotgun, came back outside, "encountered the dog[,] and shot it." Seiler shot Pups at least four times with a shotgun loaded with buckshot and slugs. Pups did not survive.

Seiler's theory at trial was that he shot Pups in self-defense. The prosecutor contended that Pups was not the aggressor but simply a gentle, family pet, which Seiler had killed without provocation. During opening statement, the prosecutor commented on Pups' characteristics, "The testimony will be that the dog really didn't have a mean bone in his [sic] body, it barked, never bit anybody, never attacked anyone." When the prosecutor asked Jacob Pearson if Pups had ever hurt him, he answered, "Never." And when the prosecutor asked Jacob Pearson if he "ever [saw] the dog snap or bite or growl at anyone," he again answered, "Never." Similarly, Richard Pearson testified that he had never seen Pups bite anyone and had never seen her display any mean behavior.

The prosecutor also elicited testimony regarding Richard Pearson's observations of his wounded and dying family pet. Richard Pearson explained,

The front left paw was completely almost shot off, it was just hanging by the hide right above the—up in this area here. Behind the left ear was a chunk of flesh gone here. Down the side of the—the dog was all peppered, which to me it looked like birdshot but I’m not sure. And then the hind quarters were all shot up, too.

When asked what efforts Richard Pearson took to save Pups, he testified, “I called the veterinarian . . . I just thought maybe, you know, there would have been a chance to bring the dog in; but, as time went on, you could see it wasn’t going to—it wasn’t going to work.” Richard Pearson further testified,

I had gotten a box, I thought—I still thought maybe I could get her to the vet to see if, you know, to do something with her; but, Seiler had left already and I went and got my son Jake to give me a hand because—to get her in the box. But when we went over there to do that, I went to grab her and her hair stood up on her back, so I figured she was, you know, in too much pain, she didn’t want to be touched with. So I just told Jake to go back in the house. And I went back into—I went and grabbed my .22 because I thought I was going to have to put her down; but, by the time I got back out, she was—she was gone already, so—

Richard Pearson also explained that after the incident his children were “both crying and carrying on[.]”

At the end of Richard Pearson’s testimony, the prosecution sought to play a 51-second video for the jury as proof of Pups’ characteristics of gentleness and good temperament. The prosecutor stated that he was introducing the video into evidence in anticipation of Seiler’s self-defense claim:

I think that the video is important to visually indicate not only the temperament but gentleness of the dog in response of that anticipated defense. I certainly look at this and see a dog that’s really not an aggressive animal at all in the way it’s playing, and I think it’s clearly relevant and important given the nature of the case.

Defense counsel objected, arguing that video showing Pups’ playing with her owners had “no relevancy as how the dog acted and behaved towards Mr. Seiler on that particular day.”

The trial court ruled that the video was relevant, not prejudicial, and admissible, reasoning: “This goes to the temperament of the dog, the nature of the dog, and in an effort to rebut a claim of self-defense which is already been [sic] raised here by the evidence.” The trial court then commented,

Let me offer something else, which is slightly unusual, and that is that character evidence under 404.^[3] Character of the alleged victim of a homicide. Now, I don't know if you can call the shooting of a dog as an alleged victim of a homicide; but, when self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim or evidence of a trait of peacefulness of the alleged victim to rebut the evidence of alleged victim was the first aggressor is considered as relevant.

The trial court then agreed with defense counsel that the rule did not apply because Pups was not human, and then stated that the rule merely gave “some rationale for the reason—for the offering of this [the video] as its particular relevance in this case.”

Seiler testified in his own defense about previously being bitten by two dogs and about a German Shepherd attacking one of his own dogs. Seiler also testified about a previous instance of Pups allegedly aggressively approaching him; he explained that the only way to fend her off was to point a snow blower and blow snow toward her. Seiler testified that on the day of the incident, Pups approached him while he was trying to load his motorcycle into his trailer. Seiler claimed that Pups “was running towards [him], . . . barking . . . acting rather wildly, unpredictably, and rather viciously towards” him. Seiler claimed that he was “terrified.” Seiler further claimed that he went inside to get his gun so that he could safely finish loading the motorcycle, a process that required him to “be turning my back on this dog and squatting down.” Seiler stated, “I’d be very vulnerable, the jugular would be easily exposed as well as, you know, my rear-end or other parts of my anatomy.” According to Seiler, Pups returned and “began another attack on” him: “the dog was starting to run up towards me and it was barking and it was leaping on its, you know, on its front legs rather aggressively[.]” Seiler testified that he had “an instinctive reaction” and shot Pups in self-defense. Seiler admitted that Pups was at least 13 yards, and possibly even as much as 17 yards, away when he shot her, but he explained that dogs run fast. Seiler claimed that he shot Pups multiple times in an effort to put her out of her misery.

During closing argument, the prosecutor stated,

[Y]ou may have heard people say that you can—you can really tell a lot about a person the way that person plays sports. . . . You can also tell if that person plays with passion but doesn't play with maliciousness. Plays hard but doesn't play rough, with intent to hurt. And I would suggest to you that the same can be said about a dog. The film that you'll see here in a moment—which you've already seen, but you'll see again—I suggest shows you a gentleness to this dog, the way it hops around, the way it's not being real aggressive, the way it's being patient, it shows some gentleness, some intelligence that speaks highly of its trait. And it's consistent with what the Pearsons have said about the temperament of this dog.

The prosecutor then replayed for the jury the 51-second video of Pups playing with her family.

³ Presumably, the trial court was referring to MRE 404(a)(2), regarding the admissibility of evidence of a homicide victim's character when a defendant claims self-defense.

The jury found Seiler guilty as charged, and Seiler now appeals.

II. ADMISSION OF EVIDENCE

A. STANDARD OF REVIEW

Seiler argues that he was denied a fair trial and was denied his Sixth Amendment right to a trial when the trial court allowed into evidence the 51-second video depicting the gentle and friendly disposition of Pups playing with her family. Seiler also argues that the trial court erred in allowing inadmissible testimony about Pups' temperament. Seiler argues that the video and other similar evidence had no probative value to determining Pups' disposition with strangers and that its unfair prejudicial effect attributed to the jury's decision to convict him.

Defense counsel objected to the prosecution's request to admit the video into evidence. Therefore, this issue is preserved.⁴ The decision whether to admit evidence is within the trial court's discretion, and we will not disturb that decision absent an abuse of that discretion.⁵ An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.⁶

However, defense counsel did not object to the other instances of allegedly prejudicial testimony; therefore, those issues are unpreserved.⁷ We review unpreserved claims of constitutional error for plain error that affected the defendant's substantial rights.⁸ To avoid forfeiture under the plain error rule, the defendant bears the burden to show that: (1) an error occurred, (2) the error was clear or obvious, (3) and the plain error affected the outcome of the lower court proceedings.⁹ Further, "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "“seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings” independent of the defendant's innocence.”¹⁰

B. ANALYSIS

MRE 404 states, in pertinent part:

⁴ *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

⁵ *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

⁶ *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

⁷ *Grant*, 445 Mich at 546; see *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (“[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.”).

⁸ *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

⁹ *Id.* at 763.

¹⁰ *Id.* (internal citations omitted).

(a) *Character evidence generally.* Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor[.]

Seiler argues that the trial court erred in allowing the prosecution to introduce evidence of Pups’ characteristics during its case-in-chief instead of waiting until rebuttal. In support of this claim, Seiler relies on *People v McIntosh*,¹¹ in which this Court stated that “evidence of the peaceful character of the deceased [is] not . . . admissible in the prosecution’s case in chief in anticipation of defense testimony of violent character supporting a plea of self-defense[.]” However, Seiler’s argument mischaracterizes the trial court’s ruling regarding admissibility of the evidence.

In ruling on the admissibility of the video evidence, the trial court did comment on the possible applicability of MRE 404. However, the trial court ultimately ruled that MRE 404 did not apply because Pups was not human and then stated that the rule merely gave “some rationale for the reason—for the offering of this [the video] as its particular relevance in this case.” Thus, we agree with the prosecution that Seiler’s argument that the trial court erred in admitting the video during the prosecution’s case-in-chief is without merit. Therefore, the proper inquiry is whether the trial court abused its discretion in allowing admission of the video evidence and that inquiry is based on whether the evidence was relevant.

Generally, all relevant evidence is admissible.¹² And “[r]elevant evidence’ means 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.”¹³ Seiler argues that, regardless of its admissibility under MRE 404(a)(2), the evidence was unfairly prejudicial.¹⁴

¹¹ *People v McIntosh*, 62 Mich App 422, 429; 234 NW2d 157 (1975), aff’d in part and rev’d in part on other grounds 400 Mich 1 (1977). See also *People v Edwards*, 139 Mich App 711, 718-719; 362 NW2d 775 (1984) (“Evidence of a victim’s character may be presented by the prosecution in a homicide case only to rebut evidence that the victim was the first aggressor and that the defendant was acting only in self-defense.”).

¹² MRE 402.

¹³ MRE 401.

¹⁴ See MRE 403.

Here, Pups' characteristics and temperament were clearly at issue in this trial. During opening statement, defense counsel told the jury that Seiler's claim was that he was "attacked" and that Seiler had "made repeated calls to animal control over the last year and a half regarding this dog and the issues that he's been facing with it." Defense counsel requested that the jury look at both sides of the story and look for "just cause." Therefore, Pups' nature and temperament were put into question from the start. We conclude that evidence regarding Pups' characteristics was relevant as it had a tendency to make Seiler's testimony about the alleged attack less probable than it would be without the evidence. We also disagree that the probative value of the relevant evidence was substantially outweighed by any danger of prejudice. Accordingly, in light of Seiler's defense theory, we cannot say that the trial court abused its discretion in allowing admission of the video evidence.

Nor can we say, with respect to the testimony elicited regarding Pups' characteristics, that there was any plain error affecting Seiler's substantial rights. That is, we are satisfied that there was no plain error that resulted in the conviction of an actually innocent defendant or that "“seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings” independent of the defendant's innocence.””¹⁵ Even accepting Seiler's testimony that Pups was barking and acting aggressively towards him, he admitted that she never bit him, nor did he testify that she even attempted to bite him, and he admitted that she was still at least 13 yards away when he shot her. Therefore, it is reasonably likely that the jury concluded that Seiler did not have an honest and reasonable belief that he was in imminent danger of death or great bodily harm necessitating exercise of deadly force.¹⁶

Further, to the extent that Seiler argues that the trial court erred in allowing admission of testimony regarding Pups' suffering or the Pearson family's grief, we similarly find no plain error affecting Seiler's substantial rights.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Seiler argues that defense counsel was ineffective for failing to file motions in limine to bar testimony relating to Pups' condition after she was shot, whether or not the owners had to make a decision to put Pups down, and the witnesses' emotional reactions to the shooting of Pups. Seiler also argues that defense counsel was ineffective by failing to object to this testimony during trial, by failing to object to impermissible character evidence, and by failing to move for a mistrial. Because Seiler did not move the trial court for a new trial or for a *Ginther*¹⁷

¹⁵ *Carines*, 460 Mich at 763 (internal citations omitted).

¹⁶ See *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.").

¹⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

hearing,¹⁸ we consider Seiler's claims only to the extent that defense counsel's claimed mistakes are apparent on the record.¹⁹

B. ANALYSIS

To prove a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) that defense counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial—that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.²⁰

We concluded above that the trial court did not abuse its discretion in allowing admission of the video evidence over defense counsel's objection. Therefore, Seiler's argument that defense counsel was ineffective for failing to move for a mistrial on that same ground is without merit.²¹

Further, we concluded above that admission of testimony regarding Pups' characteristics, Pups' suffering, and the family's grief did not constitute plain error affecting Seiler's substantial rights. Therefore, Seiler's argument that defense counsel was ineffective for failing to file motions regarding its admissibility or object on that same ground is without merit.²²

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello

¹⁸ We decline Seiler's request to remand for an evidentiary *Ginther* hearing because the request is not properly before us, MCR 7.211(C)(1)(a), and because we conclude that an evidentiary hearing is not necessary to decide this issue. Indeed, Seiler admits that "the record speaks for itself[.]"

¹⁹ *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

²⁰ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

²¹ *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002) (stating that when evidence is admissible, it follows that defense counsel's decision not to object to presentation of the testimony did not deprive defendant of the effective assistance of counsel).

²² *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986) ("A claim of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal is without merit.").