STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2012
v	No. 302219 Alger Circuit Court
JAMES DAVID SMITHINGELL, Defendant-Appellant.	LC No. 2010-001917-FC

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of safe breaking, MCL 750.531, and breaking and entering a building with intent to commit a felony therein, MCL 750.110. Defendant was found not guilty of witness intimidation, MCL 750.122(7)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to prison terms of 8 years, 8 months to 20 years for safe breaking and 4 years, 9 months to 10 years for breaking and entering. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that joinder of the charge of witness intimidation with the charges relating to the breaking and entering of the Munising Moose Lodge was improper because they were unrelated acts that occurred on separate dates. However, defendant waived this issue by stipulating to joinder of charges. Where there has been express approval at trial of an issue subsequently raised on appeal, this Court will find "a waiver that *extinguishes* any error." *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (emphasis in original).

Defendant next argues that insufficient evidence was presented to convict him of safe breaking. We disagree. "In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Accordingly, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To prove safe breaking, the prosecution must demonstrate that (1) a defendant attempted to "break into, burn, blow up or otherwise injure or destroy any safe," and that (2) the defendant did so with the intent to commit a larceny or other felony. MCL 750.531. Defendant challenges the sufficiency of evidence solely with regard to the first element.

Taken in the light most favorable to the prosecution, there was sufficient circumstantial evidence to find that defendant broke into the safe located in the office of the Munising Moose Lodge. First, there was evidence that defendant was in possession of money taken from the safe. Alan Weymouth, administrator of the lodge, testified that a fund used to support an orphanage that consisted of approximately $350 to $400, had been in the safe. It was made up of various denominations, but was predominantly comprised of one dollar bills. Shawn Osborn, who had driven Trisha Nikunen to Froggy's bar the evening of the break-in to get a house key and some money from defendant, testified that he saw defendant outside the bar with a lot of money in his hand, consisting mostly of one dollar bills. Munising Police Department Lieutenant John Nelson stated that defendant told him he had given Nikunen $50 outside of Froggy's and then proceeded to another location to buy drugs. Nikunen testified that she let defendant stay at her home often in January and February 2010. She did not believe defendant was working at the time nor did he have any source of income. The prelate of the lodge also estimated that approximately $50 to $60 in rolled coins was also missing from the safe. Osborn stated that when he and Nikunen returned to her house, defendant pulled a blue bag filled with loose and rolled coin out of the closet and handed it to Osborn. Nikunen testified that the bag was a bank deposit bag and that it contained rolled and loose change.

Second, sufficient evidence was adduced to support the finding that the safe was closed but possibly not locked on the night of the breaking and entering. Howard Bosely, a member of the lodge's executive board, testified that when he previously had access to the safe, the tumbler and latch locking mechanism was difficult to operate, and he often closed the door but did not spin the tumbler. The treasurer of the lodge admitted that the safe is often left closed but not locked during events at the lodge. And the prelate stated that it was possible that the safe was closed but not locked when he last accessed it on January 27. When police arrived to investigate the break in, they observed bank bags scattered on the office floor and that the safe door was partially ajar.

Taken as a whole, this evidence and the reasonable inferences arising therefrom support a finding that defendant broke into the safe, and thus the verdict.

Defendant also argues that evidence that he had been in jail many times, as well as evidence that he assaulted a witness, should not have been admitted, and that its admission resulted in unfair prejudice. Defendant failed to object to the admissibility of the reference to the frequency he was in jail, and the issue is therefore subject to plain error review. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). The record is unclear on whether defendant raised an objection to testimony regarding the witness assault, as an off-the-record discussion occurred at the trial bench immediately after the cited testimony was given.

Under MRE 402, evidence must be relevant in order to be admissible. Evidence is relevant if it has "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; see *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Even where relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.[1]

Osborn testified that after defendant got out of jail for a previous crime, Osborn saw him head butt Shawn Saville in the face because Saville refused to "take the rap for what he had done." Saville had written out a statement saying that Osborn was guilty of the breaking and entering of the lodge and the safe. At trial, however, he testified that this was false and that he had copied what he wrote from something given to him by defendant. Saville testified he did so because he was afraid of defendant, who had previously head butted him. Osborn's evidence was relevant to the witness intimidation charge because it went to the state of mind of Saville, the allegedly intimidated witness.

Defendant also argues that testimony showing that he had previously been in jail was also improperly admitted and should have been excluded. Specifically, he challenges testimony by Daniel Lindstrom, who worked at the Alger County Sheriff's Department jail. On direct examination, the prosecutor was asking why defendant had told Lindstrom he would be going after Office Nelson and would kill him if he "ever met [him] in a dark alley":

> *Q.* Okay. Is it possible he was using this to cover the awkwardness of changing his clothes in front of you?
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> *A.* I don't believe so. Since I've worked there, Jamie's been in there quite often and I've gotten to know Jamie on a daily basis while working there and there was no awkwardness that I had felt between . . . us.

The people concede that this evidence was improper, but asserts that it was volunteered by the witnesses in response to proper questioning. We agree. The prosecutor's question could have been answered simply "yes" or "no." Further, Lindstrom could have explained that the two were familiar with each other without reference to the regularity of jail contact. Further, defendant has failed to demonstrate that he is "actually innocent" or how this isolated remark "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Knox*, 469 Mich at 508. Other acts evidence was introduced regarding defendant's prior history of illegal activity, so this isolated comment should not be deemed to raise a reasonable probability that the outcome of the trial would have changed if it had not been made.

At trial, defendant requested that the jury receive the addict-informer instruction, CJI2d 5.7, with respect to witnesses Osborn, Nikunen, and Shane Edmondson. The court denied the request, and defendant claims that this was error. "'[A]n instruction concerning special scrutiny

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[1] Plaintiff argues that evidence that defendant had head butted Saville was admissible under MRE 404(b). However, there is no indication in the record that the prosecution sought to introduce the evidence as other acts evidence. The record includes a response by defendant to the prosecution's motion in limine to introduce other acts evidence, and it references three incidents of past theft. No mention is made of the head butting incident.

of the testimony of addict-informants should be given upon request where the testimony of the informant is the only evidence linking the defendant to the offense.'" *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), quoting *People v Smith*, 82 Mich App 132, 133-134; 266 NW2d 476 (1978) (alteration by *Griffin*).

Defendant points to no testimony, nor was there any evidence on the record tending to establish that Edmondson and Nikunen were "addicts" dependent on a specific drug. See CJI2d 5.7(1) ("You have heard the testimony of _____, who has given information to the police . . . . The evidence shows that [he / she] is addicted to a drug, namely _____."). Edmondson testified that he used oxymorphone on the day of the incident, and went on a drug run with defendant. But these single admissions do not establish a history of abuse tending to show that Edmondson was an addict. And contrary to defendant's assertion, Edmondson never made mention of being in rehab or getting out of rehab. Nikunen testified that her condition the night of the incident "wasn't good," and admitted to being under the influence of both alcohol and drugs. However, she specifically testified that January 29, 2010, was the first time had used IV drugs and that at the time of trial, she had not used drugs for over three months.

The issue of Osborn being an addict is a closer question. However, the evidence did not establish that he was "compulsively and psychologically dependent on a habit-forming substance." *The American Heritage Dictionary of the English Language* (1996) (defining "addict"). It did not indicate that he had been taking ever increasing amounts of a drug and had repeatedly failed in attempts to stop using the drug even though he was aware of its harmful effects, nor did it show that he ordered his life around obtaining the drug. See DSM-IV-R (4th ed), pp 192-195 (setting forth the criterion of substance dependence). Therefore, the evidence did not establish that Osborn was an addict.

Further, there was no testimony in this case that these witnesses at issue were "informants," and the addict-informant instruction need not be given if the witness is not an informant. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). Thus, the trial court did not abuse its discretion in refusing to give the addict-informant instruction.

Defendant also argues that the trial court should have read requested accomplice instructions, CJI2d 5.5 and 5.6, with regard to witness Ryan Hill. "CJI2d 5.5 defines 'accomplice' as a 'person who knowingly and willingly helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). There was no evidence that Hill had helped or cooperated with defendant in committing the crime. An accomplice instruction need not be given unless supported by the evidence. *People v McGhee*, 268 Mich App 600, 608; 709 NW2d 595 (2005).

Finally, defendant argues that trial counsel's failure to object to the admissibility of certain evidence and to the joinder of charges constituted ineffective assistance of counsel. Defendant failed to preserve this issue by raising it in the trial court in connection with a motion for new trial or evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Accordingly, review is for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). 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 the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. Defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Id.* at 688. Defendant must also show that trial counsel's deficient performance prejudiced the defense. *Id.* at 690. In order to demonstrate prejudice, defendant must show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. When bringing an ineffective assistance of counsel claim, there exists a presumption that defense counsel was effective. To prevail, defendant must overcome the strong presumption that counsel provided effective assistance. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Based on the record in this case, defendant has failed to demonstrate either deficient performance by trial counsel or resulting prejudice. With respect to the issue of joinder of charges, stipulated to at trial by defendant, under MCR 6.120(1),

> [j]oinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.

Defendant argues that joinder was improper because the charged offenses were not "a series of connected acts," nor were they "a series of acts constituting parts of a single scheme or plan," and were therefore unrelated for purposes of MCR 6.120. In support, defendant relies heavily on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). Defendant's reliance is misplaced, however, because our state Supreme Court recently overruled *Tobey*, specifically stating that "MCR 6.120 superseded *Tobey*." *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009).

The charged acts were connected because defendant committed the breaking and entering of the Moose Lodge and then repeatedly attempted to have someone else take the blame. The witness intimidation charge arose from allegations by Saville that defendant had coerced him into writing a statement implicating someone else in the breaking and entering. Further, Brittany Gerou, who has a child with defendant, testified that defendant gave her statements from three witnesses to deliver to his attorney. Defendant also instructed Gerou to tell Edmondson that he was pleased with Edmondson's testimony. Gerou also testified that defendant suggested Osborn

should write that he was intimidated by a police officer into making a statement implicating defendant in the lodge break-in. Thus, the charges were "related" as defined by MCR 6.120, and joinder was proper. Defense counsel will not be considered ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

As for the alleged failure to object to the admission of evidence regarding defendant's coercion and assault of a witness, that did not represent deficient performance by trial counsel. As discussed above, it is not clear from the record that an objection was not made. Moreover, the evidence was admissible in support of the witness intimidation charge. Finally, failure to object to the brief mention by Lindstrom of his interactions with defendant at the jail did not represent deficient performance. If trial counsel had objected, it could be argued that this would have drawn more attention to the remark, and this Court has recognized that "declining to raise objections . . . can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). In any event, because other acts evidence was introduced regarding defendant's prior history of illegal activity, we see no reasonable probability that the outcome of the trial would have been different had counsel objected to the comment by Lindstrom. Thus, defendant has failed to establish that trial counsel's performance was deficient.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra