STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2013
v	No. 311292 Wayne Circuit Court
ROBERT CHAMBERS, Defendant-Appellant.	LC No. 11-003629-FH

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of arson of a dwelling, MCL 750.72, and arson of insured property, MCL 750.75. Defendant was sentenced to concurrent prison terms of 5 to 20 years for arson of a dwelling and 5 to 10 years for arson of insured property. For the reasons set forth in this opinion, we affirm.

Defendant's convictions arise from his participation in a fire set on November 3, 2010. The prosecution's theory was that defendant paid his brother-in-law, Keeman Crosby, to set fire to a house owned by defendant's mother. A little over a week after the fire, and prior to any finding of arson, Crosby turned himself into the police. Crosby pleaded guilty to arson of a dwelling for his role in the offense. As part of his plea agreement, Crosby testified against defendant.

Following his conviction, defendant filed a motion for a new trial and a request for a *Ginther*[1] hearing. The basis for defendant's motion was Crosby's written statement and preliminary examination testimony in which Crosby stated that someone named "Delly" or "Delly Chambers" contacted him after the fire and asked if the job was done. In his motion, defendant asserted that "Delly" was LaDale Bain, defendant's nephew. Defendant submitted affidavits from LaDale and Linda Bain, LaDale's mother. In his affidavit, LaDale Bain indicated that his nickname is "Delly." He averred that he has not been associated with Crosby since 2006 because Crosby was abusive to his family. LaDale Bain stated that he "was informed that . . . Crosby claimed that [he] had called him on the phone after he set the fire, inquiring as to whether

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

he had completed the task of setting fire to the home." He denied that he ever called Crosby, stating that such a claim was "a complete lie on [Crosby's] part." He further stated that trial counsel never spoke to him about the case. Linda Bain asserted that she brought this information to trial counsel's attention, but counsel did not interview her son or call him as a witness. Defendant argued that his attorney was ineffective for failing to investigate LaDale Bain as a possible witness. After hearing arguments, the trial court denied defendant's motion for a new trial and request for a *Ginther* hearing.

On appeal, defendant renews his argument that counsel was ineffective for failing to properly investigate LaDale Bain as a potential witness. Because the trial court denied defendant's motion for a *Ginther* hearing, this Court's review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's failure to reasonably investigate can "constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant asserts that counsel did not reasonably investigate the case because he did not interview LaDale Bain. However, "the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990) (citation omitted). In the present case, there is no indication that counsel was ignorant of valuable evidence. In her affidavit, Linda Bain maintained: "I informed [counsel] on more than one occasion that the allegation that my son being involved and placing the call was false, and that this could be confirmed by my son." She further averred that the attorney "stated that any information that my son could provide regarding the allegation that he was not involved and called Mr. Crosby was not important, because he . . . was focusing only on the people that were involved."

Thus, it is clear that defense counsel was aware of LaDale Bain's potential testimony and made a strategic decision to focus on other witnesses. Here, trial counsel was not objectively unreasonable to conclude that challenging Crosby on the accuracy of any statements made regarding "Delly" would be of marginal benefit, and that it would be more effective to focus on the circumstances of defendant, Bain, and Crosby. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Further, defendant cannot show that there is a reasonable probability that, but for the alleged error, the result of the proceedings would have been different. *Swain*, 288 Mich App at 643. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308, lv den 471 Mich 939 (2004). A substantial defense is a defense that might affect the

trial's outcome. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Here, defendant's theory of defense was that Crosby set the fire on his own initiative and implicated defendant in order to procure a favorable plea bargain. On this issue, trial counsel cross-examined Crosby regarding the details of his plea bargain. Trial counsel also questioned Linda Bain and defendant regarding their relationship with Crosby. Linda Bain and defendant both testified that Crosby was abusive to their sister and that they had cut ties with him. Linda Bain further stated that she was involved in litigation with Crosby prior to the fire, and that Crosby was angry with her because she stopped him from receiving his children's social security benefits. Further, Linda Bain stated that Crosby had a poor relationship with defendant's mother. Thus, counsel established that Crosby had an independent motivation to start the fire and then a motivation to lie and implicate defendant. Under these circumstances, defendant was not denied a substantial defense by counsel's failure to call LaDale Bain.

Even assuming that trial counsel's decision not to interview the witness or to call him to testify established that trial counsel's performance fell below objective standards of reasonableness, defendant was still demonstrate that there is a reasonable probability that the result of the proceedings would have been different. *Swain*, 288 Mich App at 643. Here, the testimony which defendant asserts was essential to his defense was merely cumulative. As previously indicated, defendant's sister testified regarding Crosby's relationship with defendant's family. The only new testimony that would have been introduced through LaDale Bain was that Crosby lied when he stated that LaDale had called him and inquired: " . . . did y'all do that yet." The crux of this testimony was to portray Crosby as a liar. However, testimony from other family members of defendant's, particularly his sister, had already had cast doubt on Crosby's veracity. Additionally, trial counsel elicited testimony from Crosby regarding the terms of his plea agreement such that trial counsel was able to argue that the only reason why Crosby was testifying was to secure a very favorable plea agreement.

Viewing the proffered evidence against the weight of all the evidence makes its exclusion less compelling. Prior to turning himself in and agreeing to testify against defendant, Crosby had never been approached by the police. Additionally, there was no active arson investigation at the time that Crosby turned himself into police and agreed to testify against defendant. Thus, even if trial counsel had called LaDale and he had testified in accordance with his proffered affidavit, the testimony, assuming it was admissible, was of little consequence as merely cumulative. Both defendant and his sister testified that no one in their family, including we suppose LaDale, had spoken with or communicated with Crosby. Thus, following our review of the record in this case, we find that even if we were to assume that trial counsel had been deficient, the deficiency cited by defendant was not outcome-determinative. Thus, defendant has failed to demonstrate to this Court that the impairments complained of are sufficiently serious to warrant setting aside the outcome of the proceeding. *Strickland v Washington*, 466 US 668, 693; 104 S Ct 2052; 80 L Ed2d 674 (1984). Accordingly, defendant is not entitled to relief on this issue. *Swain*, 288 Mich App at 643.

Defendant also argues that the trial court erred when it denied his motion for a new trial based on ineffective assistance of counsel without first conducting a *Ginther* hearing. Defendant's arguments at the motion hearing were the same as his arguments on appeal; counsel was ineffective for failing to investigate LaDale Bain's potential testimony, and failing to call him as a witness. As noted above, however, counsel was aware of the LaDale's potential

testimony and made a reasonable strategic decision not to call LaDale as a witness. Further, defendant failed to provide the trial court with any specifics on what additional relevant facts might be developed at a *Ginther* hearing. Under these circumstances, we cannot conclude that the trial court abused its discretion when it denied defendant's motion for a *Ginther* hearing.

Defendant next argues that he was denied his right a fair trial when the prosecutor introduced Crosby's written statement into evidence at trial. When the prosecutor moved to admit Crosby's written statement, defense counsel stated that he had no objection. Therefore, the issue is waived, *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012), and our review is limited to whether defendant was denied effective assistance of counsel, *People v Buie*, 491 Mich 294, 315 n 13; 817 NW2d 33 (2012).

Defendant argues that counsel was ineffective for failing to object to admission of Crosby's written statement. Defendant argues that the statement was inadmissible hearsay and improperly bolstered Crosby's testimony. Hearsay is an out-of-court statement offered to establish the truth of the matter asserted, and it is generally inadmissible unless it falls into a hearsay exception. MRE 801(c); MRE 802. MRE 801(d)(1)(B), however, provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Under this rule, a statement is admissible if four elements are satisfied:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (citation and internal quotation marks omitted).]

The first and third elements are not in dispute. The crux of defendant's argument is that Crosby's statement was inadmissible because counsel never challenged Crosby's testimony with a charge of recent fabrication. A review of the record, however, reveals that counsel challenged Crosby's veracity during opening arguments. Counsel stated that "Crosby is going to be the kind of witness where it's going to be very dubious. You're really going to have to stretch to believe him." Further, before Crosby testified, counsel implied that Crosby had an improper motive for implicating defendant. During cross-examination of a police lieutenant, counsel stated: "Now as to Keeman Crosby, at least he had enough sense to make a deal with the Prosecution's Office." Thus, counsel implied that Crosby was not a credible witness because he accepted a plea bargain in exchange for his testimony. Counsel again raised these arguments during his cross-examination of Crosby, after Crosby's prior statement had been admitted. Therefore, the second element of MRE 801(d)(1)(B) was satisfied.

The fourth element of MRE 801(d)(1)(B) was also fulfilled. Counsel's theory below was that Crosby implicated defendant to get a plea bargain. When Crosby turned himself in, however, neither defendant nor Crosby were suspects in the arson. Indeed, the fire department

had not even determined that the fire was arson. It was not until after Crosby spoke to the police that the fire department conducted a cause and origin investigation. Further, at the time Crosby made the prior statement, nothing had been promised to him in return for his cooperation. Crosby had not yet met with the prosecutor, and the police lieutenant stated that he did not promise Crosby anything in exchange for his cooperation. Therefore, the fourth element is satisfied, and counsel was not ineffective for failing to object to the introduction of Crosby's prior statement.

Next, defendant argues that he is entitled to resentencing because the trial court improperly scored offense variable 1 (OV 1) at 20 points. Defendant raised this issue in his motion for resentencing. The issue is preserved for review. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). A trial court's scoring under the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). To the extent that a scoring issue calls for statutory interpretation, our review is de novo. *Lechleitner*, 291 Mich App at 62.

OV 1 is aggravated use of a weapon. MCL 777.31(1). Section 31(1)(b) provides that OV 1 must be scored at 20 points if "[t]he victim was subjected or exposed to a[n] . . . incendiary device. " Gasoline is an incendiary device, MCL 777.31(3)(b), and Crosby used gasoline to start the fire. On appeal, defendant argues that the trial court erred in scoring OV 1 because it failed to first determine whether Crosby or defendant possessed a weapon. Defendant focuses on the word "weapon" and argues that possession of gasoline alone is not possession of weapon. Thus, while defendant acknowledges that Crosby possessed gasoline, he argues that Crosby did not possess a weapon. Specifically, defendant argues that there is no indication that defendant or Crosby ever threatened anyone with the gasoline or used it in a manner likely to cause serious injury or death. Defendant's argument is unpersuasive.

Gasoline is not itself a weapon; however, it became a weapon as soon as Crosby poured it throughout the house and ignited it. Contrary to defendant's argument, the gasoline was used in a manner likely to cause injury or death. The statute defines victim as "each person who was placed in danger of injury or loss of life." MCL 777.31(2)(a). Crosby himself could potentially qualify as a victim under this definition. Further, there was at least one witness in the area when the fire was started, and approximately 22 firefighters responded to the fire. All of these persons "w[ere] placed in danger of injury or loss of life" as a result of the fire caused by Crosby and defendant. *Id*. Therefore, 20 points was appropriate under OV 1.

Defendant also argues that the trial court was precluded from assessing defendant 20 points under OV 1 under the doctrine of collateral estoppel because Crosby had previously been assessed 0 points under OV 1. In *People v Brown*, 279 Mich App 116, 126; 755 NW2d 664 (2008), this Court explained:

> The doctrine of collateral estoppel applies to criminal cases. *Ashe v Swenson*, 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970). Collateral estoppel bars relitigation of an issue in a subsequent, different litigation between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was both actually litigated and necessarily determined. *People v*

> *Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). Collateral estoppel only applies if the issue was necessarily determined by the judgment in the prior proceeding. *Id.* at 158. "An issue is necessarily determined only if it is 'essential' to the judgment." *Id*. "Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally." *Id*.

Despite defendant's assertion to the contrary, collateral estoppel has no application to the circumstances of this case. Collateral estoppel only applies to subsequent litigation between the same parties. *Id*. In the present case, the parties are not the same. Moreover, the scoring of OV 1 was never litigated and decided in Crosby's case because Crosby accepted a sentencing agreement.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello