STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2001
v	No. 224536 Oakland Circuit Court
SEAN TIMOTHY DONNELLY, Defendant-Appellant.	LC No. 96-146354-FH

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of burning a dwelling house, MCL 750.72, and one count of burning insured property, MCL 750.75, which was dismissed. Defendant was sentenced to five years' probation, with the first year to be served in the county jail. He appeals as of right. We affirm.

Defendant argues on appeal that his counsel was ineffective for failing to object to testimony that defendant made statements indicating that he wanted to burn his house down. Because defendant did not request a Ginther[1] hearing, this Court's review of defendant's claim of ineffective assistance is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it was a plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764, 773-774; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel's performance must be measured against an objective standard of reasonableness. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Moreover, "[t]his Court will not substitute its judgment for that of

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant's appellate argument focuses on witnesses Steve McCargar's and Brian Johnston's testimony. McCargar testified that defendant stated to him that, "I'm going to burn the house. I'm going to burn my house down." Similarly, Johnston testified that defendant told him, "he hoped that his [defendant's] house would burn – would catch on fire and burn down."[2] Contrary to defendant's assertion that these statements were inadmissible as prior "bad acts" evidence, this testimony actually described defendant's admissions in the form of statements and not his prior acts. Thus, MRE 404(b) is inapplicable because "[a] statement of general intent is not a prior act for purposes of MRE 404(b)." *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988).

We further note that McCargar's and Johnston's testimony, regarding defendant's statements, was permissible under MRE 801(d)(2) as an admission by a party-opponent. This Court must now determine if this evidence was relevant and not unduly prejudicial. MRE 401 and 403; see also *Goddard, supra* at 515. Evidence is relevant if it has "any tendency to make the existence of any fact that is one of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The facts of this case revealed that the doors and windows of defendant's house were locked, that defendant was the only person with keys to the house, and that there were no signs of forced entry. There was additional evidence presented that defendant was facing economic problems and had given a fraudulent statement of loss to his insurance company. Since it was undisputed that the fire was intentionally set, defendant's statements in this case were relevant as they made it more probable than not that he started the fire. Defendant's statements also indicated an intent and motive for starting the fire. As such, we find that the probative value of defendant's statements was not substantially outweighed by any danger of unfair prejudice. MRE 403; see also *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

Because the statements were properly admitted, defendant's claim for ineffectiveness of counsel fails. Counsel is not required to advocate a meritless position. *Snider, supra* at 425. Furthermore, we find that defendant has failed to demonstrate that his counsel's performance was ultimately prejudicial. *Carbin, supra* at 600.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

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[2] Whether evidence may be properly admitted under a specific evidentiary rule is a question of law subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Lukity, supra* at 488.