

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL GLENN ROSSBACH,

Defendant-Appellant.

UNPUBLISHED

May 27, 2004

No. 245262

Gladwin Circuit Court

LC No. 01-006760-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Randall Rossbach appeals as of right his jury convictions for arson of a dwelling house¹ and arson of insured property² for which the trial court sentenced him to 365 days in the county jail. We affirm.

I. Basic Facts And Procedural History

This case arose when Rossbach's house caught on fire in the early morning of November 19, 2000. At the trial in this matter, Carl Ladd, Rossbach's coworker, testified that he picked Rossbach up at 11:00 p.m. on November 18, 2000, from his house and they drove to a bar. According to Ladd, they stayed until closing, around 2:00 or 2:30 a.m., at which time Rossbach suggested they follow some women to a party. When there turned out to be no party at the appointed address, Ladd drove Rossbach home and dropped him off alone at approximately 2:45 a.m.

Rossbach testified that on November 19, 2000, he was awakened by smoke in his bedroom. He stated he remembered attempting to start a fire earlier that evening in the downstairs fireplace and went down to the basement to investigate. Rossbach said it was too hot and too smoky in the basement to see anything, so he left through the sliding glass door. Once outside, Rossbach said, he began breaking windows because his cats were trapped inside.

¹ MCL 750.72.

² MCL 750.75.

Rossbach's neighbor, Sandra Fern, testified that she woke up because someone was yelling. She said that she went out on her deck and saw smoke coming from Rossbach's home. She also saw Rossbach kicking out the basement windows. She went back inside and woke her boyfriend, James Watt. As she did so, Rossbach began knocking on her bedroom window and yelling to her to call 911. Watt testified that when he went outside, he saw flames coming from the very top and from the very bottom of the house.

According to Fern, after she called 911, she and Watt went back outside and saw Rossbach sitting by their campfire area watching his house burn while drinking a beer. Fern and Watt testified that Rossbach was wearing a stocking cap, coat, and military-style boots, laced up with his pants tucked into them. Watt testified that Rossbach told him he did not remember lacing up his boots. Watt also said that Rossbach first told him that he had run out of the house but later said that he crawled out.

According to Fern, Rossbach told her that he and a friend had been out drinking earlier, and they had picked up some girls and brought them back to his house. Fern testified that Rossbach said that when he tried to light a fire in the fireplace, the fire got out of control. Fern had also heard Rossbach tell his wife the same story when he used Fern's phone to call his wife and tell her their house was gone. Watt also testified that he heard Rossbach on the phone telling his wife that he had been at a bar and had brought two girls home. However, Fern and Watt testified that Rossbach later told them he did not know who started the fire, whether it was he himself or one of the women. Fern testified that Rossbach was drunk, and when he asked her for a beer she gave him coffee instead.

Secord Township Fire Department Chief Al Arends arrived at Rossbach's home at 4:28 a.m. Arends testified that when he arrived, one wall of the house had already fallen or was just beginning to fall, and the roof collapsed into the basement 5 to 10 minutes after their arrival. Arends said Rossbach told him the fire started when he was lighting the gas fireplace and it "kind of blew up" on him. Secord Township Fire Department Lieutenant Shaver testified that Rossbach told him that he and a friend had picked up some women in a bar and brought them back to his place and the fire started when the upstairs gas fireplace flashed on him. Clement Township Fire Department Chief Mike Fournier and firefighters Mary Lynk and Mary Schmetter all testified that Rossbach said he was lighting a wood stove when it exploded, starting the fire. However, no wood stove was found in the house.

Shaver also testified that just as the fire was almost out, Rossbach told them to leave so that no firefighter would get hurt because the house was already a total loss. Fournier and Schmetter testified that they also heard Rossbach asking them to leave because the house was already a loss. The fire was extinguished between 6:00 and 6:30 a.m. Arends testified that before the fire was extinguished, Rossbach asked him if he was going to call the fire marshal. Arends said the fire marshal was notified because several firefighters, including Shaver, had commented on how fast the house had burned. Arends also thought it was unusual for the house to keep burning until there was nothing but ashes remaining in the basement.

Secord Township firefighter and paramedic David Hooper found Rossbach in a light, early shock state, with no need of treatment except for a minor burn on his knuckle. As Hooper bandaged Rossbach's hand, Rossbach told him he was a prison guard at the Standish prison and that an inmate had recently threatened his family.

State Police Fire Marshals Leonard Jaskulka and Greg Proudfoot examined the scene on November 19, 2000. Because they smelled a petroleum product in the area in front of the downstairs fireplace, they removed a sample of the carpeting for analysis. The marshals found logs just outside the fireplace, including one log partially inside and outside the fireplace, with the inside portion partly burned. A second log was placed outside the fireplace with one corner on top of the log partially inside the fireplace. A third log was outside the fireplace in the middle of the hearth. Proudfoot testified that a fourth log was found in the remnants of a chair's seat cushion and that the chair appeared to have been positioned directly in front of the fireplace.

In a telephone interview with Rossbach on November 19, 2000, Rossbach told Proudfoot he had started a fire in the wood-burning fireplace in the basement after he came home from the bar, then went upstairs to sleep. Proudfoot said Rossbach told him the women had already been dropped off. According to Proudfoot, Rossbach told him that when he woke up, the house was full of smoke, and he left the basement through the sliding glass doors without seeing any flames. Proudfoot said that Rossbach told him that the home had both carbon monoxide detectors and smoke detectors, but neither had been activated.

Proudfoot concluded that the lower fireplace was the origin of the fire because the logs had been arranged in and outside the fireplace, indicating that they were deliberately placed and ignited in that position to start the fire. Proudfoot testified that from the location of the log on the chair, he concluded it was deliberately placed in that position and set on fire. Proudfoot returned to Rossbach's house with an insurance investigator on December 1, 2000, and with a dog trained to detect the presence of accelerants. The dog alerted on six different areas, and samples were taken from each area.

Proudfoot also testified that he had examined the contents of the garage on November 19, 2000; it contained garage-like items, and the boxes stored there contained no evidence of personal mementos. However, Proudfoot said, when he reinspected the garage on December 1, 2000, he noticed there were additional boxes containing personal mementos such as family bibles, photograph albums, a yearbook, and a graduation photograph of a corrections officer class.

State Police forensic scientist Keith LaMont testified that the samples the dog had alerted on tested negative for the presence of accelerants. However, the sample taken on November 19, 2000, from the front of the fireplace, tested positive for the presence of a medium petroleum distillate. LaMont explained that mineral spirits, charcoal lighter fluids, paint thinners, lamp oils, and some solvents all contain medium petroleum distillates, and he was unable to identify the type of distillate from the sample submitted. Rossbach's friend Edward Kerner, who was assisting Rossbach with home renovations, testified that he had kept a crate of flammable materials near the main floor fireplace, which contained a two-gallon can of isopropyl alcohol, a two-gallon can of mineral spirits, and a twelve-ounce can of "Goop Off," a cleaning agent.

On January 30, 2002, Proudfoot and Jaskulka returned to Rossbach's house with a search warrant to inspect the gas fireplace. Proudfoot testified that the gas fireplace could not be removed without destroying it. However, Proudfoot explained, he had the basement floor cleared of debris and discovered "spall marks" on the basement floor. Proudfoot explained that "spall marks" can be caused by the use of accelerants or by other causes such as burning material falling onto the concrete, cold water from a fire hose hitting the hot concrete, or the rekindling of

hot spots. But, Proudfoot testified, some of the “spall marks” were indicative of arson because they were in the shape of a pouring pattern, and the “spall mark” at the base of the stairs was particularly indicative of arson because it showed that another fuel load was placed there.

Proudfoot testified that the flames Watt saw coming from the basement bedroom corresponded with the “spall marks” on the floor, indicating that accelerant was used although Proudfoot could not prove it. Proudfoot also admitted that none of the “spall mark” areas had been tested for the presence of an accelerant. Proudfoot testified that none of Rossbach’s explanations with respect to how the fire began were consistent with the actual fire. Proudfoot explained that flames simultaneously shooting out of both the upper and lower floors of the house was not consistent with Rossbach’s explanation of a single accidental fire starting in the basement. In Proudfoot’s expert opinion, the fire was deliberately set in front of the basement fireplace, with additional points of origin throughout the house.

Professional engineer Roswell Ard testified that he returned to the remains of Rossbach’s house with Proudfoot and Jaskulka on February 14, 2002. Ard also examined photographs of the scene taken on November 19, 2000, and December 1, 2000. Ard testified that there was no sign that the fire had an electrical cause.

Jack Hughes was Rossbach’s expert on the cause and origin of fires. Hughes examined photographs and testified that the cause of the fire could not be determined. Hughes also criticized how the investigation was handled and explained that an electrical cause had not been adequately eliminated, nor had the LP gas tanks been adequately investigated. Hughes explained that if the point of origin was the logs in front of the fireplace, they would have been burned more. He continued that the logs were virtually unburned in comparison to the rest of the basement. According to Hughes, the placement of the logs after the fire was extinguished could have been due to the collapsed ceiling or from the force of the water from the fire hose. Hughes also explained that the “spalling marks” could have been caused by the water from the fire hoses hitting the hot cement or from debris left smoldering. Hughes also said that a single area of medium petroleum distillate was not significant in classifying this fire as an arson because plastic dolls immediately adjacent to the fireplace when burned would have melted down and would be classified as a medium petroleum distillate.

The jury convicted Rossbach of arson of a dwelling house and arson of insured property. He now appeals as of right.

II. Right Of Confrontation

A. Standard Of Review

We review claims of constitutional violations de novo.³ At trial, Rossbach objected to the admission of the witness’s testimony as prejudicial because he was unable to cross-examine the witness about events that had occurred between the time of the preliminary examination and

³ *People v Akins*, 259 Mich App 545, 559; 675 NW2d 863 (2003).

trial. Although Rossbach did not expressly invoke his Sixth Amendment right to confront the witness, in our view, Rossbach's objection was sufficient to preserve the issue for review.

We review the trial court's determination that the prosecution exercised due diligence in procuring the witness for trial for an abuse of discretion.⁴

B. Witness Unavailability

Here, the prosecutor introduced a witness's preliminary examination testimony that Rossbach had stated that he would "torch" his home. Rossbach argues the trial court erred by denying him his constitutional right to confront this witness by finding the witness unavailable and allowing the witness's preliminary examination testimony to be read pursuant to MRE 804(b)(1).

First, the trial court properly determined that the witness was unavailable. Under MRE 804(a)(5), a witness is considered unavailable if the prosecutor "made a diligent good-faith effort" to procure the witness.⁵ Testimony indicated that the witness, who had been a prisoner at the facility where Rossbach was a guard, refused to take the stand unless he could be guaranteed a transfer to a different facility. Both the police and the prosecutor's office attempted to secure a written guarantee, but employees at the Department of Corrections refused because issuing written transfer guarantees violated the Department's policy. We conclude that the trial court did not abuse its discretion in concluding that the prosecutor made a good-faith effort to secure the witness's testimony, and therefore did not err in declaring him unavailable.

Second, we find no error in the admission of the witness's preliminary examination testimony. Prior testimonial evidence is admissible if the witness is unavailable and the defendant had an opportunity to cross-examine the witness.⁶ Our review of the record indicates that Rossbach had a full opportunity to cross-examine the witness at the preliminary hearing regarding his interactions with Rossbach. Accordingly, the trial court did not violate Rossbach's Sixth Amendment right to confront the witness by admitting the testimony.

III. Expert Witness Testimony

A. Standard Of Review

Rossbach argues the trial court erred in failing to appoint an expert witness for the purpose of determining whether the prosecution's mechanical/electrical engineer's testimony was an accurate assessment of the evidence. We review a trial court's decision whether to grant an indigent defendant's request to appoint an expert witness for an abuse of discretion.⁷

⁴ *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

⁵ *Id.*

⁶ See *Crawford v Washington*, 541 US ___, ___; 124 S Ct 1354, 1374; 158 L Ed 2d 177 (2004).

⁷ *People v Carson*, 217 Mich App 801, 806; 553 NW2d 1 (1996).

B. MCL 775.15

MCL 775.15 authorizes the procurement of an expert witness for an indigent criminal defendant at the public's expense if the defendant satisfies the presiding trial judge that the defendant cannot safely proceed to trial without the testimony of the proposed witness. The defendant must "show a nexus between the facts of the case and the need for an expert,"⁸ and must also show something more than "a mere possibility of assistance from the requested expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003).

The trial court here denied Rossbach's request because the prosecutor's expert had not conducted any tests of the equipment, but had only made observations of the equipment at the scene, which an arson investigator is equally competent to do. Furthermore, Rossbach made no showing that he was prejudiced by the trial court's refusal to deny him an expert mechanical/electrical engineer. A jury is free to believe all, part, or none of an expert's testimony,⁹ and a jury may not judge the strength of a party's case based on the number of witnesses.¹⁰ Because Rossbach failed to show how another expert would have benefited his case, we conclude that the trial court did not abuse its discretion in denying Rossbach's motion.

IV. Improper Admission Of Evidence And Ineffective Assistance Of Counsel

A. Standard Of Review

Rossbach argues that he is entitled to a new trial because the admission of expert testimony relating to common practices of arsonists, as well as expert testimony on canine detection of accelerants, denied him a fair trial. Because defense counsel did not object when the prosecutor elicited the "arsonist profile" testimony, that aspect of the issue is unpreserved.¹¹ We review the trial court's decision to admit or exclude evidence for an abuse of discretion;¹² however, an unpreserved error will only be considered to the extent that a defendant has shown plain error affecting his substantial rights.¹³

Rossbach also claims that his counsel provided ineffective assistance by failing to challenge the expert's testimony on arsonists, and failing to renew his challenge relating to

⁸ *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

⁹ CJI2d 5.10.

¹⁰ CJI2d 5.2.

¹¹ *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

¹² *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

¹³ *Carines*, *supra* at 763.

canine detection.¹⁴ We review de novo claims of ineffective assistance of counsel.¹⁵ Because no evidentiary hearing was held on this issue, our review is limited to the existing record.¹⁶

B. “Profile” Evidence

Relying on rulings regarding so-called “drug profile” expert testimony, Rossbach argues that testimony relating to the typical behavior of arsonists should have been excluded. While this Court has not addressed profile testimony in the context of arsonists, it has reversed a defendant’s conviction for possessing cocaine with the intent to deliver after drug profile evidence was submitted as substantive evidence of the defendant’s guilt.¹⁷ On the other hand, “courts generally have allowed expert testimony to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity.”¹⁸ For such expert testimony to be admissible, “(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline.”¹⁹

To determine whether the evidence was admitted for the proper purpose of providing background to assist the jury or as substantive evidence to prove a defendant’s guilt, each piece of disputed testimony must be examined in context.²⁰ Generally, even if an expert witness’s testimony is “‘founded solely on observations of innocent conduct,’ courts have upheld admission of the expert’s opinion that the ‘defendant’s activities indicated that he acted in accordance with usual criminal modus operandi.’”²¹

Our review of the record shows that the prosecutor’s testimony assisted the jury in understanding how the fire began by explaining the significance of the evidence at the scene. The expert explained that, based on his knowledge and experience, he could demonstrate that the logs did not roll out of the fireplace, but that they were purposefully positioned outside the fireplace in such a way that it could not have been an accident. He also testified that the remote location where the fire started was typical of arson, as was the fact that the fire appeared to start near the fireplace and that Rossbach’s personal effects had been moved to the garage. This expert testimony aided the jury in resolving the important factual issue whether the fire was intentional or accidental by supplying information that was not within the knowledge of the

¹⁴ *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999).

¹⁵ *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

¹⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

¹⁷ See *People v Hubbard*, 209 Mich App 234, 242-243; 530 NW2d 130 (1995).

¹⁸ *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999), citing *Hubbard*, *supra* at 239; MRE 702.

¹⁹ *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

²⁰ *Murray*, *supra* at 59.

²¹ *Id.* at 54, quoting *United States v Espinosa*, 827 F2d 604, 612 (CA 9, 1987).

layperson.²² Therefore, the testimony was not improper profile evidence, but expert testimony on the material issues.²³ We conclude that the admission of this testimony did not constitute plain error.

Alternatively, Rossbach urges reversal on the ground that counsel's failure to object to the testimony constituted ineffective assistance of counsel. However, the testimony was properly admitted, and an ineffective assistance claim cannot be predicated on counsel's failure to make a futile or meritless objection.²⁴ Accordingly, Rossbach has not established his ineffective assistance claim.

C. Canine Detection

Rossbach argues that there is no generally recognized acceptance of a dog's detection capabilities being more sensitive than a gas chromatograph mass spectrometer, and therefore, the trial court erred in admitting evidence that the arson dog alerted to the presence of accelerants. Alternatively, Rossbach argues trial counsel was ineffective for failing to renew his objections to the admission of this evidence.

At trial, the dog handler testified concerning his dog's extensive training, qualifications and aptitude for detecting the smell of accelerants at fire scenes. Defense counsel did not challenge the dog's abilities. Once the foundation was laid, the dog handler testified to instances where the dog alerted on accelerants in the remnants of defendant's home. However, when samples were taken from these location, chemical analysis of the samples provided no evidence of accelerants. There was no evidence of any kind introduced at trial to indicate that the dog's response was more accurate than that of the subsequent chemical analysis. Under these circumstances, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence.²⁵

Rossbach argues that counsel's failure to renew his objection to this evidence constituted ineffective assistance. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.²⁶ An attack of a criminal defendant's assistance of counsel based on hindsight is insufficient.²⁷ In addition, a "defendant must establish more than deficient performance; he must also demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."²⁸ In this case, we

²² *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

²³ *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999); *Murray*, *supra* at 54.

²⁴ See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

²⁵ *Starr*, *supra* at 494.

²⁶ *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994).

²⁷ *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991).

²⁸ *Zinn*, *supra* at 350.

conclude that Rossbach has failed to show counsel's performance was either deficient or prejudicial.

V. Aggregate Errors

Rossbach argues the errors in the aggregate require reversal. We conclude that Rossbach's conviction does not require reversal on the basis of cumulative error because he was unable to prove unfair prejudice or actual errors in this case.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard Allen Griffin

/s/ Stephen L. Borrello