

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEWAN JAMAR GRAY,

Defendant-Appellant.

UNPUBLISHED

November 10, 2009

No. 288394

Wayne Circuit Court

LC No. 08-007558-FC

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of arson of a dwelling house, MCL 750.72, and felonious assault, MCL 750.82. He was sentenced to concurrent prison terms of five to twenty years for the arson conviction and one to four years for the assault conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On May 22, 2008, a fire severely damaged the house of the Loy family. The burning patterns indicated use of an accelerant. William Loy, Sr., testified that at approximately midnight, he heard his dogs barking. He went to the front door and saw defendant at the edge of the property. Defendant was wearing black pants, a black shirt, a red and black baseball cap, and a jacket that had what seemed to be Chinese characters on it. He threw a bottle or jar that was on fire toward the front door. It hit a pole and splattered toward Loy. Loy screamed and slammed the door. He then assisted in getting the other occupants out of the house and unsuccessfully attempted to extinguish the fire.

As Lieutenant Wheeler of the fire department was concluding his investigation at approximately 2:30 p.m. on May 23, 2008, defendant and three other people walked from around the corner in front of the burned house. Loy saw defendant and pointed him out to the lieutenant. Defendant did not run or resist physically, but he walked away several times. The investigator arrested defendant. According to the lieutenant, defendant was wearing dark clothing, but the lieutenant did not recall if any of it had Asian writing on it.

Loy testified that although he did not know defendant's name, he was familiar with defendant because Loy had seen him in front of Loy's house several times. Loy explained that he lived in a known drug area, and people in the neighborhood knew not to stand in front of his house because he tells them that he will call the police. Loy testified that he had called the

police on defendant a few times before for selling drugs, and defendant once flicked a cigarette butt at Loy's son.

Earlier on May 22, 2008, Loy saw defendant when the police tried to arrest him. When defendant saw Loy, defendant called him a snitch and positioned his thumb and index finger like a gun as though he were shooting Loy. Loy's stepdaughter also saw defendant position his thumb and finger like a gun and motion toward Loy. She believed this occurred a day or two before the fire. She further testified that Loy had problems with four or five young boys in the neighborhood because he called the police if they were standing in front of the house selling drugs.

Defendant presented two witnesses who testified that they were with defendant for periods during the late night and early morning when the fire started. One of the witnesses testified that Loy had a reputation in the neighborhood as "a snitch."

On appeal, defendant argues that his constitutional rights were violated by the admission of prejudicial evidence of his purported bad acts, specifically Loy's testimony about him selling drugs and flicking a cigarette butt at Loy's son. Defendant argues that this "bad acts" evidence was inadmissible under MRE 404(b). He asserts that trial counsel was ineffective for failing to object to the evidence, and that the trial court failed in its duty to intervene and control the proceedings.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . ." *Id.*, pp 302-303 (citations and internal quotations omitted).

MRE 404(b)(1) provides that evidence of other wrongs or acts "is not admissible to prove the character of a person in order to show action in conformity," but is admissible for other proper purposes, such as proof of motive. In the present case, Loy's testimony that he had reported that defendant sold drugs in front of Loy's home and that defendant had flicked a cigarette butt at Loy's son was integral to establishing defendant's motive for the charged acts, i.e., retaliation for Loy's summoning of the police. Establishing that defendant had a motive for the crimes was crucial because the identity of the perpetrator was the principal issue at trial. Because the evidence was not offered to show defendant's character and was admissible for a proper purpose under MRE 404(b)(1), trial counsel was not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), lv den 467 Mich 950 (2003). For the same reason, the trial court had no duty to intervene. Cf. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

Defendant also argues that trial counsel was ineffective for failing to object to hearsay evidence during Lt. Wheeler's testimony. Lt. Wheeler testified that Loy

indicated that he was having some problems with the perpetrator in this case, that he had some problems with him the last few days before the fire, including the day of the fire. He said that later on that night, he had another incident with him,

of the perpetrator that's here today, throwing a Molotov cocktail bomb at his house while he was there.

The admissibility of Lt. Wheeler's testimony that Loy identified defendant as the perpetrator is not disputed. MRE 801(d)(1)(C). Lt. Wheeler's testimony about Loy's account of problems with the perpetrator was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c). The testimony was offered to provide context for the decision to arrest defendant when Loy identified him. Even if the challenged testimony were inadmissible, however, defendant is not entitled to relief because he has not demonstrated a reasonable probability that but for counsel's failure to object, the result of the proceeding would have been different. Lt. Wheeler's testimony about Loy's account is cumulative of Loy's testimony. The significance of Lt. Wheeler's testimony is only that at the time Loy identified defendant, Loy was prepared to provide an account providing a purported motive for the crime. That the account co-existed with the identification does not enhance Loy's credibility. Because this testimony did not affect the outcome of the proceeding, defendant is not entitled to appellate relief.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens