STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PARKER SMITH,

Defendant-Appellant.

UNPUBLISHED
September 23, 2010

No. 292701
Allegan Circuit Court
LC No. 08-015850-FC

Before: MURPHY, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unlawful imprisonment, MCL 750.349b, arson (preparation to burn property of $20,000 or more), MCL 750.77(1)(d)(i), felonious assault, MCL 750.82, and two counts of felony-firearm, MCL 750.227b.[1] Defendant was sentenced to concurrent prison terms of 60 to 180 months for unlawful imprisonment, 60 to 120 months for arson, and 18 to 48 months for felonious assault. These were to be served consecutive to defendant's two-year concurrent prison sentences for the felony-firearm convictions. We affirm defendant's convictions, but remand for correction of the judgment of sentence as set forth in this opinion.

The genesis of this case stretches back to April 7, 2008, when defendant's wife, Kendra Smith, informed defendant she wanted to end their 24-year marriage to explore a relationship with her supervisor at work. When Mrs. Smith returned home from work later the next day, defendant dragged her into their bedroom and threatened, "unlike your mom, this one's going to do you in" before firing a shotgun shell into the bedroom ceiling. Mrs. Smith explained this comment was a reference to when her father shot her mother in 1969. Still holding the gun, defendant then told his wife "the next one is for you and I, babe."

Afraid for her life, Mrs. Smith managed to escape through the bedroom window before any other shots were fired. Defendant went outside, and still holding the gun, grabbed his wife by the neck. However, Mrs. Smith again managed to escape and called 911. Police arrived and, after a brief stand-off, subdued defendant with a taser and arrested him. Notably, after Mrs.

[1] The jury acquitted defendant of assault with intent to murder, MCL 750.83, as well as the felony-firearm charge related to that offense.

Smith's second escape but before defendant's arrest, defendant had poured gasoline throughout the house, left the stove on, twice shot Mrs. Smith's vehicle that was parked in the driveway, left suicide notes on the vehicle's windshield, removed clothing from the house, and called 911 to warn that unless the police left, there would be "suicide by cop."

Despite his words and actions, defendant testified that his intent never was to harm his wife, but rather to force her to watch his suicide. On this note, defendant elaborated that he had planned to kill himself earlier in the day, but his plans were thwarted when his dog jumped into the bathtub with him where had planned to slit his wrists. Evidence was also presented that defendant suffered from depression and had consumed a large amount of alcohol and prescription medication before his wife arrived home on the day in question. A jury subsequently convicted defendant of the aforementioned offenses, and this appeal ensued.

As his first assignment of error, defendant argues that trial counsel's eliciting inadmissible testimony that defendant had given Mrs. Smith black eyes on two prior occasions rendered his representation constitutionally ineffective. The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Thus, the legal question before us is subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order to demonstrate that an attorney's performance was substandard, a defendant must overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy is ultimately unsuccessful. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Where there is no evidentiary hearing, as was the case here, we limit our review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002).

During defense counsel's cross examination of Mrs. Smith, counsel asked if defendant had always been a good husband, to which Mrs. Smith responded, "Yeah. I've had a couple black eyes, but for the most part, yes, he's been a good husband." It is clear from the context of defense counsel's line of questioning that this specific question was a strategic decision designed to support counsel's theory that defendant lacked any malicious intent toward his wife and that his actions were an anomaly related to the news of his wife leaving him and of his depression. Indeed, following this answer counsel asked Mrs. Smith about defendant's prescription drugs, the loss of his job, and about whether defendant had a previous criminal record. And, consistent with this theory, counsel also elicited testimony from defendant concerning the history of his relationship with Mrs. Smith–including the context of the black eyes, which minimized any danger of unfair prejudice under MRE 403–as well as his depression and his sadness at the thought of his wife leaving him. In light of this, although the question at issue backfired, counsel's strategic decision is not a matter we may second-guess with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant relies on *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), and MRE 404(b), as support for his claim that Mrs. Smith's testimony was inadmissible. However, defense counsel did not elicit the testimony in question to show

defendant's propensity to commit the crimes charged as proscribed under *VanderVliet* and MRE 404(b), but rather to show the opposite. Moreover, even if this testimony were improper character evidence, that defendant gave Mrs. Smith two black eyes in the past had no bearing on whether defendant intended to commit arson as defendant now claims.

Regardless, we can find no outcome determinative error where defendant himself admitted at trial to firing the shotgun while in the bedroom with his wife, trying to physically restrain his wife from leaving, and pouring gasoline throughout his house. Also noteworthy is that defendant's character witnesses denied seeing Mrs. Smith with black eyes in response to the prosecution's questions on this topic.[2] Consequently, defense counsel's questioning and failure to request a mistrial did not deprive defendant of the effective assistance of counsel.

Next, defendant claims the court erred in permitting the jurors to propose questions for the witnesses at trial. Because defendant failed to raise this issue below, our review is only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Despite defendant's citation to case law from a foreign jurisdiction in support of his position,[3] our Supreme Court has definitively held that jurors may propose questions to witnesses at the trial court's discretion. *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972); see also MCR 6.414(E). As we are bound to follow precedent, we reject defendant's argument outright. Nevertheless, before moving on, we would highlight that no proposed jury question was actually submitted to a witness. Thus, defendant's argument on this issue is utterly baseless.

Finally, we agree with defendant that his felony-firearm convictions should run concurrently to his preparing to burn property conviction. Indeed, as the prosecution concedes, defendant faced no felony-firearm charge involving the predicate offense of preparing to burn property. See *People v Clark*, 463 Mich 459; 464; 619 NW2d 538 (2000) (the felony-firearm statute does not "permit[] consecutive sentencing with convictions other than the predicate offense); see also MCL 750.227b(2).

Therefore, we remand this case for correction of the judgment of sentence to provide that defendant's felony-firearm convictions are to be served concurrently with each other, but preceding only his unlawful imprisonment and felonious assault convictions. We affirm in all other respects and do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray

[2] We note that defendant makes no challenge involving prosecutorial misconduct, but merely raises this issue in the context of his ineffective assistance of counsel claim.

[3] See *State v Costello*, 646 NW2d 204 (Minn, 2002).