STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
v	No. 295006 Jackson Circuit Court
SETH ELISHA BROWN, Defendant-Appellant.	LC No. 08-005177-FH

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of arson of a dwelling house, MCL 750.72, and second-degree home invasion, MCL 750.110a(3). The trial court sentenced him to concurrent terms of 20 to 30 years' imprisonment for the arson conviction and 10 to 20 years' imprisonment for the home-invasion conviction. We affirm.

On September 3, 2008, the Concord Fire Department responded to a fire in a furnished cabin in a remote area of Jackson County. The fire was determined to be of suspicious origin, and a specialist fire investigator, Michigan State Police Detective Sergeant Kenneth Hersha, was called to the scene. Hersha was near the scene because he was investigating an arson that had occurred the previous day in nearby Pulaski Township. A suspect in that case lived within eyesight of the burning cabin, causing Hersha concern regarding whether the fires were related. As he approached the cabin, Hersha saw a young man walking on the road and asked him how to access the cabin. The man told Hersha that defendant had called him on his cellular telephone and told him that he (defendant) "did it" and that the police were chasing him.

Hersha examined the structure immediately after the fire was suppressed and identified two separate points of origin, one on a couch that had been tipped over and burned and one on the front porch area. Based on the fire and heat patterns that were present throughout the structure, as well as on the absence of an identifiable accidental cause, Hersha determined that the fire had been intentionally set.

Defendant and Gail Allen were soon identified as suspects and were apprehended at a residence located within one-half mile of the cabin. Defendant initially denied involvement, asserting instead that he had seen someone running from the fire, that he had fought with this person, and that he then went to the cabin and called 911. However, defendant subsequently admitted to Hersha that he had used a shovel to break the back window of the cabin and that he

and Allen had entered through the window, tipped the couch over, and lit the couch and porch on fire using bug spray and lighter fluid. Defendant also provided a written statement acknowledging that he and Allen had broken into the cabin, flipped the couch over, and lit it on fire. Allen was interviewed separately and also eventually confessed, providing an identical account of the details of the arson.

Defendant first argues that he was denied a fair trial when Hersha testified about the Pulaski Township arson, which had occurred on the day before the charged offense. Defendant asserts that this testimony constituted improper "other-acts" evidence under MRE 404(b)(1) and that its admission served to prejudice the defense by raising the implication that defendant was involved in the prior incident. However, this issue is waived for appellate review. On cross-examination, defense counsel questioned Hersha at length about Allen's involvement in the Pulaski Township arson, eliciting testimony that Allen had confessed to committing both arsons and had pleaded guilty in both cases, and that defendant was not implicated in the earlier arson. Defendant relied heavily on this testimony in presenting his defense, postulating in his closing argument that Allen was the sole perpetrator of both arsons and that defendant was privy to the details of the instant arson only because Allen had told him or because he was present at the scene when Allen started the fire. A party may not claim error when he contributes to the alleged error by plan or negligence, *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), and he waives alleged error by making affirmative use of otherwise inadmissible evidence, *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001). Therefore, appellate relief is precluded. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant additionally contends that trial counsel was ineffective for failing to object to the admission of the testimony concerning the Pulaski Township arson. Because defendant failed to move for a new trial or an evidentiary hearing below, his ineffective-assistance claim is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To prevail on his claim, defendant must show that "counsel's performance fell below an objective standard of reasonableness under professional norms" and that but for counsel's performance, the outcome of the trial would have been different. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Defendant must also show that the result that did occur was fundamentally unfair or unreliable. *Id*. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In light of the overwhelming evidence against defendant—including his presence in the immediate vicinity of the fire, his admission to an acquaintance that he started it, and his written statement and detailed confession to police—he can neither establish that counsel's performance prejudiced his defense nor overcome the presumption that counsel's strategy, to portray Allen as the sole offender and defendant as the innocent bystander, was a reasonable one. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (discussing the general

standard for ineffective-assistance claims). That the strategy was ultimately unsuccessful does not automatically mean that ineffective assistance of counsel occurred. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next argues that he was denied a fair trial and denied his constitutional right of confrontation by the introduction of hearsay testimony that Allen confessed his involvement in the instant crimes and that his account of the incident was identical to that provided by defendant. Defendant failed to object, on Confrontation-Clause grounds or otherwise, to the admission of the hearsay evidence. Accordingly, this issue is not preserved for appellate review, *People v Payne*, 285 Mich App 181, 199; 774 NW2d 714 (2009); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005), and is therefore reviewed for plain error affecting defendant's substantial rights, *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief, defendant must establish that a plain error affected the outcome of the lower-court proceedings; additionally, reversal is warranted only if defendant is actually innocent or the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *Shafier*, 483 Mich at 219-220.

"The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Statements made during a police interrogation are testimonial if the circumstances objectively indicate that the investigation's primary purpose was to establish past events potentially relevant to a later criminal prosecution, and not to meet an ongoing emergency. *People v Bryant*, 483 Mich 132, 139; 768 NW2d 65 (2009), cert granted ___ US ___; 130 S Ct 1685; 176 L Ed 2d 179 (2010); see also *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004), quoting *Crawford v Washington*, 541 US 36, 52; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("'[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard'"). Because Allen did not testify at defendant's trial, and because there is no suggestion that he was unavailable and that defendant had a prior opportunity to cross-examine him, the admission of Hersha's testimony concerning Allen's statement violated defendant's right of confrontation. *McPherson*, 263 Mich App at 132.

Nevertheless, we find no basis for reversal. A defendant's own statement or confession may be examined on appeal when determining whether a Confrontation Clause violation was harmless. *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992). In light of defendant's confession and the other evidence against him, the error was harmless beyond a reasonable doubt. See, e.g., *id*. at 51.

Finally, defendant argues that he was denied a fair trial when he appeared before the jury venire wearing prison-issue pants. The record reveals no objection to his clothing before the empaneling of the jury and before the jury venire viewed him in prison clothing.[1] Therefore, this

[1] The record indicates that, well into the voir-dire process, defense counsel pointed out that defendant was wearing "blue pants with an orange stripe" and asked if anyone knew what this
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claim is not preserved for appellate review. *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969); *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). Generally, when a defendant makes a timely request to wear civilian clothing, rather than identifiable prison clothing, at trial, the request must be granted. *Estelle v Williams*, 425 US 501, 512; 96 S Ct 1691; 48 L Ed 2d 126 (1976); *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). A defendant who fails to raise such a request, however, may not claim constitutional error:

> [T]he particular evil proscribed is *compelling* a defendant, against his will, to be tried in jail attire. The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury. [*Estelle*, 425 US at 507-508 (emphasis supplied).]

Accordingly, "the failure to make an objection to the court as to being tried in [prison] clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id*. at 512-513.

Defendant has failed to establish that he was compelled against his will to appear before the jury in prison clothing. Indeed, from the evidence in the record, it is possible that defendant wished to remain in his prison-issue pants as a matter of strategy. See *Estelle*, 425 US at 507-508. Moreover, the trial court instructed the jury that defendant's clothing was not indicative of his guilt, and there is no indication that defendant's pants undermined the presumption of innocence in his favor. *People v Lewis*, 160 Mich App 20, 31, 408 NW2d 94 (1987) ("[o]nly if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process"). In light of the substantial evidence of defendant's guilt, he cannot establish error affecting the outcome of the proceedings. *Carines*, 460 Mich at 764.

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meant. One of the potential jurors responded that it meant that "[t]hey've got him detained" and that it was "just part of the process." The trial court noted for the record that defendant "was offered a chance," that he "had a right to wear civilian clothes," and that he was wearing one of the trial judge's jackets. The court further stated, "I just want it brought out for the record that the defense attorney is the one that objected to that issue" and that defense counsel was "the one who raised the issue." Although defendant seems to be asserting that this exchange demonstrates that he raised a timely objection to his clothing, this is not at all apparent from the record. In fact, it seems from the context that the court, in stating that defense counsel was "the one who raised the issue," was referring not to any past objection raised by defense counsel, but to the fact that counsel had affirmatively directed the jury's attention to defendant's pants.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter