

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEVEN ZYGILA,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 169117

LC No. 92-003767

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DICKEY WHITSETT, JR.,

Defendant-Appellant.

No. 169778

LC No. 92-003767

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Following a consolidated jury trial, defendant Michael Steven Zygila was convicted of one count of breaking and entering an occupied dwelling with intent to commit an assault, MCL 750.110; MSA 28.305, and one count of assault with intent to murder, MCL 750.83; MSA 28.278. He was sentenced to five to fifteen years' imprisonment for the breaking and entering conviction, and fifteen to thirty years' imprisonment for the assault conviction. Defendant Thomas Dickey Whitsett Jr. was convicted of one count of breaking and entering an occupied dwelling with intent to commit an assault, MCL 750.110; MSA 28.305, and one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to five to ten years' imprisonment for the

* Circuit judge, sitting on the Court of Appeals by assignment.

breaking and entering conviction, and three to ten years' imprisonment for the assault conviction. Both defendants appeal as of right. We affirm.

No. 169117

I

Defendant first argues that that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as the attorney whose assistance is guaranteed by the Sixth Amendment to the United States Constitution. Further, defendant must show that any deficiency was prejudicial to his case such that counsel's error may have affected the outcome at trial. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994).

A *Ginther*¹ hearing was held regarding defendant's claim of ineffective assistance of counsel on May 5 and 17, 1995, following which the trial court denied defendant's motion for new trial. After careful review of the many allegations of error, we find no error in the trial court's ruling.

Although trial counsel may have made some trial decisions which resulted in unfavorable results, each decision appears to have been a part of counsel's trial strategy. It is well established that this Court will not second-guess trial counsel's strategy. The fact that the strategy may not have worked does not constitute ineffective assistance of counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

II

Next, defendant asserts that the trial judge should not have presided over the *Ginther* hearing. We disagree. Disqualification of a trial judge as the finder of fact in a subsequent trial is not required solely because the judge sat as the trier of fact in a former trial, absent some special circumstances which increase the risk of unfairness. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). Mere proof that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification. *Id.* at 388. In this case, defendant claims that the trial judge was impartial merely because he sat as the presiding judge in the jury trial. However, suspicions alone do not constitute proof of partiality or prejudice. *Id.* Defendant has presented no evidence to support a finding that the trial judge was biased or prejudiced against defendant. Thus, this issue is without merit.

III

Next, defendant contends that the trial court made several errors at trial that resulted in denying him a fair trial. We have reviewed each allegation of error and conclude that defendant was not denied a fair and impartial trial.

Defendant first argues that the trial court improperly prevented defense counsel from cross-examining defendant's ex-girlfriend about the nature of their relationship. We disagree. The trial court did not forbid the questioning of the ex-girlfriend; rather, the court, merely postponed such questioning until after defendant testified, if he testified at all. Such a ruling was proper, in light of the fact that the trial judge has the authority to control all aspects of trial, including what order the testimony of witnesses should be heard. See MCR 6.414(A) As such, defendant's argument that he was compelled to testify is without merit, and reversal is not warranted on this issue.

Next, defendant alleges that the trial judge erroneously admitted evidence of defendant's prior act of threatening the victim with a shotgun. We disagree. Evidence of a prior bad act does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). Thus, other acts evidence is admissible whenever it is relevant on a noncharacter theory, such as intent. *Id.* Here, the prosecutor's questioning of the victim was done to delve into defendant's intent or motive for breaking into his ex-girlfriend's home and attacking the victim. Defendant's prior relationship and previous interactions with the victim were relevant and were placed in issue by defendant when he raised a lack of intent defense. Consequently, evidence of defendant's prior act was relevant under MRE 404(b). In addition, the probative value of the victim's testimony was not substantially outweighed by the danger of unfair prejudice. *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993).

Next, defendant maintains that the trial court erroneously allowed the prosecutor to impeach defendant with the forensic examiner's report. We agree. See MCL 768.20a(5); MSA 28.1043(1)(5); *People v Jacobs*, 138 Mich App 273, 275-279; 360 NW2d 593 (1984). However, any error in the admission of the statements was harmless because the evidence was merely cumulative. MCR 2.613(A).

Next, defendant argues that the trial court failed to properly instruct the jury on the elements of assault with intent to murder, and failed to instruct the jury regarding mitigating circumstances. We disagree. With regard to the instruction on the crime of assault with intent to murder, the trial judge instructed the jury with the standard jury instruction on that crime, CJI2d 17.3. This Court has approved the use of CJI 17:2:01 (now CJI2d 17.3) in *People v Haggart*, 142 Mich App 330, 341; 370 NW2d 345 (1985), and *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). Because the lower court's instructions mirrored those contained in CJI2d 17.3, they were sufficient to inform the jury of the elements of assault with intent to murder, and, as such, were properly given. See *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Moreover, we find that, as a matter of law, the trial court was correct in deciding not to instruct the jury on mitigating circumstances. Upon review of the lower court record, we find no evidence which would allow a reasonable juror to conclude that defendant acted out of a heat of passion and was provoked into beating the victim. See *People v Pouncey*, 437 Mich 382, 389-390; 471 NW2d 346 (1991); *People v Eagen*, 136 Mich App 524, 526-527; 357 NW2d 710 (1984).

Next, defendant argues that the trial court was biased against him at sentencing. We disagree. Defendant's allegations of bias are without record support and are pure conjecture. In addition, defendant's claim that the sentence imposed was disproportionate is equally without merit. The sentence imposed falls within the sentencing guidelines' range, and we find no unusual circumstances to render it disproportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994).

No. 169778

I

Defendant first argues that he was denied a fair trial by the prosecutor's denigrating remarks about defense counsel. Because defendant failed to object to the prosecutor's comments, this issue has not been preserved for appeal. Accordingly, appellate review of the allegedly improper remarks by the prosecutor is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

A prosecutor may not question defense counsel's veracity. See *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). Here, however, a timely objection could have cured any prejudice by causing the giving of an appropriate cautionary instruction. Accordingly, we hold that no miscarriage of justice would result from our failure to review this issue.

II

Next, defendant argues that the trial court incorrectly instructed the jury on the specific intent element of aiding and abetting. We disagree. The lower court's instructions on aiding and abetting mirrored those contained in CJI2d 8.1, and were sufficient to inform the jury of the elements of aiding and abetting. See *Sammons*, *supra* at 372.

III

Lastly, defendant argues that he was denied his constitutional right to due process when the trial court allowed the prosecutor to amend count one of the information. We disagree. A trial court may at any time before, during, or after trial amend the information in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. MCL 767.76; MSA 28.1016. The prosecution may amend the information so long as the accused is not prejudiced or unduly surprised by the amendment. MCR 6.112(G). Prejudice occurs when the defendant does not admit guilt and is not given a chance to defend himself against the crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). We find no evidence that defendant was prejudiced by the amendment, or that he would have presented a different defense had the prosecutor requested the amendment at an earlier time.

Affirmed.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello

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