

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 12, 2013

V

ROSA SHARIE WATSON,

Defendant-Appellant.

No. 307741
Wayne Circuit Court
LC No. 11-006082-FH

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right her convictions following a jury trial for arson of a dwelling, MCL 750.72,¹ and arson of insured property, MCL 750.75.² The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of seven to 30 years for arson of a dwelling and seven to 15 years for arson of insured property. The court also ordered defendant to pay \$22,051.36 in restitution. We conclude that defendant was deprived of the effective assistance of counsel and that but for counsel's errors there is a reasonable

¹ At the time of defendant's convictions, MCL 750.72 provided:

Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the cartilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

² At the time of defendant's convictions, MCL 750.75 provided:

Any person who shall willfully burn any building or personal property which shall be at the time insured against loss or damage by fire with intent to injure and defraud the insurer, whether such person be the owner of the property or not, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

probability that the outcome of defendant's trial would have been different. Accordingly, we reverse and remand for a new trial.

I. FACTS

On December 8, 2010, at approximately 11:00 a.m., a fire significantly damaged a portion of defendant's home. The fire department was contacted by a neighbor who saw smoke coming from the home. A neighbor called defendant on her cell phone and told her about the fire. She arrived home in her car soon after, while the fire department was putting the fire out. Later, according to defendant's next-door neighbor, Christina Collins, and prosecution expert witness Mark Pelot, defendant said that the fire might have been accidentally caused by a candle she left burning on a basement bar to eliminate a bad odor.

There was no direct physical evidence that defendant intentionally set fire to her home. At trial, the prosecution's proofs focused on three areas. First, an expert in "fire investigations" testified that, due to the absence of any evidence that the fire occurred accidentally, he concluded that it had been intentionally set. Second, the prosecution introduced evidence that defendant had previously been convicted of embezzlement and uttering and publishing, as well as evidence that she had previously engaged in a scheme to defraud her home insurer by filing a false theft report. Third, the prosecution presented several lay witnesses who contradicted the statements defendant made to the police regarding her whereabouts when the fire began. Specifically, two neighbors testified that they saw defendant driving her car near her home only minutes before the smoke was seen, contradicting defendant's testimony that she had left her home several hours earlier. Another witness contradicted defendant's statement that she had been at an auto repair shop immediately before returning home.

The jury convicted defendant of both arson charges. On appeal, defendant moved for and we ordered³ remand for a *Ginther*⁴ hearing on her claims of ineffective assistance of counsel. The trial court found that counsel was not ineffective.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that her trial counsel proved ineffective by failing to consult with, and present, an arson expert and by failing to object to the admission of prior bad acts evidence under MRE 609 and/or MRE 404(b).⁵ We agree.

³ *People v Watson*, unpublished order of the Court of Appeals, entered August 27, 2012 (Docket No. 307741).

⁴ See *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

⁵ "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). “Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise.” *Swain*, 288 Mich App at 643. “To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.” *Id.*

A. EXPERT WITNESS

Mark Pelot testified for the prosecution as an expert in fire investigations. Most of Pelot’s testimony concerned the contradictions between the statements of defendant and the testimony of her neighbors as to when she left her home. He described the inconsistencies and offered his opinion that defendant was not being truthful.⁶ He also testified that upon inspection of the premises, he found no evidence of an accidental cause of the fire, such as mechanical or electrical failure. Given the lack of any evidence of an accidental cause, combined with his opinion that defendant was not truthful about her whereabouts when the fire started, he concluded that defendant intentionally set the fire.

At the *Ginther* hearing, defendant called Rodney Larkin, a retired firefighter and arson investigator, to testify. He was qualified as an expert by stipulation and testified that he reviewed the police reports, Pelot’s reports, and the trial transcripts. He attacked Pelot’s conclusions as falling outside recognized standards of arson investigation. Specifically, he testified that Pelot employed improper methodology and failed to comply with a nationally-recognized fire investigation guideline requiring that any conclusion that a fire was started intentionally be supported by affirmative physical evidence rather than upon the absence of physical evidence of an accidental cause. See *National Fire Protection Association (NFPA) 921*. Larkin concluded that, in his opinion, that standard required that the origin of the instant fire be classified as undetermined: “My conclusion was that the fire was undetermined because the cause of its ignition was never determined, the actual material first ignited wasn’t determined, and there was no ignition source that was definitively defined.” Because Larkin’s testimony would have rebutted both Pelot’s conclusion and his methodology, counsel should have consulted with Larkin and offered his testimony at trial.

At the *Ginther* hearing, defense counsel conceded that defendant had advised him that Larkin would testify on her behalf and that he had never contacted Larkin. He explained that that he did not believe that Larkin would be able to form a credible opinion without having visited the scene before it was contaminated. However, had he consulted with Larkin, he would

⁶ Pelot’s opinions regarding defendant’s veracity do not appear to be based upon any scientific expertise and were, therefore, arguably inadmissible under MRE 702. However, because we find that defense counsel was ineffective on other grounds, we decline to address defendant’s claim that counsel was ineffective for failing to move for a hearing under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

have understood the basis for Larkin's conclusions and his criticism of Pelot's methodology. Moreover, Larkin's opinions were based on his review of Pelot's testimony and other documentary evidence, and, therefore, would not have been affected by any contamination of the scene. The prosecution points out that defense counsel raised NFPA 921 during his cross-examination of Pelot. However, he did not refer to any specific provisions of the standards and Pelot stated that he complied with them. Thus, there was no testimony or other evidence that Pelot's analysis fell outside professional norms. Moreover, any implication from counsel's questions alone that Pelot had somehow failed to comply with the standards could not be considered by the jury. Counsel is not an expert and the jury was properly instructed that the attorneys' statements were not evidence. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). Accordingly, we are not persuaded that defense counsel's cross-examination of Pelot obviated the need to call either Larkin or another fire investigation expert.

While we generally defer to trial counsel on the decision to retain an expert witness, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), we find that counsel's failure to do so in this case deprived defendant of a substantial defense, *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012), i.e., a qualified expert who, after reviewing the evidence, would testify that the cause of the fire was undetermined and that the prosecution's expert's conclusion to the contrary was improper under the standards that govern fire investigations. This testimony could have established a reasonable doubt whether defendant intentionally burned her home. Accordingly, counsel's failure to contact and present Larkin as an expert witness was without sufficient tactical basis, and, therefore, fell below objective standards of reasonableness. *Swain*, 288 Mich App at 643.

B. PRIOR BAD ACTS

Prior to trial, the prosecution indicated its intent to admit, under MRE 404(b) and/or MRE 609, defendant's prior conviction for embezzlement, three prior convictions for uttering and publishing, and an uncharged prior incident in which defendant allegedly attempted to commit insurance fraud.

Defendant argues that her trial counsel was ineffective for failing to object to the admission of these prior bad acts. We need not determine whether the failure to object under MRE 609 constituted ineffective assistance since that rule only applies where the defendant testifies and defendant did not. However, we agree with defendant that her counsel was ineffective in failing to object to the admission of her prior convictions under MRE 404(b).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Unquestionably, informing the jury of defendant's four prior convictions gave rise to an inference that defendant was of dishonest character and a serial criminal. This point was emphasized during the prosecutor's closing argument where she argued that defendant had engaged in "an escalating stairway of fraud." The prosecution is correct that the crimes are all generally fraud-based offenses. However, none of them specifically involved property destruction or insurance fraud, the two central elements of the charged crimes. Thus, they were far more relevant to character than "motive, opportunity, intent, preparation, scheme, plan or system." Moreover, the jury was not merely informed of the defendant's criminal history; they heard detailed testimony by police officers describing the prior incidents.

For the same reasons, we conclude that the risks of unfair prejudice substantially outweighed the probative value of these convictions. Their relevance to the commission of arson was modest, but they were powerful, though inadmissible, evidence of propensity of character. Accordingly, the prior convictions were not admissible under MRE 404(b) and had there been an objection, they would properly have been excluded. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Thus, defense counsel's performance fell below objective standards of reasonableness for failing to object. *Swain*, 288 Mich App at 643.

We reach a different conclusion regarding the evidence that defendant had previously attempted to defraud her insurer. According to the testimony, in August 2007, defendant stored a television, two chairs, and a table in her next-door neighbors' garage, reported the items stolen, and made an insurance claim for \$5,020. After the police found the items in the garage, defendant's insurer denied the claim. Although defendant was never charged with a crime in connection with that incident and her insurer did not pursue a civil action, the evidence concerning it was admissible under MRE 404(b) because the existence of insurance and a specific intent to defraud the insurer are elements of arson of insured property. MCL 750.75. Thus, the prior attempted insurance fraud, unlike defendant's prior convictions, demonstrates an intent and scheme that is specifically relevant to an element of the crime. Moreover, in the absence of the evidence of the four convictions, this single incident standing alone was far less likely to give rise to a prejudicial inference and so did not violate either MRE 404(b) or MRE 403. Accordingly, defendant's trial counsel's performance did not fall below objective standards of reasonableness for failing to object to the admission of evidence of this incident.

C. OUTCOME DETERMINATIVE ERROR

As discussed above, we find that defendant's trial counsel's performance fell below objective standards of reasonableness for failing to consult with and retain an arson expert and object to the admission of defendant's prior convictions under MRE 404(b). However, to obtain reversal, defendant must show that, "but for counsel's error[s], there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643. While this presents a close question, we conclude that defendant has made the required showing.

It is undisputed that defendant's insured home was damaged by fire on December 8, 2010. Further, defendant acknowledged that she may have started the fire, albeit by accident, by leaving a burning candle on a bar in the basement. An element of both arson of a dwelling and arson of insured property is that defendant intentionally started the fire. MCL 750.72; MCL 750.75. There was no direct physical evidence that defendant intentionally burned her home.

However, arson cases often turn on inferences drawn from circumstantial evidence such as expert testimony. See *People v Nowack*, 462 Mich 392, 402-404; 614 NW2d 78 (2000). Therefore, to ensure that defendant received a fair trial, the jury should have been presented with Larkin's testimony in order to weigh it against Pelot's. Given that Larkin, a retired firefighter and arson investigator with decades of experience, would have not only testified that he could not conclude that the fire was arson, but also to the failures he identified in Pelot's analysis, a reasonable jury could have found that no arson occurred, which results in the reasonable probability that defendant would have been acquitted of both charges. Moreover, it is difficult for us to imagine how a reasonable jury would not have been unduly prejudiced by the evidence of defendant's prior crimes that the prosecutor repeatedly emphasized in her argument.

We recognize that there was substantial testimony contradicting the defendant's version of her whereabouts during the time at issue. She claimed to have left her home at least one hour before the fire was discovered. However, two of her neighbors testified that they saw defendant near her home 10-15 minutes prior to the discovery of the fire. In addition, defendant's statement to the police that she had been at an auto repair shop for approximately 30 to 40 minutes when she received the call that her home was on fire was contradicted by testimony from the manager of the auto repair shop that there was no record of defendant visiting the shop that day. Moreover, the jury properly heard evidence that defendant had engaged in a prior attempt to file a false insurance claim.

The evidence contradicting defendant's statements about her whereabouts and the evidence of the prior false claim certainly support the prosecution's case. However, on their own, they would likely not be adequate to support defendant's convictions absent Pelot's unrebutted expert testimony that the fire had been intentionally set. Defense counsel's failure to present available expert testimony to rebut Pelot's methodology and conclusion was a key factor in defendant's convictions, as was his failure to object to four prior convictions that were admitted in error. In sum, but for defense counsel's failure to present Larkin's expert testimony and to object to the admission of defendant's prior convictions, there was a reasonable probability that defendant's trial would have resulted in a different outcome. *Swain*, 288 Mich App at 643. Accordingly, we reverse, vacate defendant's convictions and sentences for arson of a dwelling and arson of insured property, and remand for a new trial.⁷ We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

⁷ Given this conclusion, we decline to address defendant's other arguments on appeal.