

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 21, 2014

v

CHARLES WILLIAM O'NEAL,
Defendant-Appellant.

No. 311760
Oakland Circuit Court
LC No. 2012-239764-FH

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for attempted first-degree home invasion, MCL 750.110a(2), MCL 750.92. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.13, to 38 months' to 25 years' imprisonment. We affirm.

On appeal, defendant first contends that the trial court abused its discretion in allowing the prosecution to introduce evidence of four prior convictions under MRE 404(b) for the purpose of establishing defendant's intent. We disagree.

Defendant preserved this evidentiary challenge and, consequently, our review is for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). An abuse of discretion occurs when the trial court departs from the range of "reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Relevant to defendant's argument, MRE 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts to . . . prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). Although such evidence may not be used to show a person's character, it may be admissible for other purposes, including proof of intent. MRE 404(b)(1). To introduce evidence under MRE 404(b):

First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402 . . ." Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.

[*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (internal citation omitted).]

In this case, the trial court did not abuse its discretion in allowing the introduction of evidence of defendant's prior convictions. First, the prosecution offered the contested evidence to establish defendant's intent, which is one of the enumerated proper purposes in MRE 404(b). Second, the evidence was relevant to defendant's intent. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In other words, relevance requires both materiality and probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). By pleading not guilty, defendant placed all elements of attempted first-degree home invasion at issue, including the requirement that he have the "intent to commit a felony, larceny, or assault in the dwelling" MCL 750.110a(2); *Crawford*, 458 Mich at 389. Indeed, the main issue before the jury was whether defendant intended to gain entry to the home for purposes of committing a larceny therein or whether, as defendant claimed, his actions were those of a sick man looking to make a telephone call. Given defendant's theory of the case and his not guilty plea, there can be no question that intent was a material issue.

Regarding the question of the evidence's probative value, the fact that defendant was previously involved with breaking and entering into four unoccupied buildings (including two residential dwellings), and committing larcenies therein, tends to make it more likely that his actions in this case—knocking repeatedly, peering in the window, and damaging the door—were undertaken with an intent to commit larceny rather than out of an innocent desire to use the telephone and a subsequent frustration at being ignored. MRE 401. In contesting the evidence's probative value, defendant mistakenly relies on caselaw discussing the high degree of similarity required for admission under MRE 404(b) when the evidence is offered to prove a common design, plan, or scheme. See *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). However, "[w]here other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005) (citation omitted); see also *Sabin (After Remand)*, 463 Mich at 64 (explaining that "mere similarity" between the acts will suffice). Applying the proper standard of similarity in this case, defendant's various acts of breaking and entering are of the "same general category" such that it seems improbable that defendant's attack on the front door of the victim's house was motivated by anger at being ignored rather than an intent to break into the home and steal. See *People v VanderVliet*, 444 Mich 52, 80 & nn 35, 37; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *McGhee*, 268 Mich App at 611. Because the evidence had probative value relating to a material issue, it was relevant. MRE 401.

Under MRE 403, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" However, all evidence offered against a defendant is prejudicial to some extent; only evidence that is *unfairly* prejudicial should be excluded. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). In this case, the evidence had strong probative value regarding the material issue of defendant's intent—the main issue of contention at trial. Given the difficulty in proving a defendant's state of mind, *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008), there were few proofs available to the prosecution on this element, making the evidence an important component in the prosecution's effort to prove intent. See *Yost*, 278 Mich App at 408

(“[T]he analysis under MRE 403 should take into consideration the probative value of the evidence in view of the availability of other means of proof”). In contrast, in the context of prior bad acts, there can be a danger of prejudice, namely that the jury will use the evidence for forbidden propensity purposes. *Crawford*, 458 Mich at 398. However, this risk did not *substantially* outweigh the other acts evidence’s probative value in this case. The prosecution did not urge the jury to draw impermissible character inferences from the contested evidence, but instead argued it was indicative of defendant’s intent. Further, any prejudicial effect that the other acts evidence may have had on the jury was mitigated by the trial court’s instruction to the jury, limiting the use of the other acts evidence to a proper purpose. See *People v Orr*, 275 Mich App 587, 593; 739 NW2d 385 (2007). Determinations under MRE 403 are best left to the trial court, *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), and the trial court did not abuse its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. In summary, the trial court did not abuse its discretion in admitting the contested evidence.

Next, defendant contends that the prosecution submitted insufficient evidence to support his conviction. We review issues regarding the sufficiency of the evidence *de novo*, viewing the evidence in “a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Circumstantial evidence and reasonable inferences arising therefrom can constitute sufficient evidence to establish the elements of a crime. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Under MCL 750.110a(2), a conviction for first-degree home invasion can be established where the defendant: (1) breaks and enters a dwelling, (2) with intent to commit a felony, larceny, or assault in the dwelling, and (3) another person is lawfully present in the dwelling. Pursuant to MCL 750.92, defendant can be convicted of attempted first-degree home invasion. An attempt to commit a crime under MCL 750.92 consists of: “(1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense.” *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). On appeal, defendant concedes that the evidence sufficiently supports the conclusion that he attempted to break and enter the dwelling while another person was lawfully present. Relying on *People v Uhl*, 169 Mich App 217; 425 NW2d 519 (1988), he argues only that the evidence was insufficient to establish his intent to commit a felony, larceny, or assault inside the dwelling. We disagree.

In *Uhl*, 169 Mich App at 220, this Court recognized that “[i]ntent to commit larceny cannot be presumed solely from proof of the breaking and entering.” However, we also explained that intent “may reasonably be inferred from the nature, time and place of defendant’s acts before and during the breaking and entering.” *Id.* Moreover, “minimal circumstantial evidence” will support the conclusion that defendant entertained the requisite intent. *People v Frost*, 148 Mich App 773, 777; 384 NW2d 790 (1985).

Here, the evidence showed that defendant approached a dwelling, knocked repeatedly on the door, peered into a front window, and, when he received no response to his knocking, he attempted to break down the door to gain entry. When an occupant in the dwelling called out “hey,” defendant stopped his efforts to enter and fled. These facts can be likened to *Uhl* insofar as they show repeated knocking and a failed attempt to gain entry through a door. However, beyond these basic similarities to *Uhl*, there were additional facts supporting the conclusion that defendant intended to commit a larceny inside the house. For example, the evidence showed that, despite his claim that he was seeking help, defendant bypassed a busy school and approached a house that appeared empty. Defendant attempted his entry on a Monday morning, when presumably many people would be at work. The only occupants were still in bed, and there was no car in the driveway. That defendant chose an apparently unoccupied house supports the inference that his efforts to break and enter were undertaken with an intent to commit larceny. See *People v Riemersma*, 104 Mich App 773, 780; 306 NW2d 340 (1981); *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970).

Moreover, when confronted by one of the home’s occupants, who shouted out “hey” as defendant attempted to enter, defendant fled. If defendant were truly in dire need of help as he claimed, it would have been natural for him to seek help rather than flee the premises. Defendant’s flight from the scene, his furtive efforts to dispose of his hat, and his claim to a responding police officer that “I didn’t do anything,” demonstrate a consciousness of guilt that could be considered by the jury as part of its determination whether defendant intended to steal. See *People v Bowers*, 136 Mich App 284, 298; 356 NW2d 618 (1984). Added to these circumstances is, of course, the other acts evidence of defendant’s prior convictions, which, for the reasons explained, supported the conclusion that, when defendant rammed the front door, he intended to enter the house and commit a larceny. This other acts evidence, coupled with the circumstances surrounding defendant’s actions, provided sufficient evidence for a rational jury to convict defendant of attempted first-degree home invasion.

In the alternative, the jury could reasonably have found the evidence sufficient to support defendant’s conviction on the basis of an intent to commit assault when he entered the dwelling. MCL 750.110a(2). An “assault” refers to “either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.” *People v Musser*, 259 Mich App 215, 223; 673 NW2d 800 (2003). In this case, if the jury believed some of defendant’s testimony, there was evidence that when he looked in the home’s window, he saw a woman. He specified that he did not see the home’s male occupant. Defendant testified that, while admittedly angry that the woman would not open the door, he called out an obscenity and then proceeded with a violent attack on the front door, which would reasonably be viewed as an attempt to enter the dwelling. Only when the male occupant called out “hey,” signaling to defendant that the woman was not alone, did defendant cease his efforts and retreat. Defendant’s actions so terrified the woman that she testified she feared for her life and ran to call 9-1-1. Defendant’s claim that he saw the woman in the house, coupled with his subsequent anger and violent attempt to enter, could reasonably lead to the conclusion that he intended to commit an assault once he entered the dwelling. Consequently, viewed in a light most favorable to the prosecution, the evidence presented sufficiently established that defendant attempted to commit first-degree home invasion under a theory of assault.

In a Standard 4 brief, defendant argues that the trial court judge and the magistrate should have been disqualified because they had a personal relationship with the homeowner in this case. We disagree.

Under MCR 2.003(C)(1)(a), disqualification of a judge is warranted if the judge is actually biased or prejudiced for or against a party or his attorney. See *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). In this case, the trial court acknowledged an acquaintance, both personal and professional, with the homeowner's father, a former city attorney. He also acknowledged a general acquaintance with the family of the homeowner's ex-wife, who was not involved with the case. However, the trial court denied a personal relationship with the actual homeowner, describing nothing more than a passing familiarity. At most the trial court judge indicated that he might offer a cordial greeting if he passed the homeowner in a hallway somewhere. He went on to explain that he did not know the homeowner's name or even if the former city attorney had more than one son. Defendant claims that these tangential connections to the homeowner demonstrate bias or prejudice, but his concerns are nothing more than suspicions, and "suspicions do not constitute proof of partiality or prejudice." *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). The trial court judge is presumed to be impartial, *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009), and he in fact declared his objectivity on the record, stating that "I can and would be fair and objective in this case." On these facts, there is no reason to suppose the trial court judge was actually biased or prejudiced. MCR 2.003(C)(1)(a).

Absent actual bias or prejudice, disqualification is appropriate where there is an appearance of impropriety contrary to Canon 2 of the Michigan Code of Judicial Conduct or a due process concern as enunciated in *Caperton v AT Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). MCR 2.003(C)(1)(b). The test for whether there is an appearance of impropriety is objective, concerned with "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton*, 556 US at 888; *People v Aceval*, 486 Mich 887, 889; 781 NW2d 779 (2010). In comparison, under due process principles, a judge should be disqualified in those extreme situations in which, objectively viewed, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, 556 US at 877; *Cain*, 451 Mich at 498.

In this case, viewing the facts objectively, the trial court's tangential connection is not the type of "extreme" situation giving rise to a due process concern. See *Caperton*, 556 US at 876, 887; *Cain*, 451 Mich at 498. That the trial court knew a former city attorney, and might offer a cordial greeting to his children, does not demonstrate a risk of actual bias or prejudgment in defendant's case such that due process required recusal. Moreover, these facts do not demonstrate an appearance of impropriety because reasonable minds would not expect such a minimal or passing acquaintance to impair the trial court judge's ability to carry out his judicial responsibilities with integrity, impartiality and competence. *Aceval*, 486 Mich at 889. Recusal was not necessary. MCR 2.003(C)(1)(b).

On appeal, defendant points to several of the trial court's rulings as proof of the trial court's partiality for the prosecution. However, judicial rulings do not generally constitute grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the

exercise of fair judgment is impossible.” *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011). Nothing in the trial court’s rulings evidence a “deep-seated favoritism or antagonism;” rather, reviewing the record, the trial court provided principled reasons, grounded in the evidence and the law, for its rulings. See *id.* at 599. As we have discussed, admission of the other-acts evidence was not an abuse of discretion. The motion for a directed verdict was properly denied because the evidence was sufficient to support defendant’s conviction. See *People v Toodle*, 155 Mich App 539, 551; 400 NW2d 670 (1986). Similarly, the motion to quash was properly denied because, based on our review of the preliminary examination record, it is clear the magistrate had probable cause to believe that defendant attempted first-degree home invasion. See *People v Hudson*, 241 Mich App 268, 277; 615 NW2d 784 (2000). Ultimately, that these rulings were unfavorable to defendant does not mean they were made by a biased or prejudiced jurist. See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Defendant also argues that because the trial court was biased, the sentence imposed must be tainted as well. Having concluded that the trial court was not biased, we see no reason to suppose that defendant’s sentence within the applicable minimum sentencing range under the legislative guidelines was somehow tainted.

Defendant also claims that the magistrate was biased because of his relationship to the homeowner’s family. The only evidence of the magistrate’s connection to the homeowner’s family came from a remark made by the trial court. The homeowner did not testify at the preliminary examination and, from the preliminary examination record, there is no reason to suppose that the magistrate knew he had any kind of tangential connection to anyone involved. These facts are not indicative of actual bias or prejudice, an appearance of impropriety, or due process concerns. Consequently, recusal was not required. See MCR 2.003(C)(1); *Caperton*, 556 US at 877. Moreover, even if there were some error in the bindover proceedings, “the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless.” *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Also in his Standard 4 brief, defendant makes several claims of ineffective assistance of counsel, all of which are without merit. Defendant failed to preserve his claim of ineffective assistance of counsel and, as such, review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). To establish the ineffective assistance of counsel, a defendant bears the burden of demonstrating: (1) that “counsel’s representation fell below an objective standard of reasonableness,” and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

As an initial matter, we reject defendant’s reliance on *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). *Cronin* governs the rare situations in which an attorney’s failure is complete, such that prejudice is presumed. *People v Frazier*, 478 Mich 231, 243-244; 733 NW2d 713 (2007). This is not such a case. Rather, defendant alleges errors by counsel at specific points in the proceedings; therefore, prejudice is not presumed and we review defendant’s challenges under the *Strickland* standard. See *Frazier*, 478 Mich at 243-244.

Regarding defendant’s specific claims of ineffective assistance, he first argues that counsel was ineffective for failing to investigate the potential judicial bias before it was disclosed

by the prosecution, for failing to pursue judicial disqualification, and for failing to inform defendant of the issue. Counsel is not ineffective for failing to investigate information of which he has no knowledge, *McGhee*, 268 Mich App at 626, and defense counsel specified on the record that he had no knowledge of the judges' tangential connections to the homeowner's family before the prosecution's disclosure. Further, the record shows that counsel informed defendant of the judges' connections to the homeowners, which belies defendant's claim that he was not informed of the matter. Because, as discussed, there were no grounds for recusal, defense counsel was not ineffective for failing to move for disqualification or pursue disqualification via an interlocutory appeal. See *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). Moreover, given that the information came to light through the prosecution's disclosure and was not grounds for disqualification, defendant has not shown that, but for defense counsel's actions, there was a reasonable probability of a different outcome, and, consequently, defendant has not shown he was denied the effective assistance of counsel. See *Meissner*, 294 Mich App at 459.

Defendant also raises a general claim that counsel's "inept" performance resulted in the loss of the motion to quash, the directed verdict motion, and the MRE 404(b) motion, and he suggests an interlocutory appeal should have been pursued in relation to these issues. Defendant does not explain what was unreasonable about counsel's performance or how, but for counsel's performance, the outcome could have been different. Reviewing the record, it appears counsel diligently argued all the motions. That counsel ultimately lost these arguments does not establish ineffective assistance of counsel. See *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). To the extent defendant argues counsel should have pursued interlocutory appeals, such efforts would have been futile and counsel is not ineffective for failing to pursue a futile position. See *Brown*, 279 Mich App at 142. Given that the matters were appropriately decided, defendant also cannot show that, but for counsel's performance, there was a reasonable likelihood of a different result. See *Meissner*, 294 Mich App at 459.

Defendant next contends that counsel was ineffective for failing to call two witnesses to substantiate his claims of illness. Counsel's failure to call specific witnesses is presumed to be a matter of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), and we will not second-guess strategic decisions, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Furthermore, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant's claimed defense was that he did not intend to commit a larceny or assault, but acted out of illness and frustration. Because defense counsel raised this defense, failure to call these witnesses did not deprive defendant of a substantial defense. See *id.* In addition, while defendant suggests that the witnesses' testimony would be favorable to him insofar as it supported his claim of illness, the record is silent regarding what testimony the witnesses actually would have offered. Without information on how these witnesses would have testified, defendant has not shown a reasonable probability of a different outcome. See *Avant*, 235 Mich App at 508.

Defendant also argues counsel rendered ineffective assistance by advising him to testify when, in doing so, defendant had to face cross-examination on his involvement with the crimes introduced by the prosecution under MRE 404(b). The decision whether a defendant should testify constitutes a matter of trial strategy. *People v Martin*, 150 Mich App 630, 640; 389

NW2d 713 (1986). However, a criminal defendant has the “ultimate authority to make certain fundamental decisions regarding the case,” including whether to testify on his or her own behalf. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Indeed, an accused may testify even if his counsel disagrees with that decision. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

In this case, the record is devoid of any indication regarding whether counsel encouraged or discouraged defendant’s decision to testify, or concerning whether they discussed the implications of the MRE 404(b) evidence as it related to defendant’s decision to testify. Because there is nothing in the record to suggest that defense counsel failed to inform defendant of the potential repercussions of taking the stand, or to support defendant’s claim that counsel advised him to testify, defendant has failed to establish the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, even if counsel did advise defendant to testify, there were sound strategic reasons for doing so and we will not second-guess those strategic decisions on appeal. See *Rockey*, 237 Mich App at 76-77. Further, nowhere on the record does it appear that defendant would not have testified if counseled against it by defense counsel. On the contrary, defendant indicated at trial that he was testifying voluntarily, and he specified that he believed it was a necessary strategy based on the prosecution’s introduction of other acts evidence. Given his right to testify over defense counsel’s objection, *Simmons*, 140 Mich App at 685, absent an indication that he would not have otherwise testified, defendant has not shown that, but for counsel’s advice, there was a reasonable probability of a different result. See *Meissner*, 294 Mich App at 459.

Lastly, defendant asks this Court to remand the case for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant failed to move for remand in this Court, and he has not supported his request with affidavits or other proof to establish the facts he believes will be developed on remand as required by MCR 7.211(C)(1). Further, even if accepted, his unsubstantiated allegations do not support a finding of ineffective assistance of counsel and, consequently, he has not set forth any additional facts that would require development of a record on remand. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). For these reasons, remand is unnecessary.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly