STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
v	No. 306765 Wayne Circuit Court
GERALD PERRY DICKERSON, Defendant-Appellant.	LC No. 10-012687-FC

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury trial of second-degree murder, MCL 750.317. Defendant was sentenced to 39 to 60 years' imprisonment for the second-degree murder conviction. Defendant appeals by right. We affirm.

This case involves arson of a home that resulted in the death of the victim. Defendant first argues that the trial court improperly admitted evidence related to an attempted arson that occurred on September 29, 2007, the night before the September 30, 2007, arson of the same home. Defendant similarly argues that the trial court improperly admitted evidence relating to defendant's tether monitoring device on September 29, 2007. We disagree. The prosecution asserts that because defendant argued for the admission of evidence relating to the attempted arson, he waived his right to challenge the admissibility of this evidence on appeal, and evidence regarding defendant's tether on September 29, 2007, was presented for a proper purpose because it shows defendant had the opportunity to commit the attempted arson. The prosecution also notes that defendant failed to object to admission of the tether evidence; therefore, this issue was not properly preserved. We agree.

The right to raise an objection on appeal to such evidence on appeal can be waived. "Waiver is the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 763 n 7; 597 NW2d 130 (1999) (citations and quotations omitted). "A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his wavier has extinguished any error.'" *People v Buie*, 491 Mich 294, 306; 817 NW2d 33 (2012) (citations and quotations omitted).

The prosecution filed a motion in limine to exclude all evidence relating to the attempted firebombing on September 29, 2007. The prosecution argued that video evidence regarding the September 29, 2007, attempted firebombing should be excluded pursuant to MRE 404(b). Specifically, the prosecution argued that the evidence was of a separate and irrelevant bad act because defendant was only charged with the September 30, 2007, firebombing. However, defense counsel argued that evidence regarding the September 29, 2007, attempted firebombing was relevant and should be admitted. Having previously argued in the lower court that the evidence regarding the September 29, 2007 firebombing was admissible, defendant has waived his argument that the trial court erred by admitting it.

Further, defendant failed to preserve the issue regarding the tether evidence from September 29, 2007, because defense counsel did not object to admission of this evidence. If trial counsel does not object to an evidentiary issue at the trial court level, the issue is not preserved for appeal. *People v Buie (On Remand)*, __ Mich App __; __ NW2d __ (Docket No. 278732, issued October 2, 2012), slip op at 5. "Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights." *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

> Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant. Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings. Defendants bear the burden of persuasion. . . . However, even if defendants show plain error that affected a substantial right, reversal is only warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." [*People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006) (citations omitted), quoting *Carines*, 460 Mich 750 at 763.]

Defendant has failed to meet his burden to show that the trial court plainly erred in admitting evidence regarding defendant's tether on September 29, 2007. Generally, evidence of prior bad acts is excluded under MRE 404(b). *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). MRE 404(b)(1) states:

> 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.

However, bad-acts evidence is admissible under MRE 404(b) if three requirements are satisfied: "(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice [under MRE 403]." *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). A proper purpose for admitting bad-acts evidence "is one that seeks to accomplish something other

than the establishment of a defendant's character and his propensity to commit the offense." *Johnigan*, 265 Mich App at 465. Evidence is relevant if it has "'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.

Defendant argues this evidence was improperly admitted in light of MRE 404(b), but the prosecution argues that the tether evidence was admitted to demonstrate that defendant had the opportunity to commit the attempted arson. We agree with the prosecution. Demonstrating opportunity is a proper purpose for admitting prior bad-act evidence under MRE 404(b). MRE 404(b)(1). Defendant's tether device was in cuff leave from 3:19 a.m. to 3:47 a.m. on September 29, 2007. Accordingly, this evidence shows defendant had the opportunity to commit the attempted arson, which occurred around this time, and together with the other attempted arson evidence, the tether evidence was probative of defendant's motive and intent to commit the September 30, 2007, arson. Therefore, the evidence was presented for a proper purpose. This evidence was relevant because defendant's tether being in cuff leave during the time the attempted arson occurred makes it more probable that defendant had the opportunity to commit the attempted arson.

Admission of this evidence does prejudice defendant because it is common knowledge that persons convicted of crimes and those awaiting trial on criminal charges are tethered. However, the trial court gave an appropriate jury instruction which was presumptively followed by the jury. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Moreover, there was significant additional evidence of defendant's guilt from Anthenetha Johnson and Anthony Marshall. Johnson testified that she heard defendant admit that he burned down the house. Marshall testified that on the night the arson occurred, defendant asked Marshall to be his lookout, and he saw defendant carrying a bag of glass bottles towards the home where the arson occurred. There was expert testimony presented that the fire was likely caused by a Molotov cocktail, which is created using glass bottles. Accordingly, the probative value of the evidence was not substantially outweighed by its prejudicial effect such that its admission constituted plain error affecting defendant's substantial rights.

Next, defendant argues that trial counsel deprived him of his constitutional right to the effective assistance of counsel by defense counsel failing to file a notice of intent to offer other acts evidence regarding Curtis Hawkins's prior arson conviction. The trial court granted the prosecution's motion in limine to preclude this evidence because of defense counsel's failure to file notice.

A claim of ineffective assistance of counsel is preserved by "moving for a new trial or *Ginther*[1] hearing in the court below." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant appears to concede in his brief on appeal that this issue is unpreserved. "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

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

This Court reviews the trial court's findings of fact, if any, for clear error and constitutional questions de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant failed to meet his burden to prove defense counsel's conduct at trial constituted ineffective assistance of counsel. For a defendant to succeed on an ineffective assistance of counsel claim, defendant must prove two things: (1) "counsel's performance was deficient[, which] requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that the deficient performance prejudiced the defense[, which] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "[T]he defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Armstrong*, 490 Mich at 290.

The trial court, not defendant's trial counsel, erred. Only the prosecution is required under MRE 404(b)(2) to provide notice before trial of its intent to introduce bad-acts evidence. MRE 404(b)(2) states:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. MRE 404(b)(2). See also *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001).

Indeed, by its own terms, MRE 404(b)(2) does not require defense counsel to provide notice. If, upon examination of the plain language of a court rule, the rule is not ambiguous, this Court "must enforce the meaning expressed, without further judicial construction or interpretation." *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). Therefore, defense counsel's failure to provide notice of his intent to present bad-acts evidence under MRE 404(b) does not constitute deficient performance because counsel was not required to provide such notice.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

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TALBOT, J. (*concurring*).

I concur in the result only.

/s/ Michael J. Talbot