STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS DARRELL TAYLOR,

Defendant-Appellant.

UNPUBLISHED
November 10, 2009

No. 287144
Kent Circuit Court
LC No. 08-001129-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of malicious destruction of a building causing injury of at least $1,000 but less than $20,000, MCL 750.380(3)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 46 months to forty years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecuting attorney's theory of the case was that defendant visited the residence of a woman with whom he had a child in common, who elected to spend the night elsewhere and so left defendant alone in her apartment, and that defendant then did extensive damage to the apartment and its contents.

Defendant's sole[1] issue on appeal is whether he was denied the effective assistance of defense counsel at trial.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for

[1] Defendant originally challenged also the amount of restitution he was ordered to pay, but after a remand to the trial court for further development of that issue the parties stipulated to the withdrawal of that issue.

counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant points out that the complaining witness included within her testimony that defendant had been in jail, and argues that defense counsel was ineffective for failing to ask the trial court before trial to preclude such evidence, and in failing to move the court for a mistrial in response to such testimony.

When asked on direct examination if defendant came to her residence on the day in question, complainant answered, "Yes. I believe that's the date that [defendant] had got released from jail." Then, when asked a similar question on cross-examination, complainant replied, "I saw him. That's the day he got out." Asked to specify where defendant was when she saw him, complainant responded, "He had just got out of jail and he was walking towards . . . the apartment."

With this latter mention of jail, the trial court interrupted and provided instructions to the jury and witness:

> First of all, ladies and gentlemen of the Jury, she's raising an issue here that he was released from jail or out. A few times she's mentioned it. You're to totally ignore that. That has no relevance with regards to this trial whatsoever.
>
> Ma'am, do not raise that issue again, and do not make any references to him being released from jail.

Later in the cross-examination, defense counsel asked complainant if she had in fact gone to visit defendant in jail since the incident in question, and drew an affirmative response. This mention of jail drew no action from the trial court, presumably because it arose at defense counsel's initiative, and because the jury could be expected to understand that this mention of jail related to the instant charges.

Outside the presence of the jury, the trial court stated as follows:

> The other thing I was concerned about, and I didn't hear an objection on either side, but I was concerned that the witness, several times . . . mentioned that the defendant was from jail or out of jail. I think my instruction was fairly clear to the Jury. If you wish for me to expand on that, let me know and we will.

Neither attorney requested any additional such instruction.

Defendant presents authority for the proposition that evidence of the other bad acts of a criminal accused may properly be admitted only under carefully limited circumstances. There is no dispute that such mentions of defendant's having been in jail as complainant volunteered were improper. However, we bear in mind that a criminal accused is entitled to a fair trial, not necessarily a perfect one. See *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

Defendant points out that complainant had similarly made mention of defendant's having been in jail at the preliminary examination, and suggests that this should have prompted defense

counsel to move to preclude such testimony at trial. But we cannot agree that such testimony at the preliminary examination so clearly indicated the hazard of improper testimony being heard at trial that it was ineffective assistance for counsel to fail to ask the court to bar it preemptively.

Nor can we agree that defense counsel was ineffective for declining to move the trial court for a mistrial. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Accordingly, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id*. In this case, although the testimony placing defendant in jail for reasons unrelated to the instant charges placed him in a poor light, we cannot agree that it was so prejudicial as to cause the jury to declare defendant guilty in the instant case out of concerns relating to a briefly mentioned, otherwise unexplained, earlier stint in jail. Moreover, the trial court's timely and emphatic curative instruction should have cured any prejudice. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

For these reasons, we conclude that had defense counsel moved the trial court for a mistrial, the motion would properly have been denied. Because counsel had nothing to gain from presenting such a motion, no claim of ineffective assistance can follow from the failure to do so. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not obliged to argue futile motions).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens