

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN LEE MOORE,

Defendant-Appellant.

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UNPUBLISHED

May 26, 2000

No. 218344

Cass Circuit Court

LC No. 98-009421

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3); MSA 28.305(1)(3). The trial court sentenced defendant to a term of four to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant first claims that his trial counsel was ineffective. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

Defendant asserts that counsel was ineffective because he failed to endorse and call three sheriff's deputies as witnesses at trial, failed to investigate and meet with defendant, and failed to question two jurors that defendant speculates "might prove to be biased."<sup>1</sup> However, defendant's bare allegations that counsel was ineffective are insufficient to make it so. Cf. *Pickens*, *supra* at 332. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has made no showing

that the videotape that counsel deemed irrelevant would have contributed in any way to his defense. Although defendant asserts that counsel failed to investigate the facts of the case, he does not explain what evidence counsel failed to discover that might have made a difference in the outcome. We conclude that defendant has neither sustained his burden of showing that counsel made a serious error that affected the result at trial nor overcome the presumption that his counsel's actions were sound trial strategy. See *Stanaway, supra*; *Pickens, supra*.

Defendant further argues that the trial court erred in denying his motion for a new trial because the prosecutor failed to comply with the res gestae statute, MCL 767.40a; MSA 28.980(1). We disagree. Even assuming that the three deputies in question were res gestae witnesses,<sup>2</sup> the current res gestae statute, unlike the former statute, no longer imposes a duty on the prosecutor to endorse and produce all res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Defendant has not shown that the trial court's finding that the prosecutor complied with the statutory requirements was erroneous. Accordingly, we cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial. See *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

<sup>1</sup> In his statement of the issues, defendant also asserted that counsel was ineffective for failing to raise a diminished capacity or intoxication defense. However, defendant has waived this issue by failing to provide any argument in his appellate brief. See *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994).

<sup>2</sup> A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts. *People v Gadomski*, 232 Mich App 24, 32-33, n3; 592 NW2d 75 (1998). It is undisputed that the deputies arrived at the scene after the home invasion was completed.