# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN W. ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED
June 27, 2000

No. 211715
Oakland Circuit Court
LC No. 96-149169-FH

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Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of attempted first-degree home invasion, MCL 750.92; MSA 28.287; MCL 750.110a(2)(b); MSA 28.305a(2)(b). He was sentenced, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of forty months to twenty years' imprisonment. We affirm.

Defendant argues on appeal that the trial court erred in giving a flight instruction to the jury. We disagree. Jury instructions are reviewed de novo on appeal. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Criminal jury instructions are reviewed in their entirety to determine if there was error. Even if the instructions were imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. The instructions must include all the elements of the crime charged and must not exclude any material issues, defenses or theories if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant argues that the flight instruction was inappropriate because it was not introduced to show guilty state of mind, but rather, to show identity. Specifically, defendant contends that the circumstantial evidence of defendant being the individual to flee the crime scene was insufficient to support the instruction on flight. Defendant also contends that because he was sitting on a wall when he was apprehended, he did not flee and the instruction was inappropriate. Defendant's argument is meritless. The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), quoting 29 Am Jur 2d, Evidence, § 532, p

608. There was ample circumstantial evidence here, including evidence that a police dog tracked defendant to the place where he was arrested, to support the flight instruction.

Next, defendant argues that he was denied his right to effective assistance of counsel. We disagree. Because defendant's claim of ineffective assistance of counsel was not preceded by an evidentiary hearing or a motion for a new trial, this Court may only consider this issue to the extent the claimed mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668, 688-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, the defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id. at* 687.

Defendant contends that he was denied the effective assistance of counsel when defense counsel elicited the testimony from the officer in charge of the case, Corporal Clemence, that it was his opinion that the officers concluded that evening that defendant was the culprit. During redirect examination, defense counsel asked the following of Corporal Clemence:

> *Q*. Would I be correct if I said that on October 29, 1996 everybody decided that that guy did it?
>
> *A*. It would be my testimony that yes, that the officers determined that Steven Armstrong was responsible.

Defendant argues that the question was so inherently prejudicial that it deprived him a fair trial.

Defendant's theory of the case and resultant trial strategy was that the police rushed to judgment. During defendant's opening statement, counsel stated that the police, among other things, did not dust defendant's clothes for glass fragments, did not make a shoe imprint of the alleged foot imprint by the rear window, did not take defendant's shoes back to the crime scene to compare the shoes to the footprints, and, did not adequately search for fingerprint evidence.

Defense counsel's questioning of Corporal Clemence was clearly an effort to bolster defendant's theory of the case that the police rushed to judgment. Here, defendant cannot overcome the strong presumption that counsel's assistance constituted a sound and reasonable trial strategy. *Stanaway*, *supra* at 687. Moreover, the fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that he is entitled to resentencing. We disagree. Defendant contends that the trial court erred in sentencing defendant because he did not show remorse for the offense and because the court noted that a more serious crime could have occurred because complainant was home at the time.

A lack of remorse may sometimes be considered as one factor in determining the defendant's potential for rehabilitation. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). Here, the trial court never sought an admission of guilt from defendant. Nor does it appear from the record that defendant's sentence was improperly influenced by defendant's failure to admit guilt. *Wesley, supra* at 718-719. Rather, we find that the trial judge's lack of remorse statement was made with respect to defendant's potential for rehabilitation. Immediately preceding the remorse statement, the trial judge stated that he believed defendant to be a continuing danger to society. After the colloquy with defendant, the trial judge referenced complainant's fear and defendant's extensive prior record. Defendant's clear inability to conform his conduct to the law relates directly to his potential for rehabilitation. There is no merit to defendant's claim that the trial court improperly sentenced defendant based on his lack of remorse.

Defendant next contends that the trial court's rationale for the sentence, that a more serious crime could have occurred in this case, was error. The evidence presented at trial and the ultimate conclusion of the jury was that defendant attempted to break and enter into an occupied home. The trial judge accurately noted that a forced entry into an occupied home has the potential for the homeowner to be injured. A trial court may properly consider the severity and nature of the crime and the circumstances surrounding the criminal behavior when imposing sentence. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). The potential for injury of a forced entry into an occupied home surely encompasses the "nature" of attempted first-degree home invasion. Accordingly, the trial court did not abuse its discretion in considering the potential consequences of the crime.

Defendant argues that his sentence of forty months to twenty years' imprisonment for his conviction of attempted first-degree home invasion was disproportionately harsh. The proportionality of a sentence is reviewed by this Court for an abuse of discretion. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In the instant case, defendant had a significant prior criminal record. Defendant was convicted of four prior felonies, all for breaking and entering. The offenses occurred in 1978, 1980 and two in 1990. The trial court opined that defendant was a continuing danger to the community and not a likely candidate for rehabilitation. Defendant was also on parole at the time of the instant offense. We find no abuse of discretion. *Milbourn, supra* at 636.

Finally, defendant contends that he is entitled to 221 days of credit for the time he served awaiting trial. Defendant was on parole at the time of the instant defense and is not entitled to

time served as a matter of law. MCL 768.7a(2); MSA 28.1030(2)(1); MCL 791.238(2); MSA 28.2308(2); *People v Watts*, 186 Mich App 686, 687-691; 464 NW2d 715 (1991).

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin