STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN VAN GILLIAM,

Defendant-Appellant.

UNPUBLISHED
October 13, 2000

No. 221164
Ottawa Circuit Court
LC No. 98-022685-FH

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant Steven Van Gilliam was convicted of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), following a jury trial. He was sentenced to 365 days' imprisonment. He appeals as of right. We affirm.

Defendant first contends that he was deprived of his constitutional right to the effective assistance of counsel. A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defendant did not, however, move to create a supporting record below. Where a defendant fails to develop a testimonial record supporting his or her claim that defense counsel was ineffective, the issue is "largely forfeited" and review is limited solely to the existing record. *Id*. Moreover, the defendant must overcome a "strong presumption" that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Along the same lines, this Court will not assess defense counsel's performance with the benefit of hindsight, nor will this Court substitute its judgment for that of defense counsel in matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A successful claim of ineffective assistance of counsel requires a defendant to show that "'(1) the performance of 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 Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999), quoting *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Defendant first contends that the police lacked the necessary reasonable suspicion to detain defendant in what amounted to an investigative stop. As noted by defendant, an "investigative stop" is constitutionally proper where the "totality of the circumstances" indicate a particular, reasonable, and articulable suspicion that the individual to be stopped "has been, is, or is about to be engaged in criminal activity." *People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996). Thus, defendant claims that his attorney rendered ineffective assistance when he failed to move for suppression of the evidence obtained during the investigative stop.

In the instant matter, after a burglary at the home of defendant's former brother-in-law, and the identification of defendant as a suspect, the police attempted to obtain defendant's consent to search his residence, but defendant denied consent due to the late hour. One officer stayed at the house to conduct surveillance, and at 3:00 a.m. on a snowy, January morning, defendant's wife left the house in a vehicle. The officer followed the wife, concluded that her actions were intended as a distraction, and returned to the house to find defendant walking away from his residence. The officer attempted to question defendant, but defendant continued to walk. The officer testified that defendant had a large bulge under his coat which could have been a weapon. At this point, the officer directed defendant to place his hands on the patrol car. When defendant complied, a bag which defendant had concealed beneath his coat fell to the ground. The bag contained items which were later identified as stolen from the victim's home.

Based on these facts, we believe that the arresting officer had a particular, reasonable, and articulable suspicion that defendant had engaged in criminal activity and was attempting to either flee or dispose of evidence, when the officer effected the investigative stop. Thus, we are not persuaded that the evidence obtained as a result of the investigative stop was inadmissible as a matter of law. Rather, the outcome of the proceedings would not have changed had defense counsel objected because the motion would have been denied. Defense counsel is not required to make useless motions. *Nimeth, supra* at 625. We do not believe defense counsel was ineffective for failing to challenge the admissibility of this evidence.

Defendant next contends that he was deprived of the effective assistance of counsel because his attorney failed to object to the introduction of his confession into evidence at trial. The record indicates that defendant was adequately informed of his right not to confess or make incriminating statements, and signed written waivers of those rights before each of two interviews conducted by police. Nevertheless, defendant confessed during the second interview and signed a written statement to that effect. He contends that the confession was a lie prompted by the interviewing officer's promises of leniency and threats of harsh sentencing in the event that he refused to cooperate. In reviewing the competency of defense counsel in light of his failure to object to the introduction of defendant's confession, our analysis turns to the admissibility of the confession.

Defendant argues that confessions induced by a police officer's promises of leniency are always deemed involuntary and therefore inadmissible, citing *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984). Defendant argues that the *Conte* Court established a two-part test to determine whether a defendant's confession should be suppressed, based on promises of leniency: (1) whether a promise of leniency existed, and (2) whether that promise caused the defendant to confess. Defendant is mistaken.

In *Conte*, our Supreme Court issued four separate opinions. Chief Justice Williams, joined by Justices Kavanagh and Levin, endorsed the reasoning which defendant seeks to apply in this case. *Id*. at 712 (opinion of Williams, J.). However, the remaining four justices adopted a totality of the circumstances test, which examines whether the defendant's inculpatory statement was voluntary. *Id*. at 751 (opinion of Boyle, J.); *Id*. at 761 (opinion of Brickley, J.); *Id*. at 761-762 (opinion of Cavanagh, J.). A majority of the justices held that a confession is admissible if voluntarily given, and set forth the following factors to be considered when determining the voluntariness of a confession:

> [A] multiplicity of factors, including, but not limited to, the nature of the inducement, the length and conditions of detention, the physical and mental state of the defendant (including his age, mentality, and prior criminal experience), the conduct of the police, and the adequacy and frequency of advice of rights. [*Id*. at 754 (opinion of Boyle, J.), (internal citations omitted).]

The burden is on the prosecution to prove by a preponderance of the evidence that the promises of leniency did not "overcome the defendant's ability to make a voluntary decision to make a statement." *Id*. at 754-755 (opinion of Boyle, J.). If the prosecution succeeds, the incriminating statement or confession will be admissible. *Id*.

Against this backdrop, we turn to the admissibility of defendant's confession. The interviewing officer read defendant his rights before both interviews, defendant signed a waiver each time, and confessed only after he was confronted with mounting incriminating evidence. It was not disputed that defendant was interviewed briefly at 10:00 a.m., and then again shortly after 2:00 p.m. Although defendant had been in his cell for nearly twelve hours, in light of the brevity of the interrogations, we are not persuaded that egregious police conduct occurred. To be sure, defendant testified that the arresting officer made promises to help defendant obtain an earlier release and threatened defendant with a harsh prison sentence. The officer denied these accusations. The trial court instructed the jury that testimony given by police officers should be judged by the same standards as testimony given by any other witness, and the jury found defendant guilty. Presumably, the jury found the officer to be more credible. In light of defendant's concessions that he lied throughout several stages of his arrest, defendant's credibility was certainly questionable. Thus, under the totality of the circumstances, we believe that the prosecution established the voluntariness of defendant's confession by a preponderance of the evidence, as necessary to render it admissible as a matter of law. Therefore, we conclude that defense counsel was not ineffective for failing to raise a futile motion to suppress that confession.

Defendant next contends that the trial court erred by failing to provide a sua sponte jury instruction regarding specific intent. Defendant neither requested the instruction, nor objected to the jury instructions that were provided. It is well established that a trial court's failure to provide a jury instruction cannot constitute an error requiring reversal, unless the instruction is requested by defense counsel. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999); MCL 768.29; MSA 28.1052. We believe that defendant's general denials of guilt never specifically challenged the "specific intent" necessary to commit the charged crime. Defendant's theory of defense was not that he had entered defendant's house with some intent other than the intent to steal. Rather, defendant denied that he had ever entered defendant's house. Further, the court's instructions to the jury included that the

jury must find that defendant intended to permanently deprive the owner of the items taken. Accordingly, we are not persuaded that manifest injustice would result from our failure to consider this issue. *People v Joseph*, 237 Mich App 18, 25; 601 NW2d 882 (1999).

Finally, defendant contends that the cumulative impact of the above errors denied him a fair trial, even if those errors were separately insufficient to merit a new trial. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski