STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 213339 Oakland Circuit Court
KEVIN WAYNE MYKOLAITIS, Defendant-Appellant.	LC No. 97-155147-FH

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. He was initially sentenced, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to three to thirty years' imprisonment, but was later resentenced to two to twenty years' imprisonment. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to support his conviction. When determining whether sufficient evidence has been presented to sustain a conviction, the court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of breaking and entering a building are that the defendant: (1) broke into a building, (2) entered the building, and (3) intended to commit a larceny therein at the time of the breaking and entering. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998); *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). It is not necessary that the larceny be successful as long as the defendant intended to commit a larceny at the time of the breaking and entering. *Adams, supra*, p 390. Given the difficulty of proving intent, minimal circumstantial evidence illustrating that the defendant intended to steal at the time of the breaking and entering is sufficient to sustain a conclusion that the defendant had the requisite intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

The evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to conclude that defendant committed the breaking and entering in this case. The building involved was Joe's Feed Store located in Farmington Hills. The incident

occurred on September 12, 1997, at about 10:00 p.m. Raymond Herbert, whose house abuts the property of the store, heard banging noises, the sounds of glass breaking, and a chain saw. When an ambulance drove by, the noises stopped, and Herbert soon saw two men walking from behind a heating and cooling business. Farmington Hills Police Officer James Knittel received a dispatch at about 10:07 p.m. and heard the sound of rocks being moved in the area of Joe's Feed Store. He then saw defendant and his brother, Shawn Mykolaitis, walk out from behind the feed store, and defendant was carrying a sledgehammer. Pieces of red paint on the sledgehammer matched the paint on the rear of the store. When Knittel confronted defendant and Shawn, the two men fled. Moreover, paper bags had been neatly arranged on top of the broken glass inside the store so that a person could crawl into the store without being cut on the glass fragments. The bags covered an area six feet into the store, and defendant or Shawn had to have entered the building in order to lay the bags neatly over the glass.

Even if defendant himself did not enter the building, he aided and abetted[1] Shawn in committing the offense. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he aided and encouraged the principal. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). Considering that defendant had the sledgehammer, that that the red paint on the sledgehammer matched that on the building, the jury could reasonably infer that defendant made the hole in the wall of the building to enter it. Furthermore, the evidence showed that defendant intended the commission of the crime or had knowledge that Shawn intended its commission at the time defendant aided and encouraged Shawn because Shawn at trial admitted that at one point, he formed the intent to steal from the store.

Therefore, the evidence was sufficient to support defendant's conviction for breaking and entering.

In his brief filed in propria persona,[2] defendant argues that he was deprived of his right to a fair and impartial jury when a juror who was acquainted with the store owner was permitted to sit on the jury. At trial, the juror informed the court's clerk that he had dealings with the store. The juror was questioned by the prosecutor and indicated that he has used the store in question and knew the store owner by face, but did not know the owner's name. The juror further indicated that he had no personal relations with the owner. Defense counsel then stated on the record that he discussed this with defendant and stated, "[W]e have no problem leaving him on the jury." Additionally, the trial court instructed the juror to not inform any of the other jurors of his experiences with the store or the store's owner.

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[1] The prosecution's alternative theory at trial was that defendant aided and abetted in the breaking and entering.

[2] The prosecution has not answered the two issues raised in defendant's brief filed in propria persona.

Under these circumstances, this issue has clearly been waived for appellate review. Defendant cannot express at trial that he had "no problem leaving him on the jury" and then claim on appeal that there was error in allowing this juror to remain on the jury. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Defendant also argues in his brief filed in propria persona that he was denied the effective assistance of counsel at trial. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *LaVearn, supra*, p 213. Defendant must also show the deficient performance prejudiced the defense. *Id.* This requires a showing that counsel's errors were so serious as to deny the defendant a fair trial. *Id.* Because defendant did not move for a new trial or an evidentiary hearing in the trial court, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant raises numerous allegations of ineffective assistance of counsel, but, having reviewed the record, we find that none of the allegations are meritorious. With respect to defendant's claim that that trial counsel was ineffective for failing to object to the timeliness of the preliminary examination, the record does not disclose any error regarding counsel's failure to challenge the timeliness of the preliminary examination because there is no indication that the preliminary examination was adjourned. In any event, even accepting defendant's argument as true, the preliminary examination was adjourned for only one week. There is no prejudice where counsel did not object to the timeliness of the preliminary examination.

Defendant also argues that counsel was ineffective for failing to investigate the case. Defendant contends that while conducting his own investigation, he discovered that the building next door to the feed store was equipped with cameras that would have verified the time of the offense and the actions of those present at the scene. There is no evidence in the record with respect to the cameras or what the cameras would have shown. It is possible that the cameras would have further implicated defendant in the offense charged or shown that Shawn lied during his testimony. The conduct of counsel is presumed to be sound trial strategy. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Absent some indication on the record that the cameras would have aided defendant's defense, counsel's failure to present video tape evidence from the cameras is presumed to be sound trial strategy. *Id*.

Defendant also contends that counsel should have investigated the time that the ambulance drove by to clarify the time of the offense. Herbert testified that he heard the ambulance drive by at approximately 10:00 p.m., about the same time that he heard the banging noises, chain saw, and glass breaking. Shawn, however, testified that no damage was done to the building after 9:20 p.m., when defendant arrived. Therefore, there existed a credibility issue between Herbert and Shawn regarding when the offense took place. In the absence of any evidence in the record showing that the timing of the ambulance would have corroborated Shawn's version of events, counsel's failure to investigate the time that the ambulance drove by is presumed to be sound trial strategy. *Id.*

Defendant next argues that counsel was ineffective for failing to call an expert witness to testify that when the glass case fell over, the paper bags would have fallen in such a manner as to cover the broken glass without someone having to enter the building to place the bags over the glass. Defense counsel may have determined that such testimony would have been incredible considering Kohl's testimony that the bags appeared to have been *neatly* arranged on top of the broken glass. A defense attorney's decision not to call an expert witness is presumed to be a permissible exercise of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant has not overcome the presumption that counsel's decision not to call an expert witness with respect to the paper bags constituted sound trial strategy. *Id*.

Defendant next argues that counsel was ineffective for failing to present the defense that defendant was innocent. To the contrary, counsel did present this defense when Shawn testified on defendant's behalf that Shawn alone was responsible for the damage to the feed store and that defendant did not have any part in committing the offense. Defendant also argues that the charge of breaking and entering was incorrect because Shawn never entered the feed store. However, the evidence presented at trial established that someone entered the store and neatly arranged the paper bags to cover the broken glass. Therefore, as previously discussed, sufficient evidence existed to support defendant's conviction for breaking and entering.

Defendant next argues that counsel was ineffective for failing to call as witnesses his wife, a neighbor, and other unnamed individuals who were present at a party when Shawn allegedly called defendant to calm Shawn down. No evidence was presented that these individuals would have testified favorably to defendant, and, in fact, the record is silent concerning their alleged testimony. An attorney's failure to call particular witnesses is presumed to be trial strategy, and this Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant has failed to establish that the individuals' testimony would have altered the result of the proceeding.

Defendant next contends that counsel was ineffective for refusing to permit defendant to testify in his own defense. A criminal defendant has a right to testify on his own behalf at trial. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996). Defendant admitted at his resentencing hearing that he wanted to testify at his trial, but that his attorney did not believe testifying would have been advisable considering defendant's felony record. Consequently, this was a decision of sound trial strategy.

Defendant next argues that counsel should have objected when the juror who was acquainted with Kohen was allowed to remain on the jury. However, the juror's presence on the jury did not deprive defendant of the right to a fair and impartial jury, and defendant himself, after discussing the matter with counsel, acquiesced on more than one occasion to the juror being permitted to remain on the jury. Therefore, counsel's failure to object regarding this issue did not deprive defendant of the effective assistance of counsel at trial.

Defendant further argues that counsel was ineffective for requesting that defendant be sentenced to a three-year minimum sentence as opposed to a two-year sentence at defendant's sentencing hearing. The record shows, however, that counsel's decision was clearly a matter of strategy. Counsel was under the impression that defendant would have had to have been

sentenced to at least three years' imprisonment in order to maintain his lifetime probation sentence imposed in an unrelated case. Counsel's consideration of the effect that defendant's sentence would have on his lifetime probation sentence was a proper consideration, and the decision to request a three-year minimum term was clearly a strategic decision. *People v Grady*, 204 Mich App 314, 317; 514 NW2d 541 (1994).

Lastly, defendant argues that the cumulative effect of the above errors deprived him of the right to the effective assistance of counsel. Because none of defendant's claims are meritorious, there is no cumulative effect of such errors that resulted in the denial of the effective assistance of counsel at trial.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck