

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW STEWART MCCORMACK,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2001

No. 217109

Oakland Circuit Court

LC No. 98-161754-FC

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a motor vehicle with intent to steal property with a value in excess of five dollars, MCL 750.356a; MSA 28.588(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a term of one year in jail. Defendant appeals as of right. We affirm.

Defendant claims that he was denied the effective assistance of counsel at trial. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that he is entitled to a new trial because defense counsel failed to present the defense of intoxication. However, evidence of defendant's intoxication was presented at trial, defense counsel's closing argument emphasized the defense of intoxication, and defense counsel requested and received an instruction on the defense of intoxication.

Accordingly, defendant's claim that defense counsel failed to present the defense of intoxication is not supported by the record.

Defendant next claims ineffective assistance of counsel because defense counsel failed to call any witnesses to testify. Decisions about whether to call or question witnesses are presumed to be matters of trial strategy, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant fails to overcome the presumption that the lack of defense witnesses was simply trial strategy. Defendant does not identify witnesses that should have been called or how they would have testified. Defendant does not demonstrate a reasonable probability that the testimony would have altered the outcome of the trial. See *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Defendant's third claim of ineffective assistance of counsel is that defense counsel's motion for a directed verdict was "half-hearted" because counsel gave no argument in support of the motion. However, the evidence at that point was sufficient to defeat the motion and it is unlikely that, but for counsel's action, the result of the proceeding would have been different. See *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

Defendant's fourth claim of ineffective assistance of counsel is that defense counsel used "confusing array of words" to describe the element of intent required to prove the crime charged. However, defense counsel properly and extensively discussed the intent element of the crime charged and the trial court correctly instructed the jury regarding intent.

Defendant's final claim of ineffective assistance of counsel is that defense counsel failed to question the value of the stolen item. This claim is not supported by the record. Defense counsel cross-examined the complainant about the item and its value, and reminded several times that the prosecutor had the burden of proving the value of the item. *People v Nichols*, 69 Mich App 357, 359; 244 NW2d 335 (1976); *People v Chronister*, 44 Mich App 478, 479-480; 205 NW2d 238 (1973).

In sum, defendant has failed to demonstrate that, but for counsel's action or inaction, the result of the trial would have been different. Therefore, defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Gary R. McDonald  
/s/ Janet T. Neff  
/s/ E. Thomas Fitzgerald