

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERENCE STEVEN BRYANT,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2002

No. 230294

Oakland Circuit Court

LC No. 99-169730-FH

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of eighteen to thirty years for the kidnapping conviction and four to twenty years for the assault conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to support his kidnapping conviction. He contends that any movement of the victim was incidental to the offense of assault with intent to do great bodily harm and, therefore, the prosecutor failed to prove the necessary element of asportation. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

A person can be convicted of kidnapping if it is proved beyond a reasonable doubt that the person willfully, maliciously, and without lawful authority forcibly or secretly confined or imprisoned any other person within this state against the other person's will. MCL 750.349. Although not mentioned in the statute, asportation of the victim is a judicially required element of the crime of kidnapping by forcible confinement or imprisonment. *People v Green*, 228 Mich

App 684, 696; 580 NW2d 444 (1998). To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime, unless the underlying crime involves murder, extortion, or taking a hostage. *Id.* at 696-697; see also *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish the element of asportation independent of the crime of assault with intent to commit great bodily harm. The evidence showed that the victim was standing outside of her condominium complex door when defendant attacked her from behind. After the initial attack, defendant dragged the victim to the parking lot while the victim continuously resisted. Defendant threw the victim on the ground between some parked cars, pressed his body on top of hers, and began choking her. Defendant then picked up the victim and continued to drag her. He eventually dragged her to the passenger side of his car, pushed her inside, and choked her again. When defendant closed the door and left to run around to the driver's side of the car, the victim was able to exit the vehicle and scream for help. After the victim exited the car, defendant immediately returned to the passenger side and then, seemingly in response to the victim's screams, returned to the driver's seat and backed the car away.

On these facts, a rational jury could find that the movement of the victim was in furtherance of a kidnapping and not merely incidental to the assault. Had defendant simply wanted to assault the victim, he did not need to remove her from the front door of her complex where the assault was initiated. Nonetheless, defendant moved the victim from that location, through the parking lot, stopping along the way to further assault her, and then on to his car. The degree of movement and confinement in this case was greater than that necessary to complete an assault. Accordingly, we conclude that the evidence was sufficient to support the element of asportation.

## II

Defendant also claims that he was denied the effective assistance of counsel at trial because trial counsel failed to investigate and pursue evidence of defendant's mental deficiency. 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, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the record does not contain sufficient detail to support defendant's ineffective assistance claim then he has effectively waived the issue. *Id.*

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 trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). This Court will not second-guess defense

counsel's trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).<sup>1</sup>

## A

Defendant maintains that counsel was ineffective for failing to investigate and assert an insanity defense. A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A criminal defendant is denied the effective assistance of counsel by his attorney's failure to investigate and present a meritorious insanity defense. See *People v Newton (After Remand)*, 179 Mich App 484, 491; 446 NW 487 (1989); *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial. *Ayres, supra*.

Defendant has failed to establish that trial counsel was ineffective for failing to investigate and present an insanity defense. First, defendant has not shown, and the record is devoid of any evidence, that defendant made a good-faith effort to avail himself of the right to present an insanity defense at trial. Indeed, defendant indicates that he never told trial counsel anything about his past. Further, defendant maintains his innocence, and there is no record that defendant made statements in trial counsel's presence that were obviously irrational. Therefore, this claim of ineffective assistance of counsel is without merit.

Defendant has also failed to show that the defense of insanity was substantial and may have made a difference in the outcome of the trial. In other words, having reviewed the record, there is no basis for concluding that, had an insanity defense been pursued, there was a reasonably likely chance of acquittal. The record contains no evidence that, at the time of the criminal acts and as a result of mental illness, defendant lacked the substantial capacity either to appreciate the nature and quality or wrongfulness of his conduct, or to conform his conduct to the requirements of law. MCL 768.21a. Indeed, contrary to defendant's description of his actions as "bizarre," the manner in which the crimes were committed does not indicate that they were the product of an obviously irrational mind.

## B

Defendant also argues that trial counsel was ineffective because he did not adequately investigate the issue of defendant's competency to stand trial. The failure to raise a viable claim that the defendant is not competent to stand trial may constitute ineffective assistance of counsel. See *Newton (After Remand), supra* at 487. Under MCL 330.2020, a defendant is presumed competent to stand trial unless "he is incapable because of his mental condition of understanding

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<sup>1</sup> In support of his claim, defendant submits a prison mental health progress note, and the affidavits of his mother, sister, and appellate counsel, as well as his own statements. However, these documents are not properly before us because they are not part of the lower court record. MCR 7.210(A)(1).

the nature and object of the proceedings against him or of assisting in his defense in a rational manner.”

Here, the record does not reveal any facts indicating that defendant was not competent to stand trial. There was no request to the Forensic Center for a determination on the competency of defendant at the time of the commission of the crime. There is also no indication that defendant's mental condition prevented him from understanding the nature and object of the proceedings against him or assisting in his defense, and nothing to indicate that defendant had such an overwhelming mental disability or lacked a grasp of reality sufficient that defendant was incompetent to stand trial. While not conclusive, a 1997 Forensic Psychiatry Report, which indicated that defendant was not suffering from any diminished mental capacity when he committed a prior crime on October 31, 1996, is noteworthy, particularly because the defense maintains that defendant's mental problems began before 1994.

In sum, defendant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's inaction, the result of the proceedings would have been different. *Effinger, supra*. Accordingly, defendant is not entitled to a new trial on this basis.

### III

Defendant's final argument is that he was denied effective assistance of counsel at sentencing because trial counsel did not present his history of mental illness as a mitigating factor. Again, because defendant failed to make a testimonial record in the trial court regarding this issue, our review is limited to mistakes apparent on the appellate record. *Ginther, supra*; *Sabin, supra*.

The failure to argue mental disability as a mitigating factor at sentencing may constitute ineffective assistance of counsel. *Newton (After Remand), supra* at 494-495. The decision to address the court at sentencing is a tactical one. *People v Hughes*, 165 Mich App 548, 550; 418 NW2d 913 (1987). In this case, trial counsel addressed the court at defendant's sentencing, primarily requesting leniency based on the circumstances of the offenses. More compelling, however, is that defendant also addressed the court and maintained his innocence. Given that defendant maintained his innocence, trial counsel's failure to further address the court regarding a claim that defendant committed the offenses because of an alleged history of mental illness did not constitute ineffective assistance of counsel. Further, as discussed previously, there is no basis to believe such an argument would have affected the trial court's sentence nor was there sufficient evidence on the record to support counsel's making of such an argument. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, defendant is not entitled to resentencing on this basis.

Affirmed.

/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald