

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK SMITH,

Defendant-Appellant.

UNPUBLISHED

July 9, 2002

No. 232229

Wayne Circuit Court

LC No. 00-007688

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree home invasion, MCL 750.110a(2), armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, and felony-firearm, MCL 750.227b, for which he was sentenced to 78 to 240 months' imprisonment for home invasion, and 126 to 240 months' imprisonment each for armed robbery and assault with intent to murder – to be served consecutive to defendant's two-year sentence for felony-firearm. We affirm in part and remand in part for further findings.

Defendant first argues that he was denied the effective assistance of counsel when his attorney delivered a brief and narrowly focused closing argument. We disagree.

Where no evidentiary hearing was held to determine the competence of a defendant's trial attorney, appellate review of a defendant's claim of ineffective assistance of counsel is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it was plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To merit reversal of a conviction on this basis, defense counsel's performance must have been so objectively unreasonable in light of existing professional standards that had counsel not erred, the outcome would likely have been different. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant bears a heavy burden of rebutting the presumption of competence enjoyed by counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defense counsel is required to raise any substantial defense on a defendant's behalf. *People v Green*, 96 Mich App 104, 109; 292 NW2d 142 (1980). However, counsel is not

required to – and therefore, is not ineffective for failing to – assert an illusory or baseless defense. *Id.* at 110. A substantial defense is one that, had it been raised at a defendant's trial, it might have affected the outcome. *People v Foster*, 77 Mich App 604, 609; 259 NW2d 153 (1977). A defendant must produce evidence in support of an assertion that his trial counsel's failure to perform competently deprived him of a substantial defense; that is, to merit reversal on this basis, a defendant must show the existence of a defense that could have affected the outcome of his trial. *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990). Defendant makes no such showing here.

Defendant next argues that he is entitled to resentencing because the trial court relied on sentencing guidelines that had been calculated using two incorrect offense variable (OV) scores. This Court granted defendant's motion to remand for resentencing on this same basis, and the trial court resentenced defendant based on revised OV scores. Therefore, this issue is moot. Subject to this Court's disposition of defendant's final issue on appeal, we affirm the terms to which defendant was sentenced on remand. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant next contends that he was denied the effective assistance of counsel at sentencing when his attorney failed to object to the errors in scoring. Because defendant was resentenced pursuant to this Court's order, his claim on appeal with regard to his attorney's performance at his original sentencing is moot. *People v Fleming*, 142 Mich App 119, 128; 369 NW2d 499 (1985).

Defendant's final assignment of error concerns the sufficiency of the trial court's findings of fact. We agree with defendant that the trial court failed to record findings adequate for appellate review, and we remand to the trial court for further findings of fact. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

An armed robbery conviction requires proof beyond a reasonable doubt that a defendant, while armed with a dangerous weapon as provided in the statute, used violence or intimidation to take another person's property. MCL 750.529; *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). A conviction for assault with intent to murder requires proof beyond a reasonable doubt that the defendant assaulted another person with the intention of killing that person, and if the defendant had been successful, the killing would have been murder. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). First-degree home invasion requires proof that a defendant broke into and entered a person's home – or entered the home without permission – either while another person was present there or while the defendant was armed with a dangerous weapon. MCL 750.110a(2). A defendant need not possess the intent to commit a felony *at the time* the defendant entered the home – the intent to commit one of the enumerated felonies may be formed at *any* time before, during, or after the defendant's unauthorized entry into the home. MCL 750.110a(2).

A valid conviction of any one of these three crimes requires proof that defendant possessed the requisite specific intent that his actions cause the particular result prohibited. *People v Guy Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985) (assault with intent to murder); *People v Carpenter*, 464 Mich 223, 225; 627 NW2d 276 (2001) (home invasion); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995) (armed robbery). A defendant's performance of a prohibited act – alone – cannot sustain a conviction for an offense that requires specific intent.

People v Beaudin, 417 Mich 570, 575; 339 NW2d 461 (1983). A defendant's intent may be inferred from the facts and circumstances surrounding the performance of the prohibited act; however, where an offense requires the defendant to possess a specific intent, the evidence must establish that the defendant performed the act with the intent to bring about the specific result prohibited by the statute under which the defendant was charged. *Id.*

Here, the trial court's findings of fact simply do not satisfy the requirements outlined in MCR 2.517(2). The court did not record findings from which this Court could confidently review the propriety of the court's application of the relevant law to the facts before it. Remand is required when a trial court's resolution of disputed issues is not clearly manifest in its findings of fact. *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992).

Affirmed in part and remanded in part for further findings. We retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter