STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MATTHEW ALI-HASHIM HAMADE, a Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

MATTHEW ALI-HASHIM HAMADE,

Respondent-Appellant.

UNPUBLISHED
October 25, 2002

No. 231852
Oakland Circuit Court
Family Division
LC No. 2000-641734-DL

Before: Smolenski, P.J. and Talbot and Wilder, JJ.

PER CURIAM.

Respondent minor appeals as of right his adjudication of delinquency, based upon his bench trial convictions for second-degree home invasion, MCL 750.110a(3), and receiving and concealing stolen property over $200, MCL 750.535(4)(a). An Order of Disposition was entered on December 21, 2000. The order required respondent to be placed on probation with his mother, complete fifty hours of community service, pay $50 restitution to the victim, pay a $20 victim's rights assessment, write a letter of apology to the victim, and undergo individual counseling. Respondent has fully complied with the disposition order, and an order terminating the court's jurisdiction was entered on May 7, 2001. We affirm.

Respondent first argues that he was denied his right to due process when the charge of receiving and concealing stolen property over $200 was added to his petition on the day of the trial without previous notice or service of process. On the day of the trial, before it began, the prosecutor stated that she had informed respondent's counsel of the intended amendment, and moved to have the new charge added. Respondent's counsel replied, "No objection."

Our Supreme Court distinguished waiver and forfeiture, stating, "Waiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right." *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001) (internal citations omitted). The Court also explained the different effects of waiver versus forfeiture. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not

extinguish the error." *Id*. Because respondent did not simply fail to object to the amendment, but rather specifically stated he had no objection, we find that respondent has waived review of this issue.

Respondent next argues that there was insufficient evidence to convict him of the charged offenses. We disagree. In juvenile proceedings, the standard of proof at the adjudicative stage of delinquency proceedings, as in adult criminal proceedings, is proof beyond a reasonable doubt. MCR 5.942(C); *In re Weiss*, 224 Mich App 37, 42; 568 NW2d 336 (1997). 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); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Both circumstantial evidence and reasonable inferences drawn from the evidence can provide sufficient evidence to prove the elements of an offense. *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999). Also, this Court should not disturb a trier of fact's determination regarding the weight of the evidence or witness credibility. *Wolfe, supra* at 514.

The elements of second-degree home invasion include either (1) breaking and entering a dwelling with the intent to commit a felony or larceny in the dwelling or (2) entering a dwelling without permission with the intent to commit a felony or larceny in the dwelling. MCL 750.110a(3); *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). Respondent's complaint alleged the former.

In this case, the victim testified that property was missing from her condominium, that access was apparently gained through an attic access panel, and that the police retrieved her property from respondent's condominium, which was one of the units in the five-unit complex in which she lived. Respondent had access to the attic access panels, as he lived in the third adjoining apartment from the victim. Also, a police officer testified that "the boys," respondent and his brother, both admitted to taking the property from the victim's unit, both boys went upstairs to retrieve the property, and then gave it to the police officer.[1] While the police officer testified that respondent never actually said that he had gone into the victim's condominium and took the items, a rational trier of fact could infer, from respondent's admission to taking the property from "the apartment on the end" and the apparent point of access, that respondent necessarily broke into and entered the victim's home. Therefore, we conclude that there was sufficient evidence to find respondent guilty, beyond a reasonable doubt, of second-degree home invasion.

Likewise, we find that there was sufficient evidence to find respondent guilty, beyond a reasonable doubt, of receiving and concealing stolen property over $200. The elements of receiving and concealing stolen property over $200 are (1) property was stolen, (2) the defendant received or concealed the stolen property, (3) the defendant knew the property was stolen, and

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[1] Respondent and his brother were both charged with second-degree home invasion and receiving and concealing stolen property over $200, and were tried jointly. Each brother was convicted of both offenses.

(4) the property was worth over $200. MCL 750.535(4)(a); *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996) (internal citations omitted).

In this case, the evidence established that the victim's property was stolen, respondent was in possession of the stolen property, respondent was aware that it was stolen, and the property had a value of over $200. The victim testified as to the missing articles and their value. Respondent went upstairs with his brother and retrieved the items for the police officer when the police officer asked for the items which were stolen from the victim's home. Furthermore, respondent admitted to stealing the items.

Respondent's final claim is that he was denied effective assistance of counsel in three instances. We disagree. Because respondent failed to move for a *Ginther*[2] hearing or a new trial on the basis of ineffective assistance of counsel, review of this issue is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his 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. *Bell v Cone*, 535 US ___; 122 S Ct 1843; 152 L Ed 2d 914, 927 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (internal citation omitted).

Respondent first asserts that he was denied the effective assistance of counsel when his trial counsel failed to move for the suppression of respondent's statements to the police and the items seized as a result of that discussion. This claim is without merit because we find that based upon the totality of circumstances that respondent was not in custody when he gave the statements, respondent voluntarily spoke to the police officer, and his mother gave permission to the police officer to speak with him. *Miranda v Arizona*, 384 US 436, 444, 478; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Hall*, 249 Mich App 262, 268; 643 NW2d 253 (2002). The voluntary cooperation of a citizen in response to noncoercive questioning does not implicate the constitutional guarantee against unreasonable searches and seizures. *People v Frohriep*, 247 Mich App 682, 699-700; 637 NW2d 552 (2001). Therefore, there were no grounds on which to base a motion to suppress. Counsel is not required to advocate a meritless position. *Snider*, *supra* at 425.

Respondent next contends that his trial counsel was ineffective in his cross-examination of witnesses and in failing to present a defense. After reviewing the record, we conclude that defense counsel's performance in cross-examining the witnesses did not fall below the professional standards. Defense counsel questioned the witnesses and elicited testimony aimed at causing reasonable doubt where possible. For example, the victim admitted that she had not seen respondent in her condominium or with her property, and the police officer stated that respondent had not explicitly admitted going into the victim's condominium.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

In order to substantiate an ineffective assistance of counsel claim for failure to present a defense, respondent must show that he made a good faith effort to avail himself of the right to present a particular defense and that the defense was substantial. *In re Ayers*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Respondent only notes that defense counsel called respondent's mother as a defense witness, but she declined to testify, and was not compelled to do so. Respondent does not explain what defense he believes should have been presented. Defense counsel's decision not to force respondent's mother to testify appears, from the record, to be trial strategy; a presumption which we find respondent has failed to overcome. *Id.* at 21.

Respondent also claims that trial counsel was ineffective in failing to object to the amendment of the petition to add the new charge of receiving and concealing stolen property over $200. In the original petition, respondent was charged with second-degree home invasion for allegedly breaking and entering a dwelling with the intent to commit larceny therein. On the day of the trial, before any proofs were presented, the prosecutor stated that she had informed respondent's counsel of the intended amendment, and moved for the addition of the receiving and concealing stolen property over $200 charge. Respondent's counsel responded that he had no objection to the amendment.

MCL 712A.11(6) provides that a petition "may be amended at any stage of the proceedings as the ends of justice require." However, respondent must still have a "fair opportunity" to defend against the charges. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). An amendment may only add a new charge where the defendant is not *unacceptably* prejudiced; whether the amendment caused unfair surprise, inadequate notice, or an insufficient opportunity to defend are all factors to consider.[3] *Id.*; emphasis added.

Respondent contends that he was prejudiced because he was unable to prepare a defense before trial, but does not reveal what he would have done differently. We are not persuaded that had respondent been informed before the day of the trial, his trial strategy would have been different. It is true that second-degree home invasion and receiving and concealing stolen property over $200 are separate offenses. However, because the original petition charged respondent with second-degree home invasion, respondent knew that there was an underlying larceny for which proofs would be presented. Respondent was given notice of the amendment before the prosecutor began proofs and was given an opportunity to cross-examine all witnesses. Also, respondent admitted to a police officer that he had stolen the items, and the victim testified as to their worth. Respondent was available to testify at trial, as was his brother. Had respondent any evidence to present negating his knowledge that the items were stolen or refuting the value of the items, he had an opportunity to do so. While we do not condone a general

[3] We note that *Hunt* also requires that the new charge must be supported by the proofs presented at the preliminary hearing. *Hunt, supra* at 364-365. However, this requirement is inapplicable in this case. No probable cause determination was necessary because respondent was not detained between the preliminary hearing and the trial. MCR 5.935(D).

practice of amending a petition on the day of trial, we find that it did not unduly prejudice respondent in this case. Therefore, respondent was not denied effective assistance of counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder