

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DEANDRE CORNELIUS GRAYSON,

Defendant-Appellant.

UNPUBLISHED

April 13, 2004

No. 244909

Wayne Circuit Court

LC No. 02-000382

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences for first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, following a jury trial. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of an incident that occurred at the home of Marvin Lamb, Sr., (Lamb) on September 21, 2001, in Detroit. Lamb testified at trial that he was romantically involved with defendant's mother from the time defendant was approximately eight years old until defendant was thirteen or fourteen years old and that he and defendant's mother had a child together. Beginning in August 2001, Lamb permitted defendant to keep three cars at his house. After a time, however, Lamb told defendant that he needed to move the cars by a specific date, but defendant did not comply with Lamb's request. Lamb eventually relocated the cars to a nearby market and informed defendant's mother of the whereabouts of the cars. He later saw defendant and his mother at the market discussing the status of the vehicles with a police officer. Lamb testified that defendant became angry with him about moving the cars and told Lamb that he was going to "get" him.

Lamb further testified that around noon on September 21, 2001, defendant, who did not live with Lamb, came to the door of Lamb's house and asked Lamb, through the screen door, if he had seen Lamb's son, Martin Lamb, Jr. (Lamb, Jr.). At the time, Lamb's four young children, his girlfriend, and his girlfriend's son were in his home with him. Lamb went out on the front porch to talk to defendant, and defendant informed him that Lamb, Jr., had stolen some "dope" from defendant and his friends. Lamb said defendant looked like he had been smoking or drinking and was not in his "right state of mind." Defendant also asked Lamb what he was going

to do about his cars that the police had impounded. Lamb testified that he smirked and responded that he could try to get defendant another car. Defendant then pulled out a gun from under his shirt, pointed it at Lamb from a distance of approximately three or four feet, and shot him in the abdomen. Lamb stated that he fell off of the porch but managed to make his way to the car in the driveway and call for his girlfriend to come outside. Lamb did not see where defendant went after the shooting. Lamb testified that his bladder was damaged in the shooting and that he was hospitalized for more than a month because of his injuries.

Julia McKnight, Lamb's girlfriend, testified that she was sitting in the living room of Lamb's house when she saw defendant approach the front door on September 21, 2001. After Lamb stepped out on the porch to talk to defendant, she heard their conversation grow louder. She told her son and Lamb's children to go to their bedrooms in the back of the home. As she started walking to the back of the house, she saw defendant pointing a gun at Lamb. She did not see anyone else on the porch. She then told the children to go upstairs and, as she followed them up the stairs, she heard a gunshot and started running. Before reaching the top of the stairway, she remembered that she did not close the door at the base of the stairwell. She testified that as she started to go downstairs to close the door, she saw defendant coming up the stairs behind her, holding a gun at his side. She stated that she had not given defendant permission to enter the house. McKnight testified that defendant followed her up the stairs and into Lamb's bedroom. Defendant went to the corner of the bedroom, opened Lamb's briefcase, took Lamb's gun, and ran downstairs. When McKnight eventually went downstairs, defendant was not in the house. She found Lamb sitting in her car and subsequently drove him to the hospital.

Defendant testified that Lamb agreed to let him work on his cars in Lamb's back yard and that the cars disappeared from Lamb's house approximately one month before September 21, 2001. After the cars disappeared, defendant talked to Lamb many times but did not discuss the cars with him.

Defendant also testified that a friend of his, "D,"¹ became acquainted with Lamb, Jr., and Lamb, Jr., began selling drugs for D. On September 21, 2001, D called defendant and gave him information about Lamb, Jr. Based on what D said, defendant went to Lamb's house to warn him that D had harmed Lamb, Jr., and was going to harm Lamb as well. While defendant and Lamb were talking on the porch, defendant heard a voice he recognized as D's say, "move." Defendant turned, saw a shadow, and heard the voice again. Defendant said he saw D approaching from around the house, told Lamb twice to go inside, and stepped off the porch. He then heard a gunshot and saw Lamb fall. Defendant testified that D then stood over Lamb with a gun and said, "I should shoot him again." Defendant handed D the gun that Lamb had dropped and D ran off toward the back of the house. Defendant stated that he was not carrying a gun that day.

Defendant further testified that after D ran away, he went inside the house and told McKnight to call the police. He left when McKnight took Lamb to the hospital. Defendant said that he went to his mother's house after the shooting, told her what happened, and then went to

¹ Defendant testified that D's first name is Donald but that he does not know D's last name.

the hospital with her. Defendant turned himself in to police approximately two and a half months later, after learning about a warrant for his arrest.

On the charge of assault with intent to commit murder, the jury convicted defendant of assault with intent to do great bodily harm. Additionally, the jury convicted defendant of first-degree home invasion and felony-firearm, as charged. The trial court subsequently sentenced defendant to two to ten years' imprisonment for assault with intent to do great bodily harm, fifty-one months to twenty years' imprisonment for first-degree home invasion, and two years' imprisonment for felony-firearm. Defendant now appeals.

II. Standards of Review

We review a claim that the evidence was insufficient to support a defendant's conviction to determine whether a rational trier of fact could find that the prosecution proved all of the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the prosecution. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003), citing *People v Wolfe*, 440 Mich 408, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The elements of a crime may be sufficiently proved by circumstantial evidence and reasonable inferences arising from the evidence. *People v Tanner*, 469 Mich 437, 444 n 6; 671 NW2d 728 (2003).

When the trial court has not conducted a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 227 (1973), our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003).

III. Analysis

Defendant first asserts that the prosecution presented insufficient evidence to sustain his conviction of first-degree home invasion because it failed to present sufficient evidence of a breaking or entry without permission.² We disagree.

MCL 750.110a(2) states:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a

² Defendant also states that the prosecution presented "insufficient evidence on the 'breaking' and 'entry without permission' elements." (Emphasis added.) The prosecution, however, did not have to prove both of these factors. Home invasion in the first degree is committed by a person who, under certain circumstances, "breaks and enters a dwelling" or "enters a dwelling without permission." MCL 750.110a(2).

person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

Here, the evidence was sufficient for the jury to find that defendant entered Lamb's home without permission. Defendant contends that because he had a "stepfather/son" relationship with Lamb and because McKnight testified that he was generally allowed in the home, the evidence was insufficient to show that he entered the home without permission. We disagree. McKnight testified that defendant visited Lamb's house once or twice during the month before the incident and, when asked if he was "generally allowed in the house," she responded "yes." However, she also testified that, on the day of the shooting, she did not hear Lamb give defendant permission to enter the house and she did not give him permission to enter, either.

Defendant's reliance on *People v Brownfield*, 216 Mich App 429; 548 NW2d 248 (1996), is misplaced. In that case, the defendant and his friends entered the home of one of the friends, Nutt, intending to steal certain property. *Id.* at 430-431. This Court stated that because Nutt had general permission to enter his own residence, the defendant had not committed breaking and entering premised on an aiding and abetting theory. *Id.* at 432. In the present case, however, defendant did not live with Lamb. Although he was "generally allowed" entry into the house when he visited, the evidence permitted the jury to find that he did not have permission to enter on the date in question.

Defendant next asserts that his trial counsel rendered ineffective assistance in several ways. We disagree.

To sustain a claim of ineffective assistance of counsel,

"[f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." [*Wilson, supra* at 362, quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (internal citations and quotations omitted).]

Defendant first asserts that he was denied effective assistance of counsel because his trial counsel failed to impeach Lamb's testimony with his Lamb's conviction of receiving and concealing stolen property, a crime which defendant claims would have been probative of Lamb's credibility and admissible under MRE 609. We disagree. Defendant fails to demonstrate that his counsel's performance was deficient. The document defendant presents on appeal to verify Lamb's conviction is not part of the lower court record.³ "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), citing *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998); see also *Wilson, supra* at 363. Additionally, the document, an offender profile from the Department of Corrections website, at most shows that a man named Marvin Lamb was convicted of receiving and concealing stolen property. The document does not establish authoritatively, however, that the Marvin Lamb named in the document is the same Marvin Lamb who was the victim in this case. This lack of authentication is problematic where the document appears to indicate that the offender listed was incarcerated at the time the victim in the instant case was shot.

Moreover, even assuming the victim and the offender shown in the profile are the same person, defendant has not demonstrated that the failure to impeach Lamb did not constitute sound trial strategy. As stated in *People v Nickson*, 120 Mich App 681; 327 NW2d 333 (1982), on which defendant relies, "the failure to attack the credibility of a witness could be sound trial strategy where it is perceived that the jurors empathize with the witness." *Id.* at 686 n 2. Here, although defendant's trial attorney impeached Lamb with the inconsistencies between his testimony at the preliminary examination and at trial, he may have chosen not to impeach Lamb with a prior conviction because he believed that the jury empathized with him. Additionally, because McKnight's testimony substantially corroborated Lamb's testimony, defendant has not demonstrated that but for counsel's failure to impeach Lamb, there was a reasonable probability that the outcome of the proceedings would have been different. *Wilson, supra* at 362. Therefore, defendant's first claim of ineffective assistance of counsel fails.

Defendant also contends that he was deprived of the effective assistance of counsel because his trial attorney did not assert the defense of voluntary intoxication.⁴ We disagree. Defendant fails to demonstrate that his trial counsel's decision did not constitute sound trial strategy, particularly in light of the fact that defendant's position throughout trial was that he did not commit the crimes alleged. Additionally, defense counsel may have decided that presenting an alternate defense of voluntary intoxication would have damaged defendant's credibility with the jury. Accordingly, defendant fails to establish that his counsel's performance was deficient. Defendant also fails to present any argument beyond mere conclusory statements concerning the

³ Defendant previously moved to remand this case to the trial court pursuant to MCR 7.211(C)(1) for an evidentiary hearing. This Court denied defendant's motion in an order dated September 12, 2003.

⁴ Effective September 1, 2002, voluntary intoxication does not constitute a defense to any crime, except in limited circumstances. MCL 768.37. The instant offense predated the effective date of this statute.

prejudice prong of the ineffective assistance inquiry. He has, therefore, abandoned further review of this issue. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Next, defendant contends that his trial counsel rendered ineffective assistance because he failed to argue that defendant had permission to enter the house. We disagree. Defendant fails to show that his trial counsel's decision was not a matter of sound trial strategy. Because defendant asserted at trial that he entered the home only to tell McKnight to call the police, argument by defense counsel that the prosecution did not prove first-degree home invasion merely because defendant had permission to enter the home could have diminished defendant's credibility. Defendant also fails to sufficiently brief the prejudice prong of the ineffective assistance inquiry and has, therefore, abandoned this issue. *Kevorkian, supra*.

Defendant next asserts that his trial counsel rendered ineffective assistance by failing to request jury instructions on lesser-included offenses of first-degree home invasion. Defendant has failed to demonstrate that his counsel performed deficiently. Instructions on necessarily included lesser offenses are proper "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and it is supported by a rational view of the evidence." *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002), citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). Defendant fails to articulate any offenses for which defense counsel should have requested instructions and presents no argument concerning whether a rational view of the evidence would have supported giving the instructions.

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it. [*Kevorkian, supra* at 389 (internal quotations omitted).]

Moreover, we disagree with defendant's assertion that, because the trial court instructed the jury on the offense of assault with intent to do great bodily harm less than murder as a lesser-included offense of assault with intent to murder, we must conclude that his trial attorney did not strategically decide to refrain from requesting instructions on lesser-included offenses of first-degree home invasion. The record does not establish whether the lesser assault instruction was given at the request of defense counsel or the prosecution, or if the instruction was instead given sua sponte by the trial court. Thus, defendant's assertion on this issue amounts to nothing more than speculation. Furthermore, defendant fails to present more than a conclusory assertion that he was prejudiced because of his trial counsel's conduct and has, therefore, abandoned this issue in any event. *Kevorkian, supra* at 389.

Finally, defendant argues that his attorney rendered ineffective assistance by failing to request an adjournment of the sentencing proceedings in order to confirm that Lamb wanted the trial court to depart downward from the recommended minimum sentence range. We disagree. At sentencing, the attorney substituting for defendant's trial counsel stated that that it was "[defendant's] understanding that the victim in this case wishes a downward departure for [defendant]." In his statement to the trial court at sentencing, defendant requested that the trial court "postpone the court date until you [the trial court] talk to the complainant person." The trial court did not grant defendant's request.

Defendant has not demonstrated that his attorney was ineffective because he fails to establish that had his counsel requested an adjournment, the request would have been granted. The fact that the trial court did not grant defendant's request for an adjournment shows that a request by his attorney likely would have been futile. A defendant's attorney does not render ineffective assistance by failing to make a futile or meritless motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) (citations omitted). Moreover, defendant fails to establish a reasonable probability that if the proceedings had been adjourned, the trial court would have learned that Lamb requested a downward departure and would have departed according to Lamb's request. Defendant, therefore, has not established that he was denied the effective assistance of counsel at sentencing.

In light of our conclusion that defendant has failed to demonstrate that prejudice resulted from any of the asserted instances of ineffective assistance of counsel, we also deny defendant's request that we remand this case to the trial court for a hearing pursuant to *Ginther, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly