STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 246805 Wayne Circuit Court
JEROME LAMONT DUNCAN, Defendant-Appellant.	LC No. 02-008476

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a bench trial, of second-degree home invasion, MCL 750.110a(3), for which he was sentenced to a prison term of forty-eight months to fifteen years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At the outset we note that at trial, defendant's counsel agreed to a stipulation that the victim-owner of the home broken into did not need to testify at trial. The stipulation agreed that the victim-owner knew someone broke into the property but he did not know who, that he secured the property, that he did not give permission for anyone to enter, and that he returned to the property to find the back window broken and electrical lines cut.

On appeal, defendant first argues that his conviction was against the great weight of the evidence. We disagree. A new trial should be granted based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The evidence did not preponderate heavily against the trial court's determination that defendant was the perpetrator. Two police officers identified defendant as the man who ran from the pertinent home. This in itself is strong evidence of guilt. While it was nighttime, Officer Houtos indicated that he was using a flashlight and thus was able to identify defendant. Further, according to the testimony of Officers Robert Holmes and John Smith, defendant was found lying next to a vehicle in a garage only six or seven houses away within just a short time of the officers giving chase to the perpetrator. Defendant was also found in possession of incriminating items, such as a glass cutter and pry bar. The testimony by Officer Holmes that defendant was wearing coveralls when he was apprehended, considered together with the description by Officer

Houtos that the perpetrator wore coveralls, provided additional strong corroboration of defendant's identity as the perpetrator. The evidence that defendant was unable to run or climb a fence consisted of defendant's self-serving testimony to that effect which could easily have been disregarded as incredible in light of the strong evidence of guilt. Thus, defendant is not entitled to relief based on his claim that his conviction was against the great weight of the evidence.

Defendant next argues that there was insufficient evidence that the house was occupied as a "dwelling" so as to support his conviction of second-degree home invasion. We disagree. In reviewing the sufficiency of the evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide if any rational factfinder could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Second-degree home invasion can only be committed with regard to a "dwelling." MCL 750.110a(3). A "dwelling" is statutorily defined in pertinent part as "a structure or shelter that is used permanently or temporarily as a place of abode." MCL 750.110a(1)(a).

As an initial matter, contrary to defendant's indication, there was no testimony or other affirmative evidence presented at trial that the homeowner had moved out of the house or that it was otherwise not being used as a dwelling at the time of the incident.[1] In any event, we conclude that there was sufficient evidence presented at trial to support a finding that the house was a dwelling, i.e., that it was used as a place of abode at the time of the incident. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove an element of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003). Also, the prosecution is not required to negate every reasonable theory consistent with the defendant's innocence but only to introduce sufficient evidence to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). The stipulation by the parties referred to the residence as being the homeowner's home, i.e., the parties stipulated that the homeowner would have said he "locked and secured his home before he left sometime prior to this alleged [breaking and entering]." In addition, Officer Byars testified that he believed he saw a microwave oven in the kitchen of the house, which further indicated that the house was being used as a dwelling because there would seem to be little reason to leave such an appliance in a kitchen that was not being used. Based on the parties' stipulation and the testimony from Officer Byars, there was sufficient evidence to support a finding that the relevant house was a "dwelling" for purposes of defendant's conviction.

Finally, defendant asserts two claims of ineffective assistance of counsel. Review of these claims is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient in that counsel made an error so serious as to not be functioning as the counsel guaranteed by the Sixth Amendment and (2) a reasonable

[1] In particular, there was no testimony from Officer Houtos asserting this. Rather, Officer Houtos replied, "Possibly. You'd have to ask him" when asked if the homeowner had moved a couple of months before the incident.

probability, i.e., a probability sufficient to undermine confidence in the outcome, that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

First, defendant argues that trial counsel was ineffective in failing to investigate whether the house was a "dwelling." However, there is no factual support in the record for a finding that additional investigation would have provided evidence indicating that the house was not a dwelling. Thus, defendant is not entitled to relief because he has not established the factual predicate for this claim of ineffective assistance of counsel as he has provided no evidence that any failure by trial counsel to undertake further investigation prejudiced the defense. See *Carbin, supra* at 600 (defendant bears burden of establishing factual predicate for ineffective assistance of counsel claim).

Defendant also argues that trial counsel was ineffective in stipulating as to how the homeowner would have testified rather than calling him as a witness with regard to the issue of whether the house was a "dwelling." However, defendant again has not established the factual predicate for his ineffective assistance of counsel claim, *Carbin, supra* at 600, because there is no record evidence indicating that testimony from the homeowner would have been more favorable to defendant on this point than the stipulation and, thus, no basis for a finding that defendant was prejudiced in this regard.

Defendant alternatively requests that this Court remand this case for an evidentiary hearing regarding his ineffective assistance of counsel claims. However, this Court previously denied defendant's motion to remand under MCR 7.211(C)(1) "for failure to provide the Court with an affidavit or offer of proof of the facts to be presented on remand." Accordingly, defendant is not entitled to a remand because he has not supported his request for a remand with an "affidavit or offer of proof regarding the facts to be established at a hearing" as required by MCR 7.211(C)(1)(a)(ii).

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens