STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN PERCY JONES,

Defendant-Appellant.

UNPUBLISHED
July 20, 2004

No. 248329
Van Buren Circuit Court
LC No. 02-013073-FH

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of breaking and entering with intent to commit a felony or larceny, MCL 750.110. He was sentenced to forty-six months to twenty-five years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant's conviction arises out of the entry and removal of a saw from the construction of a home. The victim had left a saw in his home, closed the door, but left the door unlocked. As the victim drove away from the home with his wife, he observed a running vehicle parked in the driveway. The victim approached the home and observed defendant coming out the door with the saw. Defendant fled to his vehicle and took off. The victim pursued defendant's vehicle while speaking to a 911 dispatcher. The pursuit ended when police arrived on the scene and arrested defendant. Despite the eyewitness account by the victim, the defense theory of the case was that the victim was mistaken regarding defendant's purpose on the property and the last location where he left the saw. Defendant was convicted as charged.

Defendant first alleges that there was insufficient evidence to support his conviction. We disagree. Our review of a challenge to the sufficiency of the evidence is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When examining the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Breaking and entering requires a showing that (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). It is the role of the trier of fact, not the appellate court, to determine the inferences that may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The assessment of

credibility, when presented by two diametrically opposed versions of events, rests with the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). We do not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In the present case, the victim testified that he left the saw in the home with the door closed. He returned to the home, after seeing a vehicle in the driveway, to find defendant exiting through the door with the saw in his hands. On the contrary, defendant stipulated that he was present at the home, but alleged that the victim was mistaken regarding the location of the saw and the purpose of his presence at the home. The jury was presented with two diametrically opposed versions of events and resolved the credibility issues and inferences from the evidence in favor of the prosecution. It is not the role of this Court to interfere with the jury's determination. *Lemmon, supra*; *Wolfe, supra*. Accordingly, the challenge to the sufficiency of the evidence is without merit.

Defendant next alleges that he was denied the effective assistance of counsel.[1] We disagree. "A defendant that claims he has been denied the effective assistance of counsel must establish (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." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). There is a presumption of effective assistance, and the defendant bears a heavy burden of proving otherwise. *Id.*

Defendant first argues that he was denied the effective assistance of counsel when his attorney failed to challenge Trooper Lewis' investigation of the case. However, the record reveals that defense counsel attacked Lewis' investigatory techniques, and elicited testimony on cross-examination that Lewis did not attempt to corroborate the victim's account of events, did not check the door or the saw for fingerprints, and did not check the scene for shoe prints. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant has failed to demonstrate prejudice resulting from defense counsel's alleged lack of preparation, and the record reveals that defense counsel did attack Lewis' investigation of the crime.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to move to suppress his prior criminal record before trial, because it precluded him from taking the stand to testify, and thereby deprived him of a substantial defense. However, there is no evidence on the record that defendant intended to testify and that he would have if only his attorney had successfully moved to suppress his prior record. Therefore,

[1] A panel of this Court denied defendant's motion to remand for an evidentiary hearing on January 13, 2004. Accordingly, our review of this issue is limited to mistakes apparent on the record. See *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

defendant has effectively waived review of the issue. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Moreover, "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," and "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Therefore, defense counsel's decision not to call defendant to testify is presumed to be a matter of trial strategy that we will not second-guess on appeal.

Defendant next alleges that he was denied the effective assistance of counsel when his attorney failed to move to preclude admission of the saw into evidence where chain of custody was not established and the victim's demonstration of the handling of the saw influenced the jury. We disagree. The decision not to object to the saw is presumed to be a matter of trial strategy that is not second-guessed on appeal. *Rockey, supra*. Moreover, defendant failed to establish that the outcome of the proceedings would have been different if the saw had been excluded from evidence. *Sabin, supra*.

Lastly, defendant's contention that he was improperly denied credit for time served toward his sentence for the instant offense is without merit. See *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996); *People v Steward*, 203 Mich App 432, 433; 513 NW2d 147 (1994); *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990).[2]

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[2] By order dated June 30, 2004, we granted defendant's motion to file a standard 11 brief. This pleading challenges the effectiveness of counsel at trial. A remand for an evidentiary hearing is unnecessary, and the challenge is without merit.